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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2018–0984; Airspace Docket No. 18–ASW–8]

RIN 2120–AA66

Expansion of R–3803 Restricted Area Complex; Fort Polk, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects a final rule published in the **Federal Register** of July 16, 2019, that expands the R–3803 restricted area complex in central Louisiana by establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and makes minor technical amendments to the existing R–3803A and R–3803B legal descriptions for improved operational efficiency and administrative standardization. This action corrects a typographical error listed in the effective date of that rule.

DATES: Effective date: 0901 UTC September 12, 2019.

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

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** (84 FR 33845; July 16, 2019) for Docket No. FAA–2018–0984 expanding the R–3803 restricted area complex in central Louisiana by establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and making minor technical amendments to R–3803A and R–3803B; Fort Polk, LA. Subsequent to publication, the FAA identified a typographical error for the date listed in the effective date; the correct effective date is September 12, 2019. This action corrects that error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, Expansion of R–3803 Restricted Area Complex; Fort Polk, LA, published in the **Federal Register** of July 16, 2019 (84 FR 33845), FR Doc. 2019–15119, is corrected as follows:

On page 33845, in the second column, line 28, remove the text ''September 13, 2019'' and add in its place ''September 12, 2019.''

Issued in Washington, DC, on July 22, 2019.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2019–15930 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL MEDIATION BOARD

29 CFR Parts 1203 and 1206

[Docket No. C–7198]

RIN 3140–AA01

Decertification of Representatives

AGENCY: National Mediation Board.

ACTION: Final rule.

SUMMARY: The National Mediation Board (NMB or Board) is amending its regulations to provide a straightforward procedure for the decertification of representatives. The Board believes this change is necessary to fulfill the statutory mission of the Railway Labor Act by protecting employees' right to complete independence in the decision to become represented, to remain represented, or to become unrepresented. This change will ensure that each employee has a say in their representative and eliminate unnecessary hurdles for employees who no longer wish to be represented.

DATES: The final rule is effective August 26, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, (202) 692–5040, *legal@nmb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Railway Labor Act (RLA or Act), 45 U.S.C. 151, *et seq*. establishes the NMB whose functions, among others, are to administer certain provisions of the RLA with respect to investigating disputes as to the representative of a craft or class. In accordance with its authority under 45 U.S.C. 152, Ninth, the Board has considered changes to its rules to better facilitate its statutory mission to investigate representation disputes ''among a carrier's employees as to who are the representatives of such employees.''

Under Section 2, Ninth of the RLA, it is the duty of the NMB to investigate representation disputes ''among a carrier's employees as to who are the representatives of such employees . . . and to certify to both parties, in writing . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.'' 45 U.S.C. 152, Ninth. The RLA also authorizes the NMB to hold a secret ballot election or employ ''any other appropriate method'' to ascertain the identity of duly designated employee representatives. *Id.*

Unlike the National Labor Relations Act (NLRA), the RLA has no statutory provision for decertification of a bargaining representative. The Supreme Court, however, has held that, under Section 2, Fourth, 45 U.S.C. 152, Fourth, employees of the craft or class ''have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.'' *Bhd. of Ry., Airline & S.S. Clerks* v. *Ass'n for the Benefit of Non-Contract Emps.,* 380 U.S. 650, 670 (1965) (*ABNE*). In *ABNE,* the Court further noted that the legislative history of the RLA supports the view that employees have the option of rejecting collective representation. *Id.* at 669 (citing Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 34–35 (1934)). The 1934 House Report on the 1934 amendments to the RLA states with regard to Section 2, Ninth, ''[i]t provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire.'' H.R. Rep. 73 No. 1944 at 2. In *Int'l Bhd. of Teamsters* v. *Bhd. of Ry., Airline & S.S. Clerks,* 402 F.2d 196, 202 (1968) (*BRAC*), the United States Court of Appeals for the District of Columbia

(D.C. Circuit), stated that ''it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.''

Nonetheless, prior to 1983, the Board would dismiss without an election an application filed pursuant to Section 2, Ninth if the NMB determined that the applicant did not ''intend to represent'' the craft or class in collective bargaining under the Act. In *Atchison, Topeka & Santa Fe Ry. Co.,* 8 NMB 66 (1980), the NMB dismissed the application filed by J.D. Blankenship because the authorization cards did not authorize him to act as the representative of the craft or class for purposes of representation under the RLA, but instead authorized him to decertify the incumbent union. The Board stated that ''such cards are not valid for purposes of Section 2, Ninth, to provide a showing of interest.'' *Id.* at 70. In *Atchison, Topeka & Santa Fe Ry. Co.,* the Board dismissed an application supported by cards authorizing Laurence G. Russell to represent the craft or class in collective bargaining under the RLA when the NMB became aware that Mr. Russell intended to negotiate an agreement to terminate the existing collective-bargaining agreement and ''thereafter refrain from engaging in further representation of employees.'' 8 NMB 469, 472 (1981). Even if an individual seeking to decertify succeeded in winning the election and attempted to disclaim representation, the Board would refuse to process the disclaimer if it was filed too close in time to the certification. In that circumstance, the Board would consider the disclaimer as ''clear and compelling evidence'' that the prior election was not a true representation dispute, was in fact ''designed to frustrate the purposes of the Act, and would void the prior election restoring the certification of the incumbent union. *See Mfrs. Ry. Co.,* 7 NMB 451 (1980).

The Board's position and refusal to act was soundly rejected as a breach of ''its clear statutory mandate'' in the Fifth Circuit's decision in *Russell* v. *NMB,* 714 F.2d 1332 (1983) (*Russell*), finding that ''employees have the clear right under the Act to opt for nonrepresentation.'' In *Russell,* the Court held that employees have complete independence under the Act to select or reject a collective bargaining representative, and the NMB could no longer refuse to process a representation application after it determined the applicant intended to terminate collective representation if certified. Since *Russell,* however, employees who no longer wish to be represented must still follow an unnecessarily complex procedure to obtain an election.

Under its current procedures, the NMB allows indirect rather than direct decertification. The Board does not allow an employee or a group of employees of a craft or class to apply for an election to vote for their current representative or for no union. Employees who wish to become unrepresented must follow a more convoluted path to an election because of the Board's requirement of the ''straw man.'' This straw man requirement means that if a craft or class of employees want to decertify, they must find a person willing to put their name up, *e.g.,* ''John Smith,'' and then explain to at least fifty percent of the workforce that John Smith does not want to represent them, but if they want to decertify they have to sign a card authorizing him to represent them. Thus, in order to become unrepresented, employees are required to first sign an authorization card to have a straw man step in to represent them. In the resulting election, the ballot options will include the names of the current representative; John Smith, the straw man applicant; ''no union;'' and an option to write in the name of another representative. To decertify, employees have to vote for John Smith, the straw man, with the understanding that if certified, he will disclaim representation, or vote for no representation.[1] Although voters selecting the straw man and the ''no union'' option may both desire nonrepresentation, their votes are not aggregated.

On January 31, 2019, the NMB published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** inviting public comment for 60 days on a proposal to amend its RLA rules to provide a straightforward procedure for decertification of representatives. 84 FR 612. Under the Board's proposed procedure employees may submit authorization cards to decertify their current representative. The wording on the card must be unambiguous and clearly state the intent to no longer be represented by the current union. The showing of interest requirement will be the same showing of interest required for a certification election—at least 50 percent of the craft or class.

The Board further proposed eliminating the straw man representation choice from the ballot in decertification elections. Once it is determined that the showing of interest is valid and that at least 50 percent of the craft or class no longer wish to be represented by their current representative, the Board will authorize an election with the incumbent and the no representation option, along with a write-in option, appearing on the ballot. The applicant's name will not appear on the ballot since the representation dispute is whether the employees in the craft or class want to continue to be represented by the incumbent union. The Board's existing run-off rules will continue to apply.

In the NPRM, the Board noted that, while employees have the ability to decertify a representative under the RLA, the current straw man process is unnecessarily complex and convoluted. There is no statutory basis for the additional requirement of a straw man where employees seek to become unrepresented. The NMB noted the legislative history and court precedent that, under the RLA, employees have complete independence to be free to reject representation, as they are free to join any labor organization of their own choosing. By failing to have in place a straight-forward process for decertification of a representative, the Board is maintaining an unjustifiable hurdle for employees who no longer wish to be represented and failing to fulfill the statutory purpose of ''freedom of association among employees.'' 45 U.S.C. 151a(2).

In the NPRM, the Board also stated its belief that successful decertification, like certification, is a challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer. In the Board's view, changes in the employee-employer relationship that occur when employees become represented, change representative, or become unrepresented require similar treatment. Accordingly, the Board proposed extending the two year time limit on applications in Section 1206.4 to decertification as well as certifications. The other time limits on

[1] In 2010, the Board changed its representation election procedures to certify a representative based on a majority of ballots cast. 75 FR 26062 (May 11, 2010) (2010 Representation Rule). Previously, an individual or organization had to receive votes from a majority of all eligible voters in the craft or class and the only way to vote for no representation was to abstain from voting. Thus, in order to decertify, after soliciting a showing of interest from fellow employees indicating their desire to have the straw man represent them for collective bargaining under the RLA, the straw man had to convince those same employees to either abstain from voting in the subsequent election so that the union would not obtain a majority, or vote for him with the understanding he would disclaim.

applications set forth in Section 1206.4 will remain unchanged.

Subsequently, on March 1, 2019, the NMB published a Notice of Meeting in the **Federal Register** inviting interested parties to attend an open public hearing with the Board to share their views on the proposed rule changes regarding the proposed decertification procedure. 84 FR 6989.

II. Notice-and-Comment Period

In response to the NPRM, the NMB received 32 submissions during the official comment period from a variety of individuals, employees, trade associations, labor unions, Members of Congress, advocacy groups, and others. (Comments may be viewed at the NMB's website at (*http://www.nmb.gov*). Additionally, the NMB received written and oral comments from nine individuals and representatives of constituent groups under the RLA that participated in the March 28, 2019 open public hearing.

All of the comments reflected strongly held views for and against the NMB's proposed change. The NMB has carefully considered all of the comments, analyses, and arguments for and against the proposed change. The commenters supporting the Board's proposed change stated that the proposal was clearly authorized by the statute and that it would simplify an unnecessarily complex procedure. In its comment in support of the NPRM, the National Railway Labor Conference (NRLC) stated that the ''Board's proposal is modest and sensible and strikes the proper balance between stability of labor relations—which is critical to the railroads—and the statutory right of employees 'to determine who shall be the representative of the craft or class''' under Section 2, Fourth of the Act. The NRLC noted that there is ''already a decertification mechanism under the RLA. Thus, any suggestion that the Board is contemplating a significant or unprecedented change in representation is hyperbole. The change under consideration is a minor, incremental adjustment that will merely make the existing procedure clearer and simpler.'' Based on their own experience with the current procedures several individuals who had filed applications as the straw man expressed strong support for a direct decertification procedure. The National Right to Work Legal Foundation (Right to Work) stated that the proposed change is ''long overdue,'' and the NPRM is ''needed to ensure that all employees have an equal and fair choice regarding union representation. The Board has statutory authority to adopt the proposed rules, and should do so as soon as possible.'' Americans for Tax Reform stated the ''NMB's proposed rule would restore balance and ensure that all workers, whether they want union representation or not, are treated equally.'' The Competitive Enterprise Institute (CEI) stated that the proposed rule would eliminate confusion in the decertification process since employees desiring decertification would no longer have to recruit a craft or class member to appear on the ballot as the straw man or convince a majority of employees to sign authorization cards for the straw man while also explaining that this individual is not actually going to represent them. Instead, employees would simply collect cards in support of no union representation. The proposed change, in the view of the CEI, would also protect employees from harassment, citing examples of on-line bullying. Rusty Brown of RWP Labor stated that ''[a]ll Americans should have the right to unionization but should also have the right to remove these unions as their bargaining representative through a straightforward and efficient means.''

Some of the arguments in favor of the NPRM will be discussed in greater detail in the discussion that follows; however, the preamble will focus on the Board's response to the substantive arguments raised by those opposed to the NPRM.

III. Summary of Comments on the NMB's Proposed Decertification Procedure

Commenters to the Board's proposal to make its current decertification procedure more simple and direct expressed widely divergent views of the NPRM and the Board's process in formulating the NPRM. The Board's response to those comments is as follows.

A. The Board's Statutory Authority for the Proposed Change

Some of the comments opposed to the NPRM question whether the NMB possesses the statutory authority to make the proposed change. The International Association of Machinists and Aerospace Workers, AFL–CIO (IAM) [2] states that ''the Board plainly lacks statutory authority to issue this proposed rule. In fact, Congress has expressly forbidden the action now proposed.'' While conceding that the RLA neither mentions nor requires a decertification procedure, the IAM asserts that the NPRM is ''contrary to the plain language of the Act.'' The Transportation Trades Department of the AFL–CIO (TTD) asserts that the proposed change exceeds the Board's narrow statutory authority to investigate and certify employees' choice of a union representative. Since, unlike the NLRA, Congress has not amended the RLA to provide an express provision for decertification, the TTD states that the current straw man procedure is the only method for decertification allowed by Section 2, Ninth. One commenter, Deven Mantz, Brotherhood of Maintenance of Way Employes Division-IBT North Dakota Legislative Director, stated that work groups should only be allowed to change unions, not become ''not Union completely.'' The TTD, IAM, Association of Flight Attendants-CWA (AFA), and other commenters opposed to the NPRM also suggest that Congress' decision to amend the Act to set a 50 percent showing of interest requirement for representation disputes under the RLA is further evidence that the scope of representation disputes under the RLA is limited to applications ''requesting that an organization or individual be

[2] On April 24, 2019, following the close of the comment period, the IAM filed a ''Supplemental Comment'' stating that the NPRM is ''motivated at least in part by a broader political strategy,'' and requesting that the Board ''exercise its statutory authority, . . . maintain its independence from carrier and political influences, and cease this rulemaking without issuing the proposed rule.'' The basis for this request lies in the IAM's Freedom of Information Act (FOIA) Request filed with the Board shortly after the publication of the NPRM. The document produced by the NMB and relied on by the IAM is one email from a carrier representative to Board Member Gerald Fauth urging the Board to ''think bigger'' than decertification and referencing other potential rulemakings by executive branch agencies as well as the potential of rulemaking as political strategy as exercised under the Obama Administration in 2011. To the extent that the IAM is alleging bias, the single received email, which was given no reply, falls short of establishing the ''clear and convincing showing that [an agency member] has an unalterably closed mind on matters critical to the disposition of the rulemaking.'' *Ass'n of Nat'l Adver.* v. *FTC,* 627 F.2d 1151, 1154 (D.C. Cir. 1979). IAM does not point to statements by Member Fauth or any Member of the Board. Further, an administrative official is presumed to be objective and ''capable of judging a particular controversy fairly on the basis of its own circumstances.'' *United States* v. *Morgan,* 313 U.S. 409, 421 (1941).

The IAM also appears to suggest that by proposing this rule change, the Board has compromised its neutrality. This suggestion is entirely unwarranted. The Board majority followed the mandates of the Administrative Procedure Act (APA) in considering, drafting, adopting, and promulgating the NPRM. The policy and procedures at issue are the Board's own determinations. An agency is free to change its interpretations and its policies so long as the new policy or interpretation is permissible under the statute, there are good reasons for it, and the agency believes it to be better. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (*FCC* v. *Fox*). Finally, under the APA, the Board's final rule is subject to judicial review.

certified as the representative of any craft or class of employees.''

With one exception, most opposing commenters acknowledge that employees have the right under the RLA to decertify their representative so long as an employee agrees to act as the straw man and gathers the requisite showing of interest from their fellow employees authorizing the straw man to represent them even though the straw man or the employees want to become unrepresented. During the election, employees must either vote for no representation or for the straw man with the understanding that the straw man will disclaim. The commenters opposed to the NPRM essentially argue that the Act compels the filing of an application for representation even if the straw man applicant, the employees in the craft or class, the incumbent union, and the Board all know that the desire of the employees invoking the Board's services is an election on the question of whether to remain represented. If the Act prohibits decertification, then there can be no indirect decertification. But that is not the case.

As has previously been stated, the RLA makes no mention of decertification and it also sets forth no specific procedure for representation. *Air Transp. Ass'n of Am.* v. *NMB,* 663 F.2d 476, 485 (D.C. Cir. 2011) (*ATA*). Section 2, Ninth gives the Board the authority to investigate representation disputes and ascertain the identity of the employees' representative through a secret ballot election or ''any other appropriate method of ascertaining the names of the duly designated and authorized representatives.'' The Board is given broad discretion with respect to the method of resolving representation disputes with the only caveat being that it ''insure'' freedom from carrier interference. *ABNE,* 380 U.S. 650, 668–669 (1965).

The courts have also long rejected the idea that the absence of a decertification provision means the Board has no power to decertify a union. Since employees have the right to reject representation under the RLA, inherent in the Board's authority to certify a representative is the power to certify that a particular group of employees has no representative. *BRAC,* 402 F.2d 196, 202 (D.C. Cir. 1968). In *Russell,* discussed above, the court found that the Board exceeded its statutory authority by dismissing a representation application with a valid showing of interest because the applicant did not intend to represent the craft or class for purposes of collective bargaining, contract disputes, and grievances. Rather, if certified, Mr. Russell intended to abrogate the contract and disclaim representation. Mr. Russell was the straw man and the purpose of seeking an election was the decertification of employees' incumbent union. The court found, however, that Mr. Russell did intend to represent the employees within the meaning of Section 1, Sixth which defines ''representative'' as ''any person or persons, labor union, organization, or corporation designated either by a carrier . . . or by its employees, to act for it or them,'' since a majority of the craft or class wanted Mr. Russell to take the steps necessary to terminate collective bargaining.[3] *Russell,* 714 F.2d at 1342. It is clear that the Board has the authority and the obligation to accept applications from employees where the question concerning representation is whether employees want to reject representation.

The TTD and other commenters opposed to the NPRM assert that Section 2, Twelfth limits the Board's authority under Section 2, Ninth and preclude the Board's proposal for direct decertification. The TTD argues that the language of Section 2, Twelfth requires that applications filed with the NMB under Section 2, Ninth are only those ''requesting that an organization or individual be certified as a representative of any craft or class of employees'' and that ''the proposed rule cannot be reconciled with that language.'' The IAM asserts that Section 2, Twelfth is an ''additional statutory limit on the Board's authority to carry out its authority to make a representation determination.'' The Board agrees that Section 2, Twelfth places an additional limitation to the Board's authority under Section 2, Ninth, but that limitation is simply that once requested to investigate a representation dispute, the NMB cannot direct an election or use any other method to determine the representative of a craft or class of employees without a showing of interest of not less than 50 percent of employees in the craft or class. Representation Procedures and Rulemaking Authority, 77 FR 75545 (Dec. 21, 2012) (2012 NMB Rulemaking).

In the Board's view, the language of Section 2, Twelfth must be read in the context of Section 2, Fourth, which gives the majority of any craft or class the right to determine who their representative shall be, and Section 2, Ninth, which places an affirmative duty to determine the employees' choice of a representative when a representation dispute exists; the dispute is among a carrier's employees; and one of the parties to the dispute has requested the Board's services. *See Ry. Labor Execs' Ass'n* v. *NMB,* 29 F.3d 655, 666–67 (D.C. Cir. 1994) *(RLEA*). Section 2, Twelfth does not require employees or their representative to pretend to seek certification in order to vindicate their statutorily protected right of complete independence in the choice to be represented or be unrepresented.

The FAA Modernization and Reform Act of 2012, Public Law 112–95 (2012 FAA Modernization Act), contained, inter alia, several amendments to the RLA[4] including the addition of Section 2, Twelfth. Section 2, Twelfth titled ''Showing of interest for representation elections,'' provides that the Board,

> upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

45 U.S.C. 152, Twelfth.

Prior to these amendments, the showing of interest requirements needed to support an application under Section 2, Ninth invoking the Board's services to investigate a representation dispute among a carrier's employees were established by the exercise of the Board's discretion and not defined by statute. The NMB's Rules provided that an individual or organization needed to support their application with authorization cards from thirty-five percent of the craft or class if those employees were unrepresented and authorization cards from more than fifty percent of the craft or class if those employees were already represented. 29 CFR 1206.2. An intervening individual

[3] The 5th Circuit's decision in *Russell* further notes that, at oral argument, the Board argued that rather than filing the straw man application, ''the correct course of action would have been for the employees to have petitioned the Board 'to hold an election to either vote for the current union representative . . . or, nonunion.' '' *Russell,* 714 F.2d at 1342. The court stated that it did not see why the Board's suggested procedure was any more or less objectionable than Mr. Russell's actions and it was in fact a procedure almost identical to the procedure under the NLRA which the Board had previously stated ''time and time again as not allowed by the RLA.'' *Id.*

[4] In addition to Section 2, Twelfth, the 2012 FAA Modernization Act amended Section 2, Ninth to direct a run-off election when no ballot option receives a majority in an election with three or more choices (including the no representation option). The run-off election is between the two ballot options that the largest and the second largest number of votes. The amendments also added a provision regarding the Board's rulemaking authority and provided for an audit of the NMB's programs and expenditures by the Comptroller General, discussed *infra.*

or organization needed a thirty-five percent showing of interest to get on the ballot. 29 CFR 1206.5.

The NMB has consistently interpreted the language of Section 2, Twelfth as requiring a valid showing of interest of 50 percent for any application invoking its services to resolve a representation dispute. In its 2012 rulemaking to modify its rules to reflect the amended statutory language, the Board rejected arguments that Section 2, Twelfth did not apply to applications resolving the representation consequences of mergers of two or more carriers. The Board stated the RLA

> Only provides for investigation of a representation dispute by the NMB ''upon request of either party'' to that dispute. Thus, the statutory language does not distinguish between requests to investigate where the craft class is unrepresented, where the employees wish to change representation or become unrepresented, or where there has been a merger or other corporate transaction. Under the Board's practice, the Section 2, Ninth request is made in the form of an application and the Board has always had one application, ''Application for Investigation of Representation Dispute,'' which requests the Board to investigate and certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth.

2012 NMB Rulemaking, 77 FR 75545. Prior to the 2012 FAA Modernization Act, the Board had one application with different showing of interest requirements. With Section 2, Twelfth, Congress determined that the Board must require the same showing of interest for any application.

The Board finds further support for its position in the Conference Report for the 2012 FAA Modernization Act (Conference Report). The most dispositive indicator of legislative intent is the conference report. *United States* v. *Commonwealth Energy Sys.,* 235 F.3d 11, 16 (1st Cir. 2000). With regard to the NMB, the Conference Report notes that the House bill, Section 903, provided for the repeal of the Board's 2010 Representation Rule, summarized as changing ''standing rules for union elections at airlines and railroads, which counted abstentions as votes 'against' unionizing, to the current rule which counts, only no votes as 'against unionizing, abstentions do not count either way.'' H.R. Conf. Rep. No. 112–381, at 259 (2012). The Senate bill contained ''no similar provision.'' *Id.* The conference action report states that repeal of the NMB's representation rule ''was not agreed to by the Conference, and is not included in the final bill.'' *Id.* The conference committee did agree, inter alia, to ''amend section 2 of the Railway Labor Act by raising the showing of interest threshold *for elections* to not less than fifty percent of the employees in the craft or class.'' *Id.* at 260 (emphasis added). The use of the term ''election'' without qualification does not suggest that Congress intended to limit the Board's authority to only those requests to certify a representative. The 2012 amendments were not intended to limit the types of representation disputes among carrier employees to be resolved by the Board under Section 2, Ninth. The authority of the NMB to resolve all representation disputes—disputes involving employees' right to become represented, to change representation, or to become unrepresented—is essential to preserve employee free choice. The statutory interpretation urged by the TTD, IAM, and other commenters opposed to the rule would profoundly alter the Board's core authority under Section 2, Ninth.[5] Congress, however, does not use vague schemes or ancillary provisions to alter the fundamental details of a regulatory scheme— it does not, as the adage says, hide elephants in mouse holes. *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001); *MCI Telecomms. Corp.* v. *AT&T Co.,* 512 U.S. 218, 231 (1994). The 2012 amendments were aimed at the Board's discretionary practices applicable to all applications, namely the showing of interest requirements and the run-off procedures, in response to the Board's decision to change the way it counted ballots in all representation elections.

In the Board's view, TTD's emphasis on the words ''application requesting that an organization or individual be certified as representative'' is misplaced. Section 2, Ninth gives the Board broad authority to determine employees' choice of representative. As the D.C. Circuit has noted, the right of employees to reject representation yields the corollary that the Board possesses the implied power to certify to the carrier that a craft or class of employees has rejected representation. *BRAC,* 402 F.2d 196, 202 (1968) (citing *ABNE,* 380 U.S. 650 (1965)). Following its duty under Section 2, Ninth, the result of every NMB representation elections is the official notification to the parties and the carrier as to who is the designated representative of the craft or class at issue. When employees choose to become represented or change representation, the notification is titled a ''certification.'' When the employees choose to become or remain unrepresented, the notification is titled a ''dismissal.''

Commenters opposed to the NPRM also suggest that the fact that the Government Accountability Office (GAO) did not recommend a change to the NMB's decertification process and Congress' subsequent inaction is tantamount to a Congressional limitation on the Board's statutory authority under the RLA. The TTD stated during the hearing that the Comptroller General was to make recommendations to the Board and appropriate congressional committees regarding actions that may be taken by Congress or the Board to ensure that processes are fair and reasonable for all parties, and no recommendations were made.

In fact, Section 165(b) of the 2012 FAA Modernization Act did direct GAO to review, evaluate and make recommendations to the Board and congressional committees within 180 days of enactment of the law regarding the Board's certification procedures. However, that mandate was terminated by the three congressional committees of jurisdiction within 134 days after the enactment of the law, according to GAO documentation. Revae Moran et al., U.S. Gov't Accountability Office, GAO–12–835R, ''National Mediation Board Mandates in the FAA Modernization and Reform Act of 2012'' (June 27, 2012). The congressional committees instead accepted a Congressional Research Service report (CRS Report) summarizing the differences between the three major federal labor relations laws. *See generally* Alexandra Hegji, Cong. Research Serv., R42526, ''Federal Labor Relations Statutes: An Overview'' (May 11, 2012). The CRS Report notes that Congress has enacted three major laws that govern labor-management relations in the private and federal sectors: the RLA, the NLRA, and the Federal Service Labor-Management Relations Statute. The CRS Report provides ''a brief history and overview of each of these statutes. It also discusses key statutory provisions for each statute.'' *Id.* at 1. The CRS Report's discussion of decertification states that, although the NMB does not have a formal procedure for decertifying a union, it has ''several practices that effectively remove an incumbent union's certification.'' *Id.* at 8 (citing ABA, ''Selecting a Bargaining Representative,'' *The Railway Labor Act,* 1st Edition, pp. 135–137 (1995)).

The Board believes that Congressional termination of this GAO research directive and reliance on the CRS

[5] At best, under a literal reading of Section 2, Twelfth, the 50 percent showing of interest is applicable only to applications seeking certification of an individual or organization and the Board is free to adopt a different showing of interest for applications for decertification.

Report which merely summarized then-current procedure has no effect on its statutory authority. Before and after the 2012 FAA Modernization Act, the authority to carry out the statutory mandates of the RLA was and is delegated by Congress to the Board. No other agency possesses this authority and the audit provisions added to the RLA by the 2012 FAA Modernization Act do not in any way circumscribe this authority.

45 U.S.C. Section 165(a) provides for the ''audit and evaluation'' of the programs and expenditures of the NMB by the Comptroller General. An evaluation and audit ''shall be conducted not less frequently than every 2 years . . . [or] as determined necessary by the Comptroller General or the appropriate congressional committees.'' GAO has conducted such an audit of the NMB in 2013, 2016, and 2018. At the time of this rulemaking, GAO is conducting the 2020 audit. As discussed above, section 165(b), which was terminated, provided for an ''immediate review of certification procedures.'' This review was to be separate from the biannual evaluation and audit and required the Comptroller General to review the NMB's process to certify or decertify representation to ensure that the processes are fair and reasonable for all parties by examining whether the NMB's processes or changes to those processes are consistent with congressional intent. The provision also required a comparison of the NMB's representation procedures with procedures under other state and federal labor statutes including justification for any discrepancies.

The 2013 GAO Report made no recommendations for the changes to the NMB's representation processes because it found that that the NMB had responded to industry legal challenges and stakeholder disagreements and its procedures were consistent with other federal labor relations statutes. U.S. Gov't Accountability Office, GAO–14–5, ''Strengthening Planning and Controls Could Better Facilitate Rail and Air Labor Relations'' (Dec. 3, 2013). The 2013 GAO Report concluded that the 2010 Representation Rule change ''caused disagreement among some stakeholders,'' and, with regard to decertification, the GAO Report stated

> Some stakeholders also wanted NMB, as part of the 2010 rulemaking, to clarify the process for decertifying, or removing, a union representative. The RLA does not specify a decertification process, and NMB offers minimal guidance on its website on steps to remove an employee representative. In its preamble to the 2010 rule, NMB noted that, while not as direct as some commenters might like, the existing election procedures allow employees to ''rid themselves of a representative,'' and that the 2010 change further gives these employees the opportunity to affirmatively cast a ballot for no representation. However, an airline carrier official and a former board member said the process in place remains ineffective and highly confusing. For example, a ballot currently may contain two options that are each a vote for no representation: ''no representative,'' and an applicant who is on the ballot as a ''straw man'' who intends, if elected, to step down so as to remove representation for the craft or class. This applicant seeking removal of representation has to collect sufficient authorization cards to prompt an election in order for the craft or class to make this change. A former NMB board member said that there is the potential for votes opposed to union representation to be split by votes for ''no representative'' and for a straw man. The result is that these vote counts will not be consolidated in favor of decertification, which can then happen only if either the ''no representative'' or straw man receives a majority of the votes cast.

Id. at 46. The GAO report also includes a table comparing the NMB to the National Labor Relations Board, the Federal Mediation and Conciliation Service, and the Federal Labor Relations Authority. *Id.* at 11.

Thus, GAO concluded and Congress accepted the conclusion that the NMB's certification and decertification procedures were reasonable and consistent with other federal statutes. This conclusion in no way precludes the NMB's obligation to make those procedures less complex and convoluted in order to better effectuate its statutory mandate.

Commenters including the TTD, the Southwest Airlines Pilots Association, and the AFA, also assert that the Board is exceeding its statutory authority by changing the language of 29 CFR 1203.2 to allow the investigation of an application to be filed by ''an individual seeking decertification.'' These commenters misinterpret the NPRM and the Board's intent as, in fact, the Board agrees that the Board may investigate a representation dispute only upon the request of the employees involved that dispute, or their representative. As the D.C. Circuit stated in *RLEA,* ''[f]or the Board to act otherwise is for the Board blatantly to exceed its statutory authority.'' 29 F.3d 655, 665 (D.C. Cir. 1994). The Board agrees with these commenters that only employees or their representatives may invoke the Board's services under Section 2, Ninth to resolve a dispute regarding the identity of their collective bargaining representative. To make clear the Board's intent, the text of Section 1203.2 has been clarified in the final rule to require an employee to file a decertification application.

Under the proposed rule change, an employee must file an application asserting that a representation dispute exists among the identified craft or class. This application must be supported by a valid showing of interest from 50 percent of the craft or class. The difference is that the Board will now accept authorizations that clearly and unambiguously state the employee's desire to no longer be represented by their incumbent union. Such an authorization will clearly indicate the intent of the employees and where it is clear that the petitioning employees wish to be free of the incumbent representative, the Board will authorize an election and the ballot will include the incumbent union and the no representation option, along with the write-in option. The applicant's name will not be included on the ballot because the Board is eliminating once and for all the forced pretense that employees are authorizing the applicant to represent them.

B. Justification for the Proposed Change

Almost all of the commenters opposed to the NPRM suggest that the Board has not provided an adequate justification for this change. The TTD notes that the NMB does not claim any changed circumstances that have led it to reevaluate a practice that it has stated is consistent with the statute and allows employees an ample opportunity to alter their representation. Many of the commenters opposed to the NPRM also argue that the Board is somehow bound by prior statements that the change is unwarranted. Some commenters point to the 1987 statement that it would only make such a change if it was ''required by statute or essential to the administration of the Act.'' *In re Chamber of Commerce,* 14 NMB 347, 360 (1987) (*Chamber of Commerce*). Other commenters rely on statements in the 2010 Representation Rule that the existing straw man procedure together with the option to vote for ''no representation'' allows employees to rid themselves of a collective-bargaining representative. 75 FR 26078.

Commenters discussed the various justifications for the rule change in the NPRM and provided additional policy reasons in support of and in opposition to the proposed change. Before discussing those specific issues, the Board notes, as it did in the 2010 Representation Rule, that under *FCC* v. *Fox,* 556 U.S. 502 (2009), agencies are free to adopt an interpretation of its governing statue that differs from a previous interpretation and that such a

change is subject to no heightened judicial scrutiny. *ATA,* 663 F.2d 476, 484 (D.C. Cir. 2011). Nor did the Board adopt a ''compelling reasons'' standard in *In re Chamber of Commerce. Id.* In upholding the Board's 2010 Representation Rule, when the NMB finally made a change to the way it counted ballots that it had previously considered and rejected several times, the D.C. Circuit stated that ''the fact that the new rule reflects a change in policy matters not at all'' and that ''under the APA, the question for us is whether the Board considered all the facts before it, whether it drew reasonable inferences from those facts and whether the final decision was rationally related to those facts and inferences.'' *Id.* As discussed in Section A, the Board believes it has the statutory authority to provide employees with the option to directly request a decertification election rather than making them seek decertification in the guise of certification with a straw man. As discussed below, the Board also believes that direct decertification better protects the right of free choice of representatives by eliminating a confusing and counterintuitive process that requires employees to ostensibly seek representation to vindicate their right to be unrepresented.

Commenters opposed to the NPRM state there is no evidence to support the Board's statement that the straw man process is ''unnecessarily complex and convoluted.'' The Board, however, received many comments regarding the confusion that is inherent in the straw man process. Many commenters supporting the NPRM, including Allegiant Air, CEI, NRLC, Gregg Formella, and the U.S. Chamber of Commerce (Chamber), noted that the Board's straw man procedure is inherently confusing because employees must authorize a representative to trigger an election to remove their representative. As the Chamber stated in its comment, ''[i]n order to achieve decertification, employees have to collect authorization cards in support of electing a representative they do not actually want and even though the vote is about declining further representation.'' Right to Work, which provides free legal services to individual employees, stated that its attorneys regularly receive calls from employees seeking information about their right to disassociate from unions and that a ''result of the inquiries is that RLA-covered employees are often left confused and disheartened when the straw man rules are explained to them.'' Right to Work described the NMB's current decertification procedure as ''daunting'' to employees and stated that ''many RLA-covered employees simply give up when the straw man obstacles are explained to them.'' Many comments in support of the NPRM noted the potential for confusion because both the straw man and the ''no representation'' option appear on the ballot. The CEI noted that under the current procedure, ''employees are faced with a ballot with the straw man and a no union option which causes confusion. Some employees who wish to remove union representation will reason they should vote for the straw man because that is the ballot option for which they signed an authorization card. However, other employees who similarly desire to reject union representation will vote for the no union option. This splits the vote for decertification.'' Rebecca Smith of Rock Creek House Consulting, LLC stated that she had assisted pilots in decertification efforts and ''no matter how well I explain it to those who ask, on voting day there is still confusion over the 'straw man.' This confusion leads to people voting for the 'straw man' because they believe it reflects their choice not to be represented.'' Ms. Smith added that, in her view, making the process more straightforward ''also clarifies for those who want to be represented where to cast their vote since the current ballot gives them what appears to be several choices for representation.'' The Board takes notice that in both successful and unsuccessful straw man elections employees cast votes for both the straw man and ''no representation.'' Jeremy Dalrymple of the Heritage Foundation noted that not only is the straw man procedure ''counterintuitive because it requires employees that are seeking to divest themselves of representation first petition for a strawman to represent them, but, given the nationwide system of representation under the RLA, there are significant barriers to communicating the convoluted concept of the 'strawman' to employees spread across multiple geographic locations.''

The comments from individuals who had been a straw man supported the view that the current procedure is confusing. Steven Stoecker, who filed an application as the straw man in *Allegiant Air,* 43 NMB 84 (2016), stated that he had to convince ''half of my work group . . . to sign an authorization card that stated that I wanted to represent them, even though I didn't want to. Trying to explain to the rest of the work group that in order to decertify and become unrepresented, they have to sign a card authorizing me to represent them was confusing to say the least.'' Following the Board's authorization of the election, Mr. Stoecker stated that ''I had a short window of time to campaign and remind my colleagues to not vote for me but rather to vote 'no representation.'" Ronald Doig, another employee who served as the straw man in *Allegiant Air,* 42 NMB 124 (2015), commented,

> [w]e had to start with an education process that explained to my fellow Dispatchers that in order to get the Teamsters out we had to sign an authorization card wanting me as the Straw Man to represent them. Then we further explained, that when the election comes around, do not vote for the Straw Man but vote for the ''No Representation Option.'' Although we were successful quite frankly some of the Dispatchers never got it. The process as it exists today is confusing and not straightforward. From my experience as a former Straw Man, employees should have a clear path that states we want an election to decertify our union.

Firsthand accounts from straw men also revealed the hostility, threats, and retaliation directed at them by union supporters. The comments from Mr. Stoecker, Mr. Woelke, straw man in *Flight Options, LLC/FlexJet, LLC,* 45 NMB 95 (2018), and Mr. Doig described the burden borne by the straw man. According to Mr. Stoecker, ''[t]he straw man also has a target on his back since his name is on all the authorization cards and on every election ballot . . . Elimination of the straw man will be beneficial from the standpoint that no one individual will have to bear the brunt of union attacks during a decertification effort.'' A comment from Frank Woelke, who also filed an application as the straw man, described his own experience, including the exposure of personal information on the internet, online personal attacks, and vulgar post cards and suspicious packages sent to his home. Mr. Woelke stated that ''[n]obody in his right mind would want to stand up as a Strawman'' knowing the intimidation, slander, and harassment they will be exposed to because of the NMB's procedures. Mr. Doig stated that he was subject to retaliation from the union and its supporters and expressed the view that it ''is almost as if the process is set up to be a deterrent to decertification efforts by making a target out of the Straw Man. Again, a straight forward [*sic*] process will remove the Straw Man's name form the ballot and give employees the freedom to exercise their rights without that fear.''

The TTD argues that the straw man will still exist and that nothing has been simplified by the NPRM. The Board disagrees. Under the current procedures,

an individual employee files an application supported by valid cards from 50 percent of the craft or class authorizing that individual to represent the employees for purposes of collective bargaining under the RLA. Following the *Russell* decision, the Board does not inquire into whether the individual actually intends to represent the craft or class or the individual is the straw man. The Board simply authorizes the election and conducts a tally. Sometimes the individual is certified. Sometimes the incumbent representative is decertified. Under the proposed change, employees who want to become unrepresented will express that desire for decertification in their showing of interest and the individual applicant's name will not appear on the authorization cards or the ballot. If, however, 50 percent of employees in a given craft or class want one of their co-workers to represent them instead of their incumbent representative and that individual files an application with a valid showing of interest indicating that 50 percent of the craft or class want that individual to represent them in collective-bargaining under the RLA, the Board will still authorize an election and conduct a tally. The ballot will include the applicant's name, the incumbent union, the no representation option, and the write-in option. In that circumstance, the individual applicant will no longer be a straw man. Under the rule change, employees will now have the ability to directly express their desire to become unrepresented instead of hiding it behind a straw man. The intent to decertify will be clear through authorization cards stating that they no longer wish to be represented by their incumbent union and the individual who filed the application will not appear on the ballot.

The IAM states the NPRM is a ''solution in search of a problem.'' Other commenters like the TTD, SWAPA, and IBT state that the straw man process is adequate as employees currently use it and succeed in decertifying their union. In her comment, Senator Patty Murray stated that there already is ''a well-established process for aviation and rail workers to remove their union representation or change union representation should they choose to do so.'' The comments received from individuals who have used the current procedure, however, demonstrate that it is confusing, counterintuitive, and often unduly burdensome for the employee who acts as straw man. The Board's own experience with calls and inquiries from employees seeking to become unrepresented bears this out. The Board believes the current straw man procedure requires employees who wish to become unrepresented to take an additional, unnecessary, and counterintuitive step to get an election to determine whether the majority of employees in their craft or class desire to become unrepresented. When employees who are currently unrepresented want representation, they file an application supported by a showing of interest for the organization they want to represent them. When employees who are currently represented want to change their representation, they file an application supported by a showing of interest for the new organization they want to represent them. When employees no longer wish to be represented, they file an application supported by a showing of interest for someone who they don't want to represent them but they must say they want as a representative to get an election to vote against the incumbent representative they no longer want. The Board's proposal will simply allow employees who no longer want representation to directly state that to the Board, in both their application and on their showing of interest and to get an election to resolve the representation dispute they actually have.

The Board is not adopting this proposal to promote decertification. The Board has no stake in the outcome of a representation dispute. Its statutory role is to act as a neutral ''referee'' in representation matters. *Switchmen* v. *NMB,* 320 U.S. 297, 304 (1943). The Board ''simply investigates, defines the scope of the electorate, holds the election, and certifies the winner.'' *ABNE,* 380 U.S. 650, 667 (1965). The Board believes that the proposed change is necessary to fulfil its statutory mission to protect employees' right to free choice in representation, including the choice to be unrepresented. The choice in every representation dispute belongs to the employees of the craft or class involved, not to the Board. And employees who no longer want collective representation have the right to bring that dispute directly to the Board and have it resolved.

Commenters opposed to the NPRM referenced and supplied statistics regarding the number of applications that resulted in no representation. The TTD states that employees freely and frequently alter their representatives and submitted a chart showing elections in which, after an application was filed by an individual or ''small unaffiliated organization,'' some incumbent unions were decertified, some incumbent unions remained certified, and some individual/small unaffiliated organizations were certified. Some incumbent unions chose to disclaim representation when faced with a potential challenge rather than go to an election.

Based on its chart, the TTD states since 1998, a total of 43 individuals or ''likely straw men'' filed applications and in 27 of those elections, the incumbent representative was ''effectively decertified'' since either no representation won or the individual was certified.[6] The TTD also states that since 1998, 51 small unaffiliated organizations, which it terms ''potential straw men'' have filed applications and of those elections, 11 resulted in no representative being certified and 19 resulted in the small unaffiliated organization being certified. The TTD also concedes that some of those small unaffiliated organizations ''may have continued as a representative.'' The Board agrees that these statistics show that employees change representation or successfully use the straw man procedure to become unrepresented.[7] However, these statistics provide no evidence regarding how many employees find the straw man process too confusing, or are unable to find someone willing to face hostility from union supporters and be the straw man or can convince enough of their fellow employees to sign cards authorizing an

[6] From 1998 to 2018, the Board held 695 representation elections.

[7] The TTD states that if the ''NPRM is adopted, the Board will have three avenues for employees to become unrepresented'' but only one way to get representation. The Board disagrees with this statement. These three avenues referred to appear to be the existing straw man procedure, the proposed direct decertification, and disclaiming representation. Once the NPRM is adopted, the Board believes that employees who wish to decertify will use the proposed direct procedure rather than the straw man. This will be apparent by authorizations indicating the employees no longer wish to be represented. As previously discussed, employees are free to seek to have an individual co-worker represent them under the Act. Finally, the Board has no control over when or under what circumstances a certified bargaining representative disclaims interest in the craft or class. That decision rests with the certified representative. As the TTD points out, some certified representatives do it when they realize they have lost majority support in the craft or class. In addition, in the public debate surrounding this rulemaking, some commenters have characterized one union seeking to take over an already organized work group (*i.e.* raiding) as decertification. In the Board's view this is incorrect. Unions have filed applications to represent crafts or classes that are already organized. Under the RLA, some large employee groups are represented by independent unions not covered by the AFL–CIO's anti-raiding provisions. The Board recognizes that employees can and do desire a change in representation. These elections may result in the incumbent retaining representation, the raiding union winning representation or, on occasion, the loss of representation entirely. Again, these elections outcomes are outside the Board's control and reflect the exercise of employee free choice.

individual to represent them when they really don't want representation in the first place.

In representation disputes, the Board's interest is that the dispute is resolved and the result reflects the free and uncoerced choice of a majority of the craft or class. Whether employees choose representation or reject representation is up to them, not the Board. What does matter to the Board is whether the election process allows them to freely exercise their right to choose; and the Board believes the current proposal to eliminate the straw man and allow direct decertification will better effectuate employees' right to choose.

When representation is desired by the employee group, the existence of a direct decertification process clearly broadcasts that the chosen representative does indeed hold the power to negotiate and advocate for the work group. In comments supporting the proposal, the NRLC pointed out that ''if anything, the proposed rule strengthens an incumbent union by confirming that the union continues to enjoy the support of a majority of employees.''

C. Effect of the Proposed Change on Stability

The Board agrees about the value of stability in the air and rail industry, as defined as a lack of disruptions caused by strikes and work stoppages. The Board's ''almost interminable'' mediation processes is given much of the credit for preventing disruptions to interstate commerce. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union,* 396 U.S. 142, 149 (1969). The Board also notes that the statutory showing of interest requirement contributes to stability, because the statute requires a valid showing of interest from 50 percent of the craft or class to trigger a representation election and there is system-wide representation under the RLA. As the NLRC noted in its comment, ''[d]ecertification elections on the large Class I carriers have been rare, to say the least. Any suggestion that the contemplated changes to the current rules will generate a massive upsurge in decertification campaigns is, at best, speculative.'' The Board will not predict the choices employees will make in the future, but it must act to facilitate the statutory mandate of free choice of representation, rather than forced unionization for the sake of stability.

The Board's representation process is the predicate to establishing a collective-bargaining relationship, but the statute mandates that the choice to become represented or unrepresented is the employees' decision and theirs alone. The *Russell* court rejected the Board's contention the employee free choice in representation election was subordinate to the RLA's purpose of avoiding work stoppages through collective representation and bargaining. While the court agreed that the RLA encourages collective bargaining as the mode by which disputes are to be settled and work stoppages avoided, the Act does not compel employees to choose collective representation. *Russell,* 714 F.2d 1332 at 1344. Employees under the RLA have complete independence to organize or not to organize and this necessarily includes the right to reject collective representation. *Id.*

D. Effect of the Proposed Change on Interference by Carriers or Outside Interest Groups

Commenters opposed state that the NPRM creates an increased risk of carrier interference in representation disputes. The AFA stated that the NPRM will embolden an employer to inject itself into the decertification process. IAM states that the proposed rule ''would no doubt embolden outside organizations funded by employer groups or interests in ways that are opaque to both the Board and employees, to seek to decertify elected officials.'' The TTD states that, without a straw man, there will be no identified individual to be held accountable throughout the process, and carriers will be ''emboldened to interfere in the election process by hiding behind the relative anonymity of the Board's new proposed decertification applications.'' The Board's proposed rule change does not eliminate accountability. As previously discussed, the Board cannot and is not changing who is allowed by statute to invoke its services to resolve a representation dispute. Further, an employee will still be required to file an application to seek decertification under the NPRM, as is clearly stated in the new Section 1206.5. The employee filing the application will still be the responsible party during the representation process as they are now. The difference is that a straw man will no longer be required. Instead, the ballot will be limited to the incumbent representative, the no representation option, and the write-in option.

The RLA protects the right of employees to select their representatives without carrier influence or interference. The Board has long held that actions or activity by a carrier that fosters, assists, or dominates an applicant may result in dismissal of a representation application because the authorizations are tainted, *N. Air Cargo,* 29 NMB 1 (2001), or disqualify the applicant as an employee representative, *Mackey Int'l Airlines,* 5 NMB 220 (1975).[8] There is nothing in the NPRM that suggests the Board would or intends to abrogate its duty to protect the right of employee to be free from carrier interference in their choice of whether to get or reject representation, and indeed we do not do so in this final rule.

E. Time Limit on Decertification Applications

Unlike the NLRA,[9] the RLA does not place any time limits on when applications to investigate representation disputes can be filed. The Board, however, has adopted time limitations on the filing of applications for the same craft or class on the same carrier. Under Section 1206.4(a), the Board will not accept an application filed within two years of the certification of a collective bargaining representative. Under Section 1206.4(b), the Board will not accept an application filed with one year of the dismissal of an application. As discussed below, the Board has modified these time limits several times in order to strike the appropriate balance between employees' organizational rights, labor stability, and the disruptive effect in the workplace from frequent elections.

Prior to 1947, following a certification, it was ''the policy of the Board not to conduct repeat elections until the organization certified has had a reasonable period to function as the duly authorized representative of employees.'' 13 NMB Ann. Rep. 4 (1947). This reasonable period was one year. In the NMB's 1947 Rulemaking, this period was extended to two years. 12 FR 3083 (May 10, 1947). The Board stated that the ''policy of the Board in this connection derives from the law which imposes upon both carriers and employees the duty to exert every reasonable effort to make and maintain agreements. Obviously, this basic purpose of the law cannot be realized if the representation issue is raised too frequently.'' 13 NMB Ann. Rep. 4. The Board observed that many representation disputes arose out of the competition between labor organizations. *Id.* In 1954, the Board revised its rules to impose a one year

[8] *See also Great Lakes Airlines,* 35 NMB 213 (2008); *Virgin Atlantic Airways,* 24 NMB 575 (1997).

[9] Section 9(c)(3) of the NLRA precludes the holding of an election in any bargaining unit in which a valid election was held during the preceding 12-month period. 29 U.S.C. 159(c)(3).

limitation on the filing of applications for the same craft or class on the same carrier where (1) the election resulted in no representative being certified; (2) the application was dismissed by the Board on the grounds no representation dispute existed; [10] or (3) the applicant withdrew the application after it was formally docketed. 19 FR 2121 (Apr. 13, 1954). In making this change, the Board stated that ''representation campaigns and the organizing campaigns which necessarily precede them cause unsettled labor conditions and, in many cases, disturb employees substantially in the discharge of their duties. It is contemplated that the [rule change] will prevent hasty refiling of applications which have previously been dismissed by the Board.'' 20 NMB Ann. Rep. 10 (1954). The 1954 rule contained a proviso that the three conditions would ''not apply to employees of a craft or class who are not represented for purposes of collective bargaining.'' 19 FR 2121. The effect of the proviso was to exempt applications pertaining to unrepresented employees from the filing time limitations. 45 NMB Ann. Rep. 10 (1979). Thus, in cases where unrepresented employees chose to remain unrepresented, there was no time limitation whatsoever and a new election could be sought the very next day. In 1979, the Board amended Section 1206.4 to make the time limits applicable regardless of whether or not the employees covered by the application are represented for purposes of collective bargaining. *Id.* The Board did not change the existing time limits of a two year bar post-certification and a one year bar following dismissal on the three enumerated grounds. Comments opposed to applying the time limits to all NMB representation applications regardless of whether the employees involved were represented or unrepresented asserted that the bar rules could be used to frustrate employee organization, for example, if an applicant dominated by a carrier filed to frustrate a legitimate organization. In response, the Board stated that the language in Section 1206.4 providing an exception to the time limits ''in unusual or extraordinary circumstances,'' would allow the Board to remedy a company dominated union situation as well as ''an election which was improperly affected by a carrier or other interference at some stage of the proceeding.'' 44 FR 10602 (Feb. 22, 1979). Thus, the Board has expanded the time limitations placed on applications several times to balance the statutory right of freedom of choice in organizing with the need for labor-management stability and to avoid undue disruption to the workplace from continual representation elections.

Commenters opposed to the two year limitation following decertification, including the IBT, the IAM, the TTD, the AFA, the Association of Professional Flight Attendants, the Allied Pilots Association, and some Members of Congress, contend that the proposed change is an unwarranted, unjustified, and impermissible restriction on employees' right under the RLA to organize and bargain collectively through representatives of their own choosing. The Board disagrees. As the foregoing discussion establishes, the NMB has both placed time limitations on the filing of applications and expanded those limitations based on considerations of labor stability and disruption to the workplace. All of these limitations—including the current two year limitation post-certification—represent a degree of restriction on employees' exercise of their right to choose or reject collective bargaining representatives. And all of these limitations reflect an exercise of the Board's discretion to balance competing interests. The proposed change reflects the Board's belief that both certification and decertification are significant undertakings by employees with a substantial impact on the workplace and employees' relationship with their employer. This belief is supported by the comments of Ronald Doig, an employee who successfully led a decertification effort using the current straw man procedure. According to Mr. Doig,

> [w]hen we were successful in the election and voted the Teamsters out [the NMB's time limits on applications] only allowed one year before there could be another election. If the Teamsters had prevailed and won the election, they would have been granted two years before another election could take place. The difference [in time limits] is unfair. The Teamsters never let up, continuing their campaign and we never really got the chance to fully enjoy the benefits of a direct relationship with our company. Our workplace remained in a state of distraction the entire year after the election which led to another election that the Teamsters won. To this date we are still in a state of distraction and I believe had we had the same two years the unions get we would have achieved a stability through a direct relationship.

Employees who have exercised their right to reject representation deserve a period of repose to transition to that direct relationship and experience their workplace without a collective representative. This period of time allows employees to judge the advantages and disadvantages of their decision without the turmoil of an immediate organizing campaign.

Commenters opposed to the proposed change to have the two year limitation in Section 1206.4(a) apply to decertification as well as certification assert that the change is unwarranted and the Board draws an improper parallel between certification and decertification. The commenters opposed state that the two year limitation post-certification is justified by the need for a newly certified representative to be afforded an insulated period to bargain for an initial contract and if necessary participate in mediation before its representative status is challenged. [11] The Board has not sought to alter this two year period post-certification and views it as an appropriate balance between the goal of labor stability and the statutory obligation to facilitate free choice in representation or rejection of representation. The proposed rule change does not affect this limitation. Rather the proposed change recognizes that the transition from represented to unrepresented has a significant impact on the employees and their workplace. The current two year limitation gives the union a chance to demonstrate the value of its services to the employees who elected it. After decertification wherein the majority of employees chose to reject representation, it is only fair to give employees a chance to experience the effects of their choice on their workplace.

If a union has become decertified, it is because a majority of the employees in the craft or class have decided that that they no longer want that representative. The RLA encourages collective bargaining between employee representative and the employer, but it gives employees the absolute right to choose to reject representation. The Board is simply giving employees who have rejected representation an additional year to experience their workplace and their direct relationship with their employer before another representation dispute can be raised in their work group. The two year

[10] Generally, when the applicant had failed to support the application with a sufficient valid showing of interest.

[11] The Board does note that the two year limitation applies not only to newly certified representatives negotiating first contracts, but to all certifications, even to an incumbent union surviving a raid by another union, *Pinnacle Airlines,* 35 NMB 1 (2007), or a decertification attempt, *Youngstown & N. R.R. Co.,* 7 NMB 132 (1979). The two year limitation also applies to certifications without an election as a result of a merger of carriers, *United Air Lines/Cont'l Airlines,* 39 NMB 167 (2011); *Tex. Mexican Ry. Co.,* 27 NMB 302 (2000).

limitation is on the time to file an application. Since the authorization cards can be dated by employees up to one year from the date of the filing of the application, employees, if they so choose, can begin organizing a year after decertification. Commenters in support of the rule noted that without this rule change, organizing can begin the day after an election which results in a decertification, and employees are afforded no period of repose at all.

A former practitioner and advocate before the NMB opposed to the proposed change states in his comment that a two year limitation ''neither applies to the NMB 'indirect' decertification process nor to any decertification provisions in other federal statutes or regulations.'' The Board does not find these arguments persuasive. As previously discussed the RLA makes no provision regarding limitations on applications. These rules have been, and remain, an exercise of the Board's discretion. The Board notes that it is equally true that a two year limitation following certification is not provided in other federal statues or regulations. Under the NLRA, the period of repose is at least one year for certification or decertification. Under the FLRA, the election bar is also one year for certification or decertification. NMB also applies a two year limitation regardless of whether the certification is a newly certified representative or the certification of an incumbent union following a raid or merger. Further, under the current indirect decertification, if a straw man is certified, the Board applies the two year limitation. If that straw man does not formally disclaim interest, an application for that same craft or class of employees at the same carrier would not be accepted by the Board for two years following the certification.

Under the proposed rule change, the additional time limit on applications will be limited to applications seeking to decertify an incumbent representative. It would be clear upon filing of the application that the intent of employees is to seek decertification. As discussed above, such an application filed by an employee or group of employees will be supported by a showing of interest stating that employees no longer wish to be represented by their incumbent union. A decertification election will be held where only the incumbent union, the no representation option, and the write-in would appear on the ballot. If a majority of employees vote for representation or if a majority of employees vote for no representation, there will be a two year limitation on applications seeking to represent the same craft or class at the same carrier. If the incumbency of an organization is challenged in a raid—by another organization or individual seeking to represent that craft or class—and, in the election a majority of employees fail to vote for representation, the one year limitation will continue to apply as it will if a currently unrepresented employee group does not vote for representation.

IV. Conclusion

Based on the rationale in the proposed rules and this rulemaking document, the Board hereby adopts the provision of the proposal as a final rule with the clarification in the text of Section 1203.2 in the final rule to require that an employee may file a decertification application. This rule will apply to applications filed on or after the effective date.

Dissenting Statement of Chairman Puchala

Chairman Puchala dissented from the action of the Board majority in adopting this rule. Her reasons for dissenting are set forth below.

Congress enacted the Railway Labor Act (RLA or Act), 45 U.S.C. 151, *et seq.,* to create a comprehensive statutory scheme to prevent disruptions of interstate commerce through the prompt resolution of labor disputes between rail and air carriers and their employees. In *Virginia Railway Co.* v. *System Federation No. 40,* the Supreme Court articulated the purposes and objectives of the Act in terms of the duty to bargain, noting that the RLA's ''major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee,'' and its ''provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representatives of their employees.'' 300 U.S. 515, 547–548 (1937). Thus, the RLA is a collective bargaining statute and its underlying philosophy is almost total reliance on collective bargaining for the settlement of labor-management disputes.

I dissent from the rule published today because the changes my colleagues have adopted are unnecessary and contrary to the purposes of the Act. In my view, these changes will impede rather than support the mission of the Agency and the objectives of the Act.

The National Mediation Board (NMB or Board) administers the RLA, the oldest extant labor relations statute in the United States and it has been remarkably successful in fulfilling its statutory mission of insuring the right of railroad and airline employees to organize into free and independent labor organizations, of assisting labor representatives and carrier management in the prompt settlement of disputes over rates of pay and terms of work, of resolving grievances over the terms of existing contracts, and of accomplishing these aims without the interruption of transportation services essential to interstate commerce.

As an initial matter, I note and my colleagues concede, the RLA does not have an express statutory provision for decertification like the National Labor Relations Act (NLRA). From 1935 to 1947, the NLRA also lacked a statutory procedure for decertification. Congress, through the Taft-Hartley Act, provided a statutory mechanism for employees to seek decertification of their current bargaining representative. 29 U.S.C. 159(c)(1)(A). Congress has taken no similar action with regard to the RLA. Not in the 1950 amendments, when Congress referenced the Taft-Hartley Act in adding Section 2, Eleventh to permit the negotiation of union shop agreements. H.R. Rep. No. 81–2111, at 4 (1950). Not in 2012, when Congress provided for a 50% showing of interest in representation applications and mandated specific provisions for run-off elections. FAA Modernization and Reform Act of 2012, Public Law 112–95 (2012 FAA Modernization Act). There have been no changed circumstances since 2012 that would necessitate or justify Board or Congressional action with respect to a decertification rule. In my view, the addition of a direct decertification procedure to the NMB's representation procedures is a step to be taken by Congress through legislation and not by the Board through rulemaking.

While the RLA lacks a statutory decertification procedure, the existing representation procedures allow employees to get representation, change representation, and reject representation. As many of the commenters opposed to the rule observed, the Board already provides a method for employees to decertify their incumbent union. In the 2010 Representation Rulemaking, the NMB declined to reexamine its decertification procedures and noted that its ''existing election procedures allow employees to rid themselves of a representative.'' 75 FR 26,078. The 2010 Rulemaking allowed employees to affirmatively cast a ballot for ''no union'' and eliminated the most confusing step in the ''straw man'' process. 75 FR 26079. The election statistics submitted with the comments of the Transportation Trades

Department of the AFL–CIO (TTD) demonstrate that employees can and do utilize the existing decertification process to become unrepresented. As the TTD further observed, while Board clearly receives more applications seeking the certification of a representative than the decertification, this represents a longstanding desire of employees in the air and rail industry to have union representation in the workplace rather than a problem with the NMB's election process.

In adopting a two year bar to representation applications following decertification, the majority ignores well-settled Board precedent recognizing the complexities unions face in establishing collective bargaining relationships and concluding labor agreements. The Board has long recognized that labor stability is enhanced by providing a reasonable period of time to establish a collective bargaining relationship. *Jet Am.,* 11 NMB 173 (1984). Instead, my colleagues rely on a false equivalence between certification of a collective bargaining representative and decertification resulting in the return to at will employment.

My own experience in various labor-management capacities has allowed me to witness firsthand the monumental tasks unions face in establishing and maintaining quality representation for their members. This task is compounded by the fact that, under the RLA, unions represent nation-wide crafts or classes, namely all the employees performing the same work for the same employer regardless of their geographic location. This system-wide representation automatically expands the number of regional issues the union must be prepared to address in collective bargaining. Once certified, the union must continue to generate system-wide employee interest in establishing a template of representation that is reflective of member priorities and gives voice to member concerns. The union's constitution and bylaws, which reflect the rights of individual members, are reviewed and explained. Volunteer employees are appointed and elected to leadership positions on numerous committees including bargaining committees and health and safety committees.

Once certified, the union assumes the responsibility to initiate collective bargaining—often counted in years under the RLA—by training volunteers to work with union staff to set the bargaining agenda through a series of member surveys, meetings, and round table discussions. Even before bargaining commences, an elaborate communications system is launched to insure internal communications keep members at all work locations informed of the status of collective bargaining. Once a tentative agreement is reached, it must be reviewed and approved by the members. The ratified contract is enforced by a grievance procedure with an arbitration clause designed to protect individual and collective rights. In the rail and airline industries, a safety culture is promoted by the union through joint labor and management initiatives as well as separate union sponsored health and safety programs. Union activities are designed to promote the workers' agenda by creating opportunities for management to hear members' voices on workplace issues. This dialogue at labor-management meetings creates opportunities for both labor and management to improve the relationship and create ideas that further the goals of both parties. These obligations of bargaining and resolving grievances are all part of the statutory framework that Congress created. Section 2, First of the RLA states,

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. 152, First. The Act's emphasis is on the full acceptance of that bilateral relationship and the free exercise of both parties' rights in determining rates of pay, rules, and working conditions with the duty imposed to seek to avoid interruptions to commerce.

What happens when an incumbent union is decertified? The carrier develops and implements the rules of the workplace. It may voluntarily seek employees' views and participation on workplace issues, but is not required to do so. The union and its former members lack standing to bargain and maintain contracts and initiate and progress grievances. All rights reflected in the collective bargaining contracts are extinguished unless required by law or regulation.

Following decertification, obligations are removed rather than assumed. There is no longer an obligation to bargain. There is no longer an obligation to administer or enforce a collective bargaining agreement. There is no role for the NMB in mediation. And in my view, there is no statutory basis for imposing an administrative restriction of two years on employees' freedom to choose a representative following a decertification election that results in no representative. A one year election bar is sufficient for employees to witness the loss of their collective bargaining rights and the loss of stability that accompanies that forfeiture.

I believe it is punitive to deny access to RLA election procedures for two years given the increasing number of furloughs in the freight rail industry as carriers move to a new business model and as airline employees contend with the residual effects of widespread bankruptcies, mergers, and reorganizations. The negative consequences of decertification and stripping employees' collective bargaining rights goes beyond the potential loss of wage growth [12] to a lack of ability to protect negotiated provisions for health and retirement benefits, seniority rights that determine work hours and location, and furlough protections that give employees rights to return to their former positions. The rail and airline industries have a union density rate of 60–80% that I believe is largely due to a long history of negotiating protections for those actively employed as well as retirees.

The two year election bar which dictates a two year break in collective bargaining is also bad public policy. The RLA is designed to avoid interruption of interstate commerce. The primary tool the NMB uses to protect the public from interruptions of service is mandatory mediation of collective bargaining agreements between unions and air and rail carriers. This is why the RLA is predisposed to promote collective bargaining. This governmental exercise of control over the labor-management relationship requires disputing parties to enter NMB mandatory mediation for an ''almost interminable'' amount of time before either party can exercise self-help. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union,* 396 U.S. 142, 149 (1969). A series of additional steps, a 30 day cooling-off period, a potential Presidential Emergency Board that recommends settlement terms followed by additional cooling off periods, and finally intervention by Congress under the Commerce Clause of the Constitution are all designed to promote the public's interest to avoid interruption of interstate commerce.

[12] According to the Bureau of Labor Statistics non-union workers only make 82% of what union workers are paid. U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, USDL–19–0079 (Jan. 18, 2019), *https://www.bls.gov/news.release/union2.htm.*

Consequently, I disagree with the Board majority's decision to make this change.

Chairman Linda Puchala.

Executive Order 12866

This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act, the NMB certifies that these regulatory changes will not have a significant impact on small business entities. This rule will not have any significant impact on the quality of the human environment under the National Environmental Policy Act.

Paperwork Reduction Act

The NMB has determined that the Paperwork Reduction Act does not apply because this interim regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects

29 CFR Part 1203

Air carriers, Labor management relations, Labor unions, Railroads.

29 CFR Part 1206

Air carriers, Labor management relations, Labor union, Railroads.

For the reasons stated in the preamble, the National Mediation Board amends 29 CFR parts 1203 and 1206 as set forth below:

PART 1203—APPLICATIONS FOR SERVICE

■ 1. The authority citation for part 1203 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151–163.

■ 2. Revise § 1203.2 to read as follows:

§ 1203.2 Investigation of representation disputes.

Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act to investigate representation disputes among carriers' employees may be made on printed forms NMB–3, copies of which may be secured from the Board's Representation and Legal Department or on the internet at *www.nmb.gov.* Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved, the name of the invoking organization or employee seeking certification, or the name of the employee seeking decertification, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, some other authorized officer of the organization, or by the invoking employee. These disputes are given docket numbers in the series ''R''.

PART 1206—HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

■ 3. The authority citation for part 1206 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151–163.

■ 4. Amend § 1206.1 by revising paragraph (b) to read as follows

§ 1206.1 Run-off elections.

* * * * *

(b) In the event a run-off election is authorized by the Board, the two options which received the highest number of votes cast in the first election shall be placed on the run-off ballot. No blank line on which voters may write in the name of any organization, individual, or no representation will be provided on the run-off ballot.

* * * * *

■ 5. Amend § 1206.2 by revising paragraph (a) to read as follows:

§ 1206.2 Percentage of valid authorizations required to determine existence of a representation dispute.

(a) Upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, or to decertify the current representative and have no representative, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least fifty (50) percent of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

* * * * *

■ 6. Amend § 1206.4 by revising paragraph (a) to read as follows:

§ 1206.4 Time Limits on Applications.

* * * * *

(a) For a period of two (2) years from the date of a certification or decertification covering the same craft or class of employees on the same carrier, and

* * * * *

§ § 1206.5 through 1206.7 [Redesignated as §§ 1206.6 through 1206.8]

■ 7. Redesignate §§ 1206.5 through 1206.7 as §§ 1206.6 through 1206.8 and add new § 1206.5 to read as follows:

§ 1206.5 Decertification of representatives.

Employees who no longer wish to be represented may seek to decertify the current representative of a craft or class in a direct election. The employees must follow the procedure outlines in § 1203.2.

Dated: July 23, 2019.

Mary L. Johnson,

General Counsel.

[FR Doc. 2019–15926 Filed 7–25–19; 8:45 am]

BILLING CODE 7550–01–P

DEPARTMENT OF LABOR

29 CFR Part 1952

Occupational Safety and Health Administration

[Docket ID. OSHA 2014–0019]

RIN 1218–AC92

Arizona State Plan for Occupational Safety and Health

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Reconsideration of final approval of state plan; withdrawal.

SUMMARY: OSHA is withdrawing its proposed reconsideration of the Arizona State Plan's final approval status.

DATES: July 26, 2019.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Francis Meilinger, OSHA Office of Communications, U.S. Department of Labor, Washington, DC 20210; telephone (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general and technical information: Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, U.S. Department of Labor, Washington, DC 20210; telephone: (202) 693–2200; email: *kalinowski.doug@dol.gov.*

SUPPLEMENTARY INFORMATION: On August 21, 2014, OSHA published a **Federal Register** document proposing to reject Arizona's residential construction fall

protection statute enacted by Arizona's state legislature (formerly published as Arizona Revised Statute (A.R.S.) 23–492), and to reconsider the Arizona State Plan's final approval pursuant to 29 CFR 1953.6(e) and 29 CFR 1902.47 (79 FR 49465). OSHA based that proposal on a finding that Arizona's requirements for residential construction fall protection were not at least as effective as OSHA's federal standard, as required by the Occupational Safety and Health Act (29 U.S.C. 667(c)(2)).

On February 6, 2015, OSHA published a **Federal Register** document responding to comments received in response to its proposed rejection document, and announcing OSHA's final decision to reject the Arizona State Plan's residential construction fall protection statute (80 FR 6652). However, SB 1307 included a conditional repeal provision. Under this provision, if OSHA rejected the state statute and published that decision in the **Federal Register** pursuant to 29 CFR 1902.23, then A.R.S. 23–492 would be repealed by operation of law (SB 1307 Sec. 7). In response to this provision, OSHA deferred its decision on the simultaneously proposed action of reconsidering the State Plan's final approval, to allow for Arizona's repeal of the rejected statute to take effect, and to allow for Arizona's subsequent enforcement of a standard at least as effective as OSHA's standard.

Since that time, Arizona has adopted OSHA's residential construction fall protection standard, 29 CFR part 1926, subpart M. Federal OSHA has monitored this issue closely and finds that Arizona has also successfully implemented this standard. Accordingly, OSHA is withdrawing its proposal to reconsider the Arizona State Plan's final approval status.

Authority and Signature

Loren Sweatt, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this document under the following authorities: Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667), Secretary of Labor's Order No. 1–2012 (77 FR 3912), and 29 CFR parts 1902 and 1953.

Signed in Washington, DC, on July 17, 2019.

Loren Sweatt,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–15850 Filed 7–25–19; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0632]

RIN 1625–AA00

Safety Zone; Fox River, Green Bay, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain navigable waters of the Fox River in Green Bay, WI within a 300-foot radius of a vessel being used to launch fireworks. This action is necessary to provide for the safety of personnel, vessels, and the marine environment from potential hazards created by a fireworks display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Lake Michigan.

DATES: This rule is effective on July 26, 2019 from 8 p.m. through 11 p.m.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0632 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 Chief Petty Officer Kyle Weitzell, Sector Lake Michigan Waterways Management Division, U.S. Coast Guard; telephone 414–747–7148, email *Kyle.W.Weitzell@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Lake Michigan
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Captain of the Port Sector Lake Michigan (COTP) has determined that potential safety hazards associated with this fireworks display pose a threat to vessel traffic on the Fox River and immediate action is needed to respond to those identified hazards. It is impracticable to publish an NPRM because this safety zone must be established by July 26, 2019 and there is not time for a sufficient comment period.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the rule's objective of protecting against potential safety hazards associated with a fireworks display scheduled for July 26, 2019.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that potential hazards associated with a fireworks display on July 26, 2019, will be a safety concern for anyone within a 300-foot radius of a vessel used to launch fireworks on the Fox River in Green Bay, WI. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone for the duration of the fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone from 8 p.m. through 11 p.m. on July 26, 2019. The safety zone will cover all navigable waters of the Fox River in Green Bay, WI within 300 feet of a vessel used to launch fireworks at latitude 44°31′ 4″ N, longitude 088°1′ 1″ W. The duration of the zone is intended to protect personnel, vessels, and the marine environment for the duration of the fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and

Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on size and duration of this safety zone. This safety zone will be enforced for all navigable waters of the Fox River within 300 feet of a vessel used to launch fireworks for no more than three hours on one day. Additionally, the COTP may consider, on a case-by-case basis, to allow vessels to enter this safety zone during the enforcement period. We anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. Also, the safety zone is designed to minimize its impact on navigable waters.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only three hours that will prohibit entry within 300 feet of a vessel being used to launch fireworks. It is categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this determination will be made available in the docket where indicated under **ADDRESSES** once it is completed.

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, 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.T09–0632 to read as follows:

§ 165.T09–0632 Safety Zone; Fox River, Green Bay, WI.

(a) *Location.* The following area is a safety zone: All navigable waters of the Fox River in Green Bay, WI within 300 feet of a vessel used to launch fireworks at latitude 44°31′ 4″ N, longitude 088°1′ 1″ W.

(b) *Period of enforcement.* This section will be enforced from 8 p.m. through 11 p.m. on July 26, 2019.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, persons and vessels are prohibited from entering the safety zone unless authorized by the Captain of the Port Sector Lake Michigan (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Lake Michigan.

(2) Persons or vessels desiring to enter into or pass through the zone must request permission from the COTP or a designated representative. They may be contacted by VHF–FM channel 16 or by telephone at 414–747–7182.

(3) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone through Broadcast Notice to Mariners, Local Notice to Mariners, and/or actual notice.

Dated: July 23, 2019.

T.J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.

[FR Doc. 2019–15925 Filed 7–25–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0622]

RIN 1625–AA00

Safety Zone; Huron All Classic Fireworks, Huron River, Huron, OH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters near the East Cleveland Road in Huron, OH. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards associated with fireworks displays created by the Huron All Classic Fireworks event on the Huron River. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Detroit, or his or her designated representative. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with fireworks displays.

DATES: This regulation is effective from 9:15 p.m. through 10 p.m. on August 3, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0622 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 MSTC Allie Lee, Waterways Department, Marine Safety Unit Toledo, Coast Guard; telephone (419) 418–6023, email *Allie.L.Lee@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

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 the event sponsor notified the Coast Guard with insufficient time to accommodate the comment period. Thus, delaying the effective date of this rule to wait for the comment period to run would be impracticable and contrary to the public interest because it would prevent the Captain of the Port Detroit from keeping the public safe from the hazards associated with a maritime fireworks displays.

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**. Waiting for a 30-day effective period to run is impracticable and contrary to the public interest for the reasons discussed in the preceding paragraph.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Detroit (COTP) has determined that potential hazards associated with fireworks displays will be a safety concern for anyone within a 400 foot radius of the launch site. The likely combination of recreational vessels, darkness punctuated by bright flashes of light, and fireworks debris falling into the water presents risks of collisions which could result in serious injuries or fatalities. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone that will be enforced from 9:15 p.m. until 10 p.m. on August 3, 2019. The safety zone will encompass all U.S. navigable waters of the Huron River within a 400 foot radius of the fireworks launch site located at position 41°23′32.5″ N 082°33′7.1″ W. All geographic coordinates are North American Datum of 1983 (NAD 83).

The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the fireworks display. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Sector Detroit or his designated representative. The Captain of the Port, Sector Detroit or his designated representative may be contacted via VHF Channel 16.

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 is based on the size, location, and duration of the safety zone. Vessel traffic will be impacted in a small designated area of the Huron River in Huron, OH for a period of 45 minutes. The Coast Guard will issue Broadcast Notice to Mariners via VHF–FM Marine Channel 16 about the safety zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only 45 minutes that will prohibit entry within 400 foot radius of where the fireworks display will be conducted. It is categorically excluded from further review under paragraph L[60](a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 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.T09–0622 to read as follows:

§ 165.T09–0622 Safety Zone; Huron All Classic Fireworks, Huron River, Huron, OH.

(a) *Location.* The following area is a temporary safety zone: all U.S. navigable waters of the Huron River within a 400 foot radius of the fireworks launch site located at position 41° 23′32.5″ N 082°33′7.1″ W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Enforcement period.* The regulation in this section will be enforced from 9:15 p.m. until 10 p.m. on August 3, 2019. The Captain of the Port Detroit, or a designated representative

may suspend enforcement of the safety zone at any time.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into, transiting or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his or her designated representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his or her designated representative.

(3) The ''designated representative'' of the Captain of the Port Detroit is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port Detroit to act on his or her behalf. The designated representative of the Captain of the Port Detroit will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port Detroit or his or her designated representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his or her designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Detroit or his or her designated representative.

Dated: July 23, 2019.

Jeffrey W. Novak,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. 2019–15898 Filed 7–25–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2019–0619]

Safety Zone for Fireworks Displays; Upper Potomac River, Washington Channel, DC

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for three fireworks displays taking place over the Washington Channel, adjacent to The Wharf DC, Washington, DC; the first on August 4, 2019, the second on September 21, 2019, and the third on December 7, 2019. This action is necessary to ensure the safety of life on navigable waterways during these fireworks displays. Our regulation for recurring fireworks displays from January 12, 2019, through December 31, 2019 identifies the temporary safety zones for these fireworks display events. During the enforcement periods, persons and vessels are prohibited from entering the safety zone unless authorized by the Captain of the Port Maryland-National Capital Region or a designated representative.

DATES: The regulations in 33 CFR 165.T05–1011 will be enforced for the location specified in paragraph (a) of that section from 8:30 p.m. through 10 p.m. on August 4, 2019; from 6:30 p.m. through 9 p.m. on September 21, 2019; from 7 p.m. through 9:30 p.m. on December 7, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Mr. Ron Houck, U.S. Coast Guard Sector Maryland-National Capital Region, Waterways Management Division; telephone 410–576–2674, email *D05–DG-SectorMD–NCR-MarineEvents@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.T05–1011 (84 FR 4333, Feb. 15, 2019) for a fireworks display from 9:20 p.m. through 9:25 p.m. on August 4, 2019. There is no alternate date for this fireworks display event. The Coast Guard will enforce the temporary safety zone in 33 CFR 165.T05–1011 (84 FR 4333, Feb. 15, 2019) for a fireworks display from 7:30 p.m. through 7:45 p.m. on September 21, 2019. There is no alternate date for this fireworks display event. The Coast Guard will enforce the temporary safety zone in 33 CFR 165.T05–1011 for a fireworks display from 8 p.m. through 8:15 p.m. on December 7, 2019. There is no alternate date for this fireworks display event. These are the third, fourth and fifth of eight recurring fireworks displays held adjacent to The Wharf DC, Washington, DC, anticipated from January 12, 2019, through December 31, 2019. This action is being taken to provide for the safety of life on navigable waterways during the fireworks displays. Our regulation for this fireworks display, § 165.T05–1011, specifies the location of the regulated area for these temporary safety zones, which encompass portions of the Washington Channel, adjacent to The Wharf DC, Washington, DC. During the enforcement periods, as specified in § 165.T05–1011(c), persons and vessels may not enter the safety zones unless authorized by the Captain of the Port Sector Maryland-National Capital Region (COTP) or the COTP's designated representative. All vessels underway within the safety zones at the time they are activated are to depart the zones. The Coast Guard may be assisted by other federal, state, or local agencies in the enforcement of these safety zones.

This notice of enforcement is issued under authority of 33 CFR 165.T05–1011 and 5 U.S.C. 552 (a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of these enforcement periods via the Local Notice to Mariners and marine information broadcasts.

Dated: July 22, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2019–15886 Filed 7–25–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0581]

RIN 1625–AA00

Safety Zone; City of St. Charles Riverfest, Missouri River, St. Charles

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Missouri River between Mile Marker (MM) 28.2 and MM 28.8. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a fireworks display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River or a designated representative

DATES: This rule is effective from 8:30 p.m. through 10:30 p.m. on August 31, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0581 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
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 to publish an NPRM because we must establish this safety zone by August 31, 2019 and lack sufficient time to request comments and respond before the zone must be established.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the fireworks display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sector Upper Mississippi River (COTP) has determined that potential hazards associated with a fireworks display on August 31, 2019 will be a safety concern for anyone on the Missouri River between Mile Marker (MM) 28.2 and MM 28.8. This rule resulted from a sudden change in the date for the fireworks display from the date of the 4th of July weekend, published in 33 CFR 165.801, Table 2, line 17, for City of St. Charles/St. Charles Riverfest. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone before, during, and after the fireworks display, which has been rescheduled from the date listed in the table to August 31, 2019.

IV. Discussion of the Rule

This rule establishes a safety zone from 8:30 p.m. through 10:30 p.m. on August 31, 2019. The safety zone will cover all navigable waters of the Missouri River between MM 28.2 and 28.8. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters before, during, and after an annual fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone through Broadcast Notice to Mariners (BNM), Local Notices to Mariners (LNMs), and/or actual notice.

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 temporary safety zone. This action involves an annually recurring fireworks display that is only changing the date due to recent flooding in the area and only impacts a half-mile stretch of the Missouri River for a short amount of time. All other details of this event remain as published in 33 CFR 165.801 Table 2, line 17, City of St. Charles/St. Charles Riverfest.

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 Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting two hours that will prohibit entry on the Missouri River between MM 28.2 and MM 28.8. It is categorically excluded from further review under paragraph L60(d) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 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.T08–0581 to read as follows:

§ 165.T08–0581 Safety Zone; Missouri River, Miles 28.2 to 28.8, St. Charles, MO.

(a) *Location.* The following area is a safety zone: All navigable waters of the Missouri River between Mile Marker (MM) 28.2 and MM 28.8.

(b) *Period of enforcement.* This section will be enforced from 8:30 p.m. through 10:30 p.m. on August 31, 2019.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, persons and vessels are prohibited from entering the safety zone unless authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Upper Mississippi River.

(2) Persons or vessels desiring to enter into or pass through the zone must request permission from the COTP or a designated representative. They may be contacted by telephone at 314–269–2332.

(3) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone, as well as any emergent safety concerns that may delay the enforcement of the zone through Broadcast Notice to Mariners (BNM), Local Notices to Mariners (LNMs), and/or actual notice.

S.A. Stoermer,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2019–15851 Filed 7–25–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2018–0851; FRL–9996–21–OAR]

RIN 2060–AU27

Standards of Performance for Stationary Compression Ignition Internal Combustion Engines

Correction

In rule document 2019–14372, appearing on pages 32084 through 32088, in the issue of Friday, July 5, 2019 make the following corrections:

1. On page 32084, in the document heading, ''FRL–9992–21–OAR'' should read ''FRL–9996–21–OAR''.

2. On page 32088, in the second column, in the final paragraph, on the final line, ''p.m.'' should read ''PM''.

[FR Doc. C1–2019–14372 Filed 7–25–19; 8:45 am]

BILLING CODE 1300–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2018–0157; FRL–9994–63]

Lactic Acid; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of lactic acid (CAS Reg. No. 50–21–5) when used as an inert ingredient (acidifier) on food-contact surfaces in public eating places, dairy processing equipment, food-processing equipment and utensils at 10,000 parts per million (ppm). Ecolab Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of lactic acid when used in accordance with the terms specified in the regulation.

DATES: This regulation is effective July 26, 2019. Objections and requests for hearings must be received on or before September 24, 2019, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2018–0157, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael L. Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2018–0157 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before September 24, 2019. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2018–0157, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of May 18, 2018 (83 FR 23247) (FRL–9976–87), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11113) by Ecolab Inc., 655 Lone Oak Drive, Eagan, MN 55121. The petition requested that 40 CFR 180.940(a) be amended by establishing an exemption from the requirement of a tolerance for residues of lactic acid (CAS Reg. No. 50–21–5) when used as an inert ingredient (acidifier) in pesticide formulations applied to food-contact surfaces in public eating places, dairy processing equipment, food-processing equipment and utensils at 10,000 parts per million (ppm). That document referenced a summary of the petition prepared by Ecolab Inc., the petitioner, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(c)(2)(B) requires EPA, in determining whether an exemption would be safe, to take into account the considerations set forth in subparagraphs (b)(2)(C) and (D). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a

reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for lactic acid including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with lactic acid follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by lactic acid as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

Lactic acid is practically non-toxic to mammals, apart from irritation stemming from its low pH. It is an endogenous compound produced in the mammalian system. L-lactic acid (lactate) is a product of fermentation in the muscles produced from pyruvate via lactate dehydrogenase. Lactate is also generated from glucose under aerobic conditions in some tissues and cell types. L-Lactic acid is normally found in the blood and interstitial fluid of humans at a level of 10 mg/dL (EPA 2009). In addition, L-lactic acid occurs naturally in several foods, primarily found in fermented milk products such as sour milk, cheese, buttermilk and yogurt. It also occurs naturally in meats, fruits, tomato juice, beer, wine, molasses, blood and muscles of animals, and in the soil.

The available acute toxicity studies indicate that lactic acid is not acutely toxic via the oral or inhalation route of exposure. Because the test substance (80% lactic acid) has a very low pH (<1), L-lactic acid is a severe dermal irritant in rabbits but not a skin sensitizer at high concentrations (*e.g.,* 80%).

Although some minor effects were observed in repeat dosing studies in rats (*e.g.,* decrease in body weight gain or organ weight gain), no significant systemic toxicity was identified for lactic acid, even at dose levels greater than 1,000 mg/kg/day. In addition, there was no indication of developmental toxicity in a developmental toxicity study in mice. Furthermore, none of the available data indicate that lactic acid is neurotoxic, immunotoxic, or carcinogenic.

Based on a review of 15 mutagenicity and clastogenicity studies on lactic acid and the ammonium, calcium, and sodium salts of lactic acid, EPA notes that the results were negative for all studies and there is no evidence that lactic acid is genotoxic.

In an *in vitro* chromosomal aberration study, some pseudo-positive reactions were observed at low pH.

B. Toxicological Points of Departure/ Levels of Concern

Although the toxicity database for lactic acid is limited, the toxicity profile indicates no significant systemic toxicity even at high dose levels. Since no toxicity is observed, an endpoint of concern for risk assessment purposes was not identified.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to lactic acid, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from lactic acid in food as follows:

Dietary exposure to lactic acid may occur following ingestion of foods containing residues of lactic acid from its use as an acidifier in pesticide formulations applied to food-contact surfaces as well as from other pesticidal uses that are already approved that may result in residues o treated crops. In addition, lactic acid occurs naturally in several foods and in the soil. However, a quantitative dietary exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

2. *Dietary exposure from drinking water.* Since a hazard endpoint of concern was not identified for the acute and chronic dietary assessment, a quantitative dietary exposure risk assessment for drinking water was not conducted, although exposures may be expected from use on food crops.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Lactic acid may be used in pesticide products and non-pesticide products that may be used in and around the home. Based on the lack of a hazard endpoint of concern above, a quantitative residential exposure assessment for lactic acid was not conducted.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found lactic acid to share a common mechanism of toxicity with any other substances, and lactic acid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that lactic acid does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

Based on the lack of threshold effects, EPA has not identified any toxicological endpoints of concern and is conducting a qualitative assessment of lactic acid. That qualitative assessment does not use safety factors for assessing risk, and no additional safety factor is needed for

assessing risk to infants and children. Based on an assessment of lactic acid, EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children.

E. Aggregate Risks and Determination of Safety

Because no toxicological endpoints of concern were identified, EPA concludes that aggregate exposure to residues of lactic acid will not pose a risk to the U.S. population, including infants and children, and that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to lactic acid residues.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.940(a) for lactic acid (CAS Reg. No. 50–21–5) when used as an inert ingredient (acidifier) in pesticide formulations applied to food-contact surfaces in public eating places, dairy processing equipment, food-processing equipment and utensils at 10,000 ppm.

VII. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 5, 2019.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.940, add alphabetically the inert ingredient ''lactic acid'' to the table in paragraph (a) and remove the inert ingredient ''lactic acid'' from the table in paragraph (c).

The addition reads as follows:

§ 180.940 Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (Food-contact surface sanitizing solutions).

(a) * * *

Pesticide chemical	CAS Reg. No.	Limits
*	*	* * * * * * *
Lactic acid	50–21–5	When ready for use, the end-use concentration is not to exceed 10,000 ppm in antimicrobial formulations applied to food-contact surfaces in public eating places.
*	*	* * * * * * *

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[FR Doc. 2019–15647 Filed 7–25–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R10–UST–2019–0191; 9996–69–Region 10]

Oregon: Final Approval of State Underground Storage Tank Program Revisions, Codification and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the State of Oregon's Underground Storage Tank (UST) program submitted by the State. The EPA has determined that these revisions satisfy all requirements needed for program approval. This action also codifies the EPA's approval of Oregon's State program and incorporates by reference those provisions of the State's regulations that we have determined meet the requirements for approval. The State's federally-authorized and codified UST program, as revised pursuant to this action, will remain subject to the EPA's inspection and enforcement authorities under Sections 9005 and 9006 of RCRA Subtitle I and other applicable statutory and regulatory provisions.

DATES: This rule is effective September 24, 2019, unless the EPA receives adverse comment by August 26, 2019. If EPA receives adverse comment, it will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. The incorporation by reference of certain material listed in the regulations is approved by the Director of the Federal Register, as of September 24, 2019.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.

2. *Email: wilder.scott@epa.gov.*

3. *Mail:* Scott Wilder, Region 10, Enforcement and Compliance Assurance Division, EPA Region 10, 1200 Sixth Avenue, Suite 155, MS: OCE–201, Seattle, WA 98101.

4. *Hand Delivery or Courier:* Deliver your comments to Scott Wilder, Region 10, Enforcement and Compliance Assurance Division, EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101.

Instructions: Direct your comments to Docket ID No. EPA–R10–UST–2019–0191. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or email. The Federal *http://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* then your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, then the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4:00 p.m. Monday through Friday at the following location: EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101, phone number (206) 553–6693. Interested persons wanting to examine these documents should make an appointment with the office at least 2 days in advance.

FOR FURTHER INFORMATION CONTACT: Scott Wilder, (206) 553–6693, *wilder.scott@epa.gov.* To inspect the hard copy materials, please schedule an appointment with Scott Wilder at (206) 553–6693.

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to Oregon's Underground Storage Tank Program

A. Why are revisions to State programs necessary?

States which have received final approval from the EPA under RCRA Section 9004(b) of RCRA, 42 U.S.C. 6991c(b), must maintain an underground storage tank program that is equivalent to, consistent with, and no less stringent than the Federal underground storage tank program. When the EPA makes revisions to the regulations that govern the UST program, states must revise their programs to comply with the updated regulations and submit these revisions to the EPA for approval. Most commonly, states must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) part 280. States can also initiate changes on their own to their underground storage tank program and these changes must then be approved by the EPA.

B. What decisions has the EPA made in this rule?

On October 19, 2018, in accordance with 40 CFR 281.51(a), Oregon submitted a complete program revision application seeking the EPA approval for its UST program revisions (State Application). Oregon's revisions correspond to the EPA final rule published on July 15, 2015 (80 FR 41566), which revised the 1988 UST regulations and the 1988 State program approval (SPA) regulations (2015 Federal Revisions). As required by 40 CFR 281.20, the State Application contains the following: A transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant state statutes and regulations. We have reviewed the State Application and determined that the revisions to Oregon's UST program are equivalent to, consistent with, and no less stringent than the corresponding Federal requirements in subpart C of 40 CFR part 281, and that the Oregon program provides for adequate enforcement of compliance with these requirements (40 CFR 281.11(b)). Therefore, the EPA grants Oregon final approval to operate its UST program with the changes described in the program revision

application, and as outlined below in Section I.G of this document.

C. What is the effect of this action on the regulated community?

This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already in effect in the State of Oregon, and are not changed by this action. This action merely approves the existing State regulations as meeting the Federal requirements and renders them federally enforceable.

D. Why is EPA using a direct final rule?

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and we anticipate no adverse comment. Oregon did not receive any comments during its comment period when the rules and regulations being considered in this document were proposed at the State level.

E. What happens if the EPA receives comments that oppose this action?

Along with this direct final rule, the EPA is publishing a separate document in the ''Proposed Rules'' section of this **Federal Register** that serves as the proposal to approve the State's UST program revisions, and provides an opportunity for public comment. If EPA receives comments that oppose this approval, then the EPA will withdraw this direct final rule by publishing a document in the **Federal Register** before it becomes effective. The EPA will base any further decision on approval of the State Application after considering all comments received during the comment period. The EPA will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this approval, then you must do so at this time.

F. For what has Oregon previously been approved?

On September 16, 2011, the EPA finalized a rule approving the UST program that Oregon proposed to administer in lieu of the Federal UST program. On April 30, 2012, the EPA codified the provisions of the approved Oregon program that are part of the underground storage tank program under Subtitle I of RCRA, and therefore are subject to the EPA's inspection and enforcement authorities under RCRA Sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions.

G. What changes are we approving with this action and what standards do we use for review?

In order to be approved, each state program application must meet the general requirements in 40 CFR 281.11, and specific requirements in 40 CFR part 281, subpart B (Components of a Program Application); subpart C (Criteria for No Less Stringent); and subpart D (Adequate Enforcement of Compliance). This is also true for proposed revisions to approved state programs.

As more fully described below, the State has made the changes to its approved UST program to reflect the 2015 Federal Revisions. The EPA is approving the State's changes because they are equivalent to, consistent with, and no less stringent than the Federal UST program and because the EPA has confirmed that the Oregon UST program will continue to provide for adequate enforcement of compliance with these requirements as described in 40 CFR 281.11(b) and part 281, subpart D, after this approval.

The Oregon Department of Environmental Quality (DEQ) is the lead implementing agency for the UST program in Oregon, except in Indian country.

The DEQ continues to have broad statutory authority to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases under Oregon Statutes (2017), Chapter 466, Hazardous Waste and Hazardous Materials II, Sections 605–995. The Oregon UST Program gets its enforcement authority from the powers and duties of the DEQ found in Chapter 466, Section 015. Under Chapter 466, Sections 765(3), 765(5), and 805(a) the DEQ is authorized to require an owner to furnish records, conduct monitoring or testing, and provide access to tanks. The DEQ is authorized to issue, modify, suspend, revoke or refuse to renew a permit under Chapter 466, Section 775. Penalties for non-compliance may be assessed under Chapter 466, Section 837(1).

Specific authorities to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases are found under Oregon Administrative Rule (OAR), as amended effective June 1, 2018, Chapter 340, Division 150, Underground Storage Tank Rules; DEQ may prohibit delivery to any UST identified by DEQ as ineligible for delivery under OAR 340–150–0020(1), 0080, 0150, 0152, and 0163; reporting and recordkeeping requirements are found under OAR 340–150–0135. Procedures for receipt, evaluation, retention and investigation of required records and reports are under OAR 340–150–0135. The aforementioned statutory sections and regulations satisfy the requirements of 40 CFR 281.40 and 281.41.

Through a Memorandum of Agreement between the State of Oregon and the EPA, effective September 24, 2019, the State maintains procedures for receiving and ensuring proper consideration of information about violations submitted by the public. The State agrees to comply with public participation provisions contained in 40 CFR 281.42 including the provision that the State will not oppose intervention under Oregon Rules of Civil Procedure 33C, its analogue to Federal Rule 24(a)(2), on the grounds that the applicant's interest is adequately represented by the State. Oregon has met the public participation requirements found in 40 CFR 281.42.

To qualify for final approval, revisions to a state's program must be ''equivalent to, consistent with, and no less stringent'' than the 2015 Federal Revisions. In the 2015 Federal Revisions the EPA addressed UST systems deferred in the 1988 UST regulations, and added, among other things, new operation and maintenance requirements; secondary containment requirements for new and replaced tanks and piping; operator training requirements; and a requirement to ensure UST system compatibility before storing certain biofuel blends. In addition, the EPA removed past deferrals for emergency generator tanks, field constructed tanks, and airport hydrant systems. The EPA analyzes revisions to approved state programs pursuant to the criteria found in 40 CFR 281.30 through 281.39.

The DEQ has revised its regulations to help ensure that the State's UST program revisions are equivalent to, consistent with, and no less stringent than the 2015 Federal Revisions.

Title 40 CFR 281.39 describes the state operator training requirements that must be met to be considered equivalent to, consistent with, and no less stringent than Federal requirements. Oregon did not incorporate by reference Federal requirements for operator training, and has promulgated and is implementing its own operator training provisions under OAR 340–150–0200, 0210, and 0315. After a thorough review, the EPA has determined that Oregon's operator training requirements are equivalent to, consistent with, and no less stringent than federal requirements.

As part of the State Application the Oregon Attorney General certified that the State revisions meet the

requirements ''equivalent to, consistent with, and no less stringent'' criteria in 40 CFR 281.30 through 281.39. The EPA is relying on this certification in addition to the analysis submitted by the State in making our determination.

H. Where are the revised rules different from the Federal rules?

Broader in Scope Provisions

Where an approved state program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the federally-approved program and is not federally enforceable (40 CFR 281.12(a)(3)(ii)). The following statutory and regulatory requirements are considered broader in coverage than the Federal program as these State-only regulations are not required by Federal regulation and are implemented by the State in addition to the federally approved program:

Heating oil tanks are regulated under OAR Chapter 340 Division 177. DEQ's requirement to report and clean up releases from underground heating oil tanks (HOTs) is broader in scope. Additionally, DEQ encourages voluntary decommissioning of HOTs and licenses UST and HOT service providers and supervisors. These programs are also broader in scope than the federal program.

Tank owners who install, decommission or test their own tanks are required to take the same proficiency examination as UST supervisors to ensure that they have the technical knowledge to do the work safely and correctly.

The universe of ''suspected releases that trigger reporting, investigation and confirmation'' under OAR 340–150–0500 may be broader than the Federal rule, including discovery of a release into a secondary containment area and monitoring results or alarms from release detection systems.

The State has provided for release response and corrective action in its remedial action rules under OAR Chapter 340, Division 122. As a general matter, the universe of regulated persons is broader under the state rules than under the federal rules. The obligations in Division 122 are imposed upon ''the responsible person,'' a term that appears to encompass a broader class of persons than the term ''owner and operator''.

The State standard for system cleaning upon permanent closure is the same as that found at 40 CFR 280.71(b), except that the State requirements apply to the UST system as a whole, whereas the Federal requirements apply to tanks. If the permittee proposes to close the UST in place and fill it, then the permittee must submit a site assessment plan. Closure cannot begin until the plan is approved by the DEQ.

The operation and maintenance of corrosion protection systems apply to all USTs and piping. The Federal rules apply only to steel UST systems with corrosion protection.

More Stringent Provisions

Where an approved state program includes requirements that are considered more stringent than required by Federal law, the more stringent requirements become part of the federally approved program. (40 CFR 281.12(a)(3)(ii)).

The following statutory and regulatory requirements are considered more stringent than the Federal program, and on approval, they become part of the federally approved program and are federally enforceable:

The State rules do not allow the use of metal tanks or piping without corrosion protection as allowed in 40 CFR 280.20(a)(4) and (b)(3), which states that no corrosion protection is required for metal tanks and piping installed at a site that have been determined by a corrosion expert not to be corrosive enough to cause either the tank or the piping to have a release due to corrosion during its operating life. Because the State does not allow the alternative to corrosion protection found in 40 CFR 280.20(a)(4), the State rules do not have a recordkeeping requirement that corresponds with that in 40 CFR 280.34(b)(1). OAR 340–150–0320.

The State rules do not allow for the use of alternative types of tanks and piping determined to be equally protective in preventing releases as those otherwise identified in the rules, as allowed in 40 CFR 280.20(a)(5) and (b)(4).

The State rules allow only one mode of certifying the installation. The certification of compliance must be signed by the owner, permittee and a service provider licensed by the department, and must certify that the system has been installed in compliance with the required methods and standards. OAR 340–150–0160.

The State rules require used USTs that have been removed from the ground to be certified by a UST manufacturer in writing before being reused. OAR 340–150–0302(2).

The owner and permittee must notify DEQ at least 30 days before beginning installation of a UST system. (DEQ may allow a shorter period on a case-by-case basis) OAR 340–150–0160(2).

The owner and permittee must notify DEQ of the confirmed time and date of the installation of the UST system at least three working days before beginning the installation. DEQ may also request additional notifications. OAR 340–150–0160(3).

DEQ's installation checklist required upon completion of the installation requires certification of compliance with required installation standards and methods, and the standards for spill and overfill prevention, corrosion protection release detection and financial responsibility as is required by 40 CFR 280.22. DEQ's installation checklist also requires the owner and permittee to provide substantially more information than appears to be required by 40 CFR 280.22(e) and (f).

Repaired tanks and piping must be tested after completion of the repairs and before operation. OAR 340–150–0350(3)(a) and (4). The Federal rules allow an UST system to return to service providing testing is conducted within 30 days of repair.

Any test failures must be reported to DEQ. OAR 340–150–0163(1)(c) and (e); OAR 340–150–0325(4); OAR 340–150–0350(3)(a) and (4).

Repaired tanks, except tanks repaired by lining, must be certified as meeting the performance standards by the original manufacturer or, if unavailable, another manufacturer of the same type of tank. OAR–340–0350.

The State requires an investigation of the magnitude and extent of soil and groundwater contamination if not otherwise fully identified in the course of the initial site characterization. OAR 340–122–0240. This requirement is more stringent than those under 40 CFR 280.65, to the extent that the additional investigation in 40 CFR 280.65 is triggered only if groundwater wells have been affected, free product is found to need recovery, soils may be in contact with groundwater or the implementing agency requests an investigation.

The permittee must perform a site assessment before permanent closure or change in service. OAR 340–150–0168 and OAR 340–150–0180. The State requirements are more stringent in that the owner or permittee, which is using groundwater or vapor monitoring in accordance with state rules, cannot satisfy the requirements of the site assessment by relying on their release detection method in place at the time of closure as allowed by 40 CFR 280.72(a).

The rules in OAR Division 150 apply to all UST systems taken out of operation between January 1, 1974 and May 1, 1988, if not emptied and cleaned as required by OAR 340–150–0168(4), and to all UST systems taken out of operation before January 1, 1974, if not empty. OAR 340–150–0006(2). This

requirement is more stringent than the Federal standard in 40 CFR 280.73, which states that the owner and operator of an UST system permanently closed before December 22, 1988, must assess the excavation zone and close the UST system in accordance with the subpart if releases from the UST may, in the judgment of the implementing agency, pose a current or potential threat to human health and the environment.

The State rules do not include the options for overfill prevention equipment found in 40 CFR 280.20(c)(1)(ii)(C) and (c)(2)(i). In 40 CFR 280.20(c)(1)(ii)(C), Federal rules allow an overfill device that can restrict flow 30 minutes prior to overfilling, alert the transfer operator with a high-level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling. In 40 CFR 280.20(c)(2)(i), Federal rules state that owners and operators are not required to use the spill and overfill prevention equipment specified in paragraph (c)(1) of the section if alternative equipment is used that is determined by the implementing agency to be no less protective of human health and the environment than the equipment specified in 40 CFR 280.20(c)(1)(i) or (ii).

I. How does this action affect Indian country (18 U.S.C. 1151) in Oregon?

The EPA's approval of Oregon's Program does not extend to Indian country as defined in 18 U.S.C. 1151. Indian country generally includes lands within the exterior boundaries of the following Indian reservations located within Oregon: Burns Paiute, Grande Ronde, Klamath, Siletz, Umatilla and Warm Springs Reservations; any land held in trust by the United States for an Indian tribe; and any other areas that are ''Indian country'' within the meaning of 18 U.S.C. 1151. Any lands removed from an Indian reservation status by Federal court action are not considered reservation lands even if located within the exterior boundaries of an Indian reservation. The EPA will retain responsibilities under RCRA for underground storage tanks in Indian country. Therefore, this action has no effect in Indian country. *See* 40 CFR 281.12(a)(2).

II. Codification

A. What is codification?

Codification is the process of placing a state's statutes and regulations that comprise the state's approved UST program into the CFR. Section 9004(b) of RCRA, as amended, allows the EPA to approve State UST programs to operate in lieu of the Federal program. The EPA codifies its authorization of state programs in 40 CFR part 282 and incorporates by reference state regulations that the EPA will enforce under Sections 9005 and 9006 of RCRA and any other applicable statutory provisions. The incorporation by reference of state authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the approved state program and state requirements that can be federally enforced. This effort provides clear notice to the public of the scope of the approved program in each state.

B. What is the history of codification of Oregon's UST program?

The EPA incorporated by reference and codified Oregon's then-approved UST program in 40 CFR 282.87, effective June 29, 2012 (77 FR 25368, April 30, 2012). Through this action, the EPA is incorporating by reference and codifying Oregon's State program in 40 CFR 282.87 to include the approved revisions.

C. What codification decisions have we made in this rule?

In this rule, we are finalizing the regulatory text that incorporates by reference the federally authorized Oregon UST Program. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the Oregon rules described in the amendments to 40 CFR part 282 set forth below. The EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 10 office (see the **ADDRESSES** section of this preamble for more information).

One purpose of this **Federal Register** document is to codify Oregon's approved UST program. The codification reflects the State program that would be in effect at the time the EPA's approved revisions to the Oregon UST program addressed in this direct final rule become final. If, however, the EPA receives substantive comment on the rule then this codification will not take effect, and the State rules that are approved after the EPA considers public comment will be codified instead. By codifying the approved Oregon program and by amending the Code of Federal Regulations (CFR), the public will more easily be able to discern the status of the federally-approved requirements of the Oregon program.

The EPA is incorporating by reference the Oregon approved UST program in 40 CFR 282.87. Section 282.87(d)(1)(i)(A) and (B) incorporate by reference for enforcement purposes the State's relevant statutes and regulations. Section 282.87 also references the Attorney General's Statement, Demonstration of Adequate Enforcement Procedures, the Program Description, and the Memorandum of Agreement, which are approved as part of the UST program under Subtitle I of RCRA.

D. What is the effect of EPA's codification of the federally authorized State UST Program on enforcement?

The EPA retains the authority under Sections 9003(h), 9005 and 9006 of Subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake corrective action, inspections, and enforcement actions, and to issue orders in approved states. If the EPA determines it will take such actions in Oregon, the EPA will rely on Federal sanctions, Federal inspection authorities, and other Federal procedures rather than the state analogs. Therefore, though the EPA has approved the State procedures listed in 40 CFR 282.87(d)(1)(i), the EPA is not incorporating by reference Oregon's procedural and enforcement authorities.

E. What State provisions are not part of the codification?

The public also needs to be aware that some provisions of the State's UST program are not part of the federally approved State program. Such provisions are not part of the RCRA Subtitle I program because they are ''broader in coverage'' than Subtitle I of RCRA. Title 40 CFR 281.12(a)(3)(ii) states that where an approved State program has provisions that are broader in coverage than the Federal program, those provisions are not a part of the federally approved program. As a result, State provisions which are ''broader in coverage'' than the Federal program are not incorporated by reference for purposes of enforcement in part 282. Title 40 CFR 282.87(d)(1)(iii) lists for reference and clarity the Oregon statutory and regulatory provisions which are ''broader in coverage'' than the Federal program and which are not, therefore, part of the approved program being codified in this rule. Provisions that are ''broader in coverage'' cannot be enforced by EPA; the State, however, will continue to implement and enforce such provisions under State law.

III. Statutory and Executive Order (E.O.) Reviews

This action only applies to Oregon's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by State law. It complies with applicable EOs and statutory provisions as follows:

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

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

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

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this final approval of Oregon's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action approves and codifies pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999), because it merely approves and codifies state requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

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

This action also is not subject to Executive Order 13045 (62 FR 19885, Apr. 23, 1997), because it is not economically significant, as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

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

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA Section 9004(b), the EPA grants a state's application for approval as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

The EPA has complied with Executive Order 12630 (53 FR 8859, Mar. 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

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

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule approves pre-existing state rules which are at least equivalent to, consistent with, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by state law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). However, this action will be effective September 24, 2019 because it is a direct final rule.

Authority: This rule is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 282

Environmental protection, Administrative practice and procedure, Hazardous substances, Incorporation by

reference, State program approval, Underground storage tanks.

Dated: June 27, 2019.

Chris Hladick,

Regional Administrator, EPA Region 10.

For the reasons set forth in the preamble, EPA is amending 40 CFR part 282 as follows:

PART 282—APPROVED UNDERGROUND STORAGE TANK PROGRAMS

■ 1. The authority citation for part 282 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

■ 2. Revise § 282.87 to read as follows:

§ 282.87 Oregon State-Administered Program.

(a) The State of Oregon is approved to administer and enforce an underground storage tank program in lieu of the Federal program under Subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 *et seq*. The State's program, as administered by the Oregon Department of Environmental Quality (DEQ), was approved by EPA pursuant to 42 U.S.C. 6991c and part 281 of this chapter. The EPA published the notice of final determination approving the Oregon underground storage tank base program effective on September 16, 2011. A subsequent program revision application was approved by the EPA and became effective on September 24, 2019.

(b) Oregon has primary responsibility for administering and enforcing its federally approved underground storage tank program. However, the EPA retains the authority to exercise its corrective action, inspection, and enforcement authorities under Sections 9003(h), 9005, and 9006 of Subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, as well as under any other applicable statutory and regulatory provisions.

(c) To retain program approval, Oregon must revise its approved program to adopt new changes to the Federal Subtitle I program which make it more stringent, in accordance with section 9004 of RCRA, 42 U.S.C. 6991c, and 40 CFR part 281, subpart E. If Oregon obtains approval for the revised requirements pursuant to Section 9004 of RCRA, 42 U.S.C. 6991c, then the newly approved statutory and regulatory provisions will be added to this subpart and notification of any change will be published in the **Federal Register**.

(d) Oregon has final approval for the following elements of its program application originally submitted to the EPA and approved effective September 16, 2011, and the program revision application approved by the EPA, effective on September 24, 2019:

(1) *State statutes and regulations.* (i) The materials cited in this paragraph (d)(1) are incorporated by reference as part of the underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.,* with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the EPA must publish a document in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101, phone number (206) 553–6693. Copies of Oregon's program application may be obtained from the Underground Storage Tank Program, Oregon Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon, 97204. All approved material is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of the material at NARA, call 202–741–6030 or go to *www.archives.gov/federal-register/cfr/ibr-locations.html.*

(A) Oregon Statutory Requirements Applicable to the Underground Storage Tank Program, June 2018.

(B) Oregon Regulatory Requirements Applicable to the Underground Storage Tank Program, June 2018.

(ii) The EPA considered the following statutes and regulations in evaluating the State program, but did not incorporate them by reference.

(A) The statutory provisions include:

(*1*) Oregon Revised Statutes, Chapter 183, Administrative Procedures Act, 2017, insofar as the provisions and procedures apply to the underground storage tank program.

(*2*) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action: Sections 465.200–465.482 and 465.900), insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved State program, although not incorporated by reference herein for enforcement purposes: Sections 465.205 through 465.250, 465.257 through 465.300, 465.310 through 465.335, 465.400 through 465.435, 465.445 through 465.455 and 465.900.

(*3*) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks: Sections 466.706–466.920 and Sections 466.990–466.995), insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved State program, although not incorporated by reference herein for enforcement purposes: Sections 466.715 through 466.735, 466.746, 466.760, 466.775 through 466.780, 466.791 through 466.810, 466.820, 466.830 through 466.845, 466.901 through 466.920 and 466.994 through 466.995.

(*4*) Chapter 468 Environmental Quality Generally, insofar as these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved State program, although not incorporated by reference herein for enforcement purposes: Sections 468.005 through 468.050, 468.090 through 468.140 and 468.963.

(B) The regulatory provisions include:

(*1*) Oregon Administrative Rules, Chapter 340, Division 11: Section 340–11–0545.

(*2*) Oregon Administrative Rules, Chapter 340, Division 12: Sections 340–012–0026 through 340–012–0053, 340–012–0067 (with the exception of subparagraphs (1)(k) and (l) and (2)(g) through (j)), 340–012–0074 (with the exception of subparagraph (1)(g)) and 340–012–0170 insofar as this applies to violations involving an underground storage tank.

(*3*) Oregon Administrative Rules, Chapter 340, Division 122: Sections 340–122–0074 through 340–122–0079 and 340–122–0130 through 340–122–0140.

(*4*) Oregon Administrative Rules, Chapter 340, Division 142: Section 340–142–0120.

(*5*) Oregon Administrative Rules, Chapter 340, Division 150: Sections 340–150–0150 through 340–150–0152, 340–150–0250, 340–150–0600 through 340–150–0620.

(*6*) Oregon Code of Civil Procedure 33C.

(*7*) Oregon Administrative Rules, Chapter 690, Division 240, insofar as

these provisions apply to matters involving an ''underground storage tank'' as that term is defined in ORS 466.706(21), as limited by the exclusions listed in ORS 466.710, except that the term does not include a tank used for storing heating oil for consumptive use on the premises where stored. The following Sections are part of the approved State program, although not incorporated by reference herein for enforcement purposes: Sections 690–240–0015, 690–240–0020, 690–240–0055 through 690–240–0340 and 690–240–0560 through 690–240–0640.

(iii) The following specifically identified sections and rules applicable to the Oregon underground storage tank program that are broader in scope than the Federal program, are not part of the approved program, and are not incorporated by reference herein for enforcement purposes:

(A) The statutory provisions include:

(*1*) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action): Sections 465.305; 465.340 through 465.391; 465.440; and 465.475 through 465.482.

(*2*) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks): Sections 466.750; 466.783 through 466.787; 466.858 through 466.882; and 466.990 through 466.992).

(*3*) Chapter 468, Environmental Quality Generally: Sections 468.055 through 468.089.

(B) The regulatory provisions include:

(*1*) Oregon Administrative Rules, Chapter 340: Divisions 160, 162, 163, 170, 177 and 178.

(*2*) Oregon Administrative Rules, Chapter 837, Division 40.

(2) *Statement of legal authority.* The Attorney General Statement, a letter signed on October 12, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(3) *Demonstration of procedures for adequate enforcement.* The ''Demonstration of Procedures for Adequate Enforcement'' submitted as part of the application for approval on October 19, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Program description.* The program description and any other material submitted as part of the original application on October 19, 2018, though not incorporated by reference, are referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 10 and the Oregon Department of Environmental Quality, signed by the EPA Regional Administrator on March 19, 2019, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 3. Appendix A to part 282 is amended by revising the entry for Oregon to read as follows:

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

* * * * *

Oregon

(a) The statutory provisions include:

(1) Chapter 465, Hazardous Waste and Hazardous Materials I (Removal or Remedial Action Sections 465.200 through 465.425):

465.200 Definitions for ORS 465.200 to 465.425 (except for Sections 465.200(5) through (11) and (17) defining terms contained in the dry cleaning requirements; (13) ''facility'' insofar as it applies to a facility that is not an underground storage tank; (16) ''hazardous substance'' insofar as it applies to hazardous wastes and any substance that is not otherwise defined as a hazardous substance pursuant to section 101(14) of the Federal Comprehensive Environmental Response, Compensation and Liability Act or that is not oil; (28) ''underground storage tank'' insofar as it includes any tank or piping that is excluded under ORS 466.710 and also any tank used to store heating oil for consumptive use on the premises where stored.)

465.255 Strict liability for remedial action costs for injury or destruction of natural resource; limited exclusions (except insofar as this includes a person who is not an owner or operator of an underground storage tank and except insofar as the exclusions would exclude persons who would be liable under Section 9003(h)(6) of RCRA).

(2) Chapter 466, Hazardous Waste and Hazardous Materials II (Oil Storage Tanks):

466.706 Definitions for ORS 466.706 to 466.882 and 466.994 (except for the following definitions: Section 466.706(17) ''regulated substance'' insofar as it would include substances designated by the commission under subsection (c) that are not included under subsections (a) and (b) of this definition; (21) ''underground storage tank'' insofar as it includes any tank or piping that is excluded under ORS 466.710, and any tank used to store heating oil for consumptive use on the premises where stored.)

466.710 Application of ORS 466.706 to 466.882 and 466.994

466.740 Noncomplying installation prohibited

466.743 Training on operation, maintenance and testing; rules

466.765 Duty of owner or permittee of underground storage tank

466.770 Corrective action required on contaminated site

466.815 Financial responsibility of owner or permittee; rules; legislative review

466.825 Strict liability of owner or permittee

(b) The regulatory provisions include:

(1) Oregon Administrative Rules, Chapter 340, Division 122 insofar as the following rules apply to a release from an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored.

340–122–0010 Purpose

340–122–0030 Scope and Applicability

340–122–0040 Standards

340–122–0047 Generic remedies

340–122–0050 Activities

340–122–0070 Removal

340–122–0071 Site Evaluation

340–122–0072 Preliminary Assessments

340–122–0073 Confirmation of Release

340–122–0080 Remedial Investigation

340–122–0084 Risk Assessment

340–122–0085 Feasibility Study

340–122–0090 Selection or Approval of the Remedial Action

340–122–0100 Public Notice and Participation

340–122–0110 Administrative Record

340–122–0115 Definitions insofar as the definition applies to an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored

340–122–0120 Security Interest Exemption

340–122–0205 Purpose

340–122–0210 Definitions except insofar as the definition of ''responsible person'' includes a person who does not own or operate an underground storage tank

340–122–0215 Scope and Applicability

340–122–0217 Requirements and Remediation Options

340–122–0218 Sampling and Analysis

340–122–0220 Initial Response

340–122–0225 Initial Abatement Measures and Site Check

340–122–0230 Initial Site Characterization

340–122–0235 Free Product Removal

340–122–0240 Investigation for Magnitude and Extent of Contamination

340–122–0243 Low-Impact Sites

340–122–0244 Risk-Based Concentrations

340–122–0250 Corrective Action Plan

340–122–0252 Generic Remedies

340–122–0260 Public Participation

340–122–0320 Soil Matrix Cleanup Options

340–122–0325 Evaluation of Matrix Cleanup Level

340–122–0330 Evaluation Parameters

340–122–0335 Numeric Soil Cleanup Standards

340–122–0340 Sample Number and Location

340–122–0345 Sample Collection Methods

340–122–0355 Evaluation of Analytical Results

340–122–0360 Reporting Requirements

(2) Oregon Administrative Rules, Chapter 340, Division 142 insofar as the following rules apply to a release from an underground storage tank, excluding tanks used to store heating oil for consumptive use on the premises where stored.

340–142–0001 Purpose and Scope

340–142–0005 Definitions as Used in This Division Unless Otherwise Specified
340–142–0030 Emergency Action
340–142–0040 Required Reporting
340–142–0050 Reportable Quantities
340–142–0060 Cleanup Standards
340–142–0070 Approval Required for Use of Chemicals
340–142–0080 Disposal of Recovered Spill Materials
340–142–0090 Cleanup Report
340–142–0100 Sampling/Testing Procedures
340–142–0130 Incident Management and Emergency Operations

(3) Oregon Administrative Rules, Chapter 340, Division 150.

340–150–0001 Purpose
340–150–0006 Applicability and General Requirements
340–150–0008 Exemptions and Deferrals
340–150–0010 Definitions
340–150–0020 UST General Permit Registration Certificate Required except insofar as this provision applies to a person who does not own or operate an underground storage tank and except insofar as the payment of fees is required
340–150–0021 Termination of Temporary Permits
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[FR Doc. 2019–15311 Filed 7–25–19; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2018–0017]

RIN 2127–AL94

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule confirms the determination NHTSA announced in the notice of proposed rulemaking (NPRM) that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act or 2015 Act) does not apply to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards and are unable to offset such a deficit with compliance credits. In addition, this final rule is finalizing the agency's determination that even if the Inflation Adjustment Act applies, increasing the CAFE civil penalty rate would have a negative economic impact, and therefore, in accordance with the Energy Policy and Conservation Act of 1975 (EPCA) and the Energy Independence and Security Act of 2007 (EISA), the current CAFE civil penalty rate of $5.50 should be retained, instead of increasing to $14 in model year 2019.

DATES:

Effective dates: This rule is effective as of September 24, 2019. Upon reconsideration, this rule supersedes the final rule published at 81 FR 95489, December 28, 2016 (delayed at 82 FR 8694, January 30, 2017, 82 FR 15302, March 28, 2017, 82 FR 29010, June 27, 2017, and 82 FR 32139, July 12, 2017), which went into force in accordance with the decision of the United States Court of Appeals for the Second Circuit in *NRDC* v. *NHTSA,* Case No. 17–2780.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than September 9, 2019.

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Deputy Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, West Building, Fourth Floor, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kerry Kolodziej, Office of Chief

Counsel, NHTSA, telephone (202) 366–5263, facsimile (202) 366–3820, 1200 New Jersey Ave. SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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A. Executive Summary

As explained in the proposed rule (83 FR 13904 (April 2, 2018)), NHTSA has almost forty years of experience in implementing the corporate average fuel economy (CAFE) program and its civil penalty component. This includes oversight and administration of the program's operation, how the automobile manufacturers respond to CAFE standards and increases, and the role of civil penalties in achieving the CAFE program's objectives. The CAFE civil penalty provisions 49 U.S.C. 32912(b) and (c), established by EPCA, are complex, containing statutory requirements that must be met if the penalty amount is to be increased, as well as a statutory cap of $10 on the maximum penalty amount, among other provisions, that distinguish it from ordinary civil penalty provisions, such as the general penalty for CAFE violations found in 49 U.S.C. 32912(a).

After the new administration took office and upon further consideration of the issues, NHTSA determined that it was appropriate and necessary to reconsider the applicability of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act or 2015 Act) to the CAFE civil penalty provision found in EPCA. In reconsidering the CAFE civil penalty rule and the applicability of the 2015 Act to the statutory provision, NHTSA had two objectives: First, to determine whether the CAFE civil penalty rate was the kind of penalty to which the 2015 Act applied, and second, if it did apply, whether increasing the civil penalty rate for the CAFE provision will have a negative economic impact. NHTSA has carefully considered these objectives and comments received in reconsidering the CAFE civil penalty statute that NHTSA administers and the application of the 2015 Act to it.[1]

As a result of this review, including consideration of all the comments received on its proposed rule, NHTSA has reconsidered its earlier decisions that accepted applicability of the 2015 Act and its predecessors to the CAFE civil penalty provision in 49 U.S.C. 32912(b).[2] Accordingly, NHTSA is finalizing its determination that the CAFE civil penalty rate is not a ''civil monetary penalty'' that must be adjusted for inflation under the 2015 Act. Prior to the proposed rule, NHTSA's **Federal Register** notifications on its inflation adjustments under the 2015 Act did not consider whether the CAFE civil penalty rate fit the definition of a ''civil monetary penalty'' subject to adjustment under the 2015 Act, instead proceeding—without analysis—as if the 2015 Act applied to the CAFE civil penalty rate. After taking the opportunity to reconsider this matter and fully analyze the issue and consider the comments received on its proposal, NHTSA concludes that the CAFE civil penalty rate is not covered by the 2015 Act.

NHTSA is finalizing its determination that civil penalties assessed for CAFE violations under Section 32912(b) are not a ''penalty, fine, or other sanction that'' is either ''a maximum amount'' or ''a specific monetary amount.'' [3] As explained in the proposed rule, the civil penalties under consideration here are part of a complicated market-based enforcement mechanism. Any potential civil penalties for failing to satisfy fuel economy requirements, unlike other civil penalties, are not determined until the conclusion of a complex formula, credit-earning arrangement, and credit transfer and trading program. In fact, after NHTSA determines there is a violation, the ultimate penalty assessed is based on the noncompliant *manufacturer's* decision, not NHTSA's, on whether and how to acquire and apply any credits that may be available to the manufacturer, and on the decisions of *other* manufacturers to earn and sell credits to a potentially liable manufacturer.[4] Manufacturers can also claim future credits as a means of meeting their current liability based upon projected credits to be earned within three subsequent model years. The amount that a manufacturer might actually pay under the CAFE civil penalty statute is dependent upon a fluid, multi-year process, involving credit trading with other manufacturers at unknown prices and unverifiable credits to be earned in the future. In other words, what the noncompliant manufacturer pays is much more the function of market forces, trading of credits, and manufacturers' projections of future performance, than it is just the application of the CAFE penalty rate.

Moreover, after consideration of comments, NHTSA concludes that Congress did not intend for the 2015 Act to apply to this specialized civil penalty rate, which has longstanding, strict procedures previously enacted by Congress that limit NHTSA's ability to increase the rate. Congress specifically contemplated that increases to the CAFE civil penalty rate for manufacturer non-compliance with CAFE standards may be appropriate and necessary and included a mechanism in the statute for such increases. Critically, this mechanism requires the Secretary of Transportation to determine specifically that any such increase will not lead to certain specific negative economic effects. In addition, Congress explicitly limited any such increase to $10 per tenth of a mile per gallon.[5] These restrictions have been in place since the statute was amended in 1978. Though Congress later amended the CAFE civil penalty provision in 2007, Congress left in place unaltered both the mechanism for increases and the upper limit of an increased civil penalty under the

[1] This final rule is promulgated under NHTSA's authority, delegated to it by the Secretary (49 CFR 1.95(a)), under 49 U.S.C. Chapter 329. *Cf.* Opinion, ECF No. 205, *NRDC* v. *NHTSA*, Case No. 17–2780, at 13, 17 (2d Cir., June 29, 2018) (citing the ''judicial review provision of EPCA [49 U.S.C. 32909(a)] as ''the legislative authorization to petition for review'' of NHTSA's indefinite delay rule; ''Judicial review here is authorized by Section 32909 of EPCA.'').

[2] NHTSA has the authority to reconsider its prior rules for the reasons described in Section D.1.

[3] As discussed below, this determination reflects a change in NHTSA's position on this issue from when NHTSA previously adjusted the CAFE civil penalty rate from $5 to $5.50 in 1997 and its earlier announcements of adjustments of the rate to $14 in its July 2016 interim final rule and its December 2016 final rule.

[4] *See* 49 U.S.C. 32903.

[5] NHTSA concludes the 2015 Act also does not apply to the $10 cap.

statute. NHTSA's determination regarding the applicability of the 2015 Act to the EPCA CAFE civil penalty provision is also confirmed by the Office of Management and Budget (OMB), the office directed by Congress to issue guidance on the implementation of the 2015 Act. OMB's views regarding the applicability of the 2015 Act to the EPCA CAFE civil penalty provision are set forth in a comprehensive opinion included in the docket for this final rule, in which OMB concurs with NHTSA's assessment that the 2015 Act does not apply to the CAFE civil penalty rate.[6] OMB supported its conclusion by noting first, that it was not aware of any other penalty scheme with the unique features of the CAFE civil penalty scheme, and also ''[i]n light of (1) EPCA's distinction between the penalty rate and the penalty itself, (2) the incompatibility of the structure of the CAFE penalty scheme and the 2015 Act, and (3) the inconsistent treatment of the CAFE penalty rate under inflation adjustment schemes over time.'' These factors, which OMB found supportive of NHTSA's conclusion that the 2015 Act does not apply to the CAFE civil penalty rate, are discussed throughout this document.

In addition to reconsidering the application of the 2015 Act to the EPCA CAFE civil penalty provision, NHTSA has reconsidered its decisions in the July 2016 interim final rule and December 2016 final rule to increase the CAFE civil penalty rate and, as a result, is retaining the current civil penalty rate applicable to 49 U.S.C. 32912(b) of $5.50 per tenth of a mile per gallon for automobile manufacturers that do not meet applicable CAFE standards and are unable to offset such a deficit with compliance credits, rather than increasing the rate to $14 in model year 2019.

Even if the 2015 Act is applied to the CAFE civil penalty rate, NHTSA has determined that the rate should remain the same in order to comply with EPCA, which must be read harmoniously with the 2015 Act. The 2015 Act confers discretion to the head of each agency to adjust the amount of a civil monetary penalty by less than the amount otherwise required for the initial adjustment, with the concurrence of the Director of the Office of Management and Budget, upon determining that doing so would have a ''negative economic impact.'' In EPCA, Congress previously identified specific factors that NHTSA is required to consider before making a determination about the ''impact on the economy'' as a prerequisite to increasing the applicable civil penalty rate. NHTSA believes that these statutory criteria are appropriate for determining whether an increase in the CAFE civil penalty rate would have a ''negative economic impact'' for purposes of the 2015 Act. Under EPCA, NHTSA faces a heavy burden to demonstrate that increasing the civil penalty rate ''will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.'' Specifically, in order to establish that the increase would not have that ''substantial deleterious impact,'' NHTSA would need to affirmatively determine that it is likely that the increase would *not* cause a significant increase in unemployment in a State or a region of a State; adversely affect competition; or cause a significant increase in automobile imports. In light of those statutory factors—and the absence of persuasive evidence to support making the EPCA findings—NHTSA concludes that increasing the CAFE civil penalty rate would have a negative economic impact. Thus, NHTSA is not adjusting the rate under the 2015 Act, even if it applied.

Even if EPCA's statutory factors for increasing civil penalties are not applied, NHTSA has determined, after consideration of comments, that the $14 penalty will lead to a negative economic impact that merits leaving the CAFE civil penalty rate at $5.50. Based on available information, including information provided by commenters, the effect of applying the 2015 Act to the CAFE civil penalty would potentially drastically increase manufacturers' costs of compliance. OMB has concurred with NHTSA's determination that increasing the CAFE civil penalty rate by the otherwise required amount will have a negative economic impact.[7]

In summary, NHTSA concludes that:

- The 2015 Act does not apply to the CAFE civil penalty rate, so no rate increase is permitted, except pursuant to the scheme established in EPCA;
- Even if the 2015 Act did apply to the CAFE civil penalty rate, the 2015 Act must be read in conjunction with EPCA, and considering the EPCA factors, increasing the CAFE penalty rate to $14 would have a ''negative economic impact''; and
- Even if the EPCA factors did not apply, increasing the CAFE civil penalty rate to $14 would still have a ''negative economic impact.''

The result is the same under all of these scenarios: The CAFE civil penalty rate is and will continue to be set at $5.50, rather than increasing to $14 in MY 2019.[8]

In EPCA, Congress also imposed a cap of $10 on the CAFE civil penalty rate. NHTSA has determined that this statutory cap also does not meet the definition of a ''civil monetary penalty'' that requires adjustment under the 2015 Act. OMB agrees with this assessment.[9] Thus, even if the CAFE civil penalty rate is a ''civil monetary penalty'' under the 2015 Act and regardless of whether increasing it would have a ''negative economic impact,'' NHTSA has determined that any increase would be statutorily capped by EPCA at $10.

The general penalty in 49 U.S.C. 32912(a) for other violations of EPCA, as amended, promulgated in 49 CFR 578.6(h)(1), is subject to additional inflationary adjustments for 2017, 2018, and 2019. In this rule, NHTSA is finalizing the 2017, 2018, and 2019 inflationary adjustments to this general penalty amount.

B. Background

1. CAFE Program

NHTSA sets [10] and enforces [11] corporate average fuel economy (CAFE) standards for the United States light-duty vehicle fleet, and in doing so, assesses civil penalties against vehicle manufacturers that fall short of the standards and are unable to make up the shortfall with credits.[12] The civil penalty amount for CAFE non-compliance was originally set by statute in 1975, and since 1997, has included a rate of $5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's fleet average CAFE level falls short of the applicable standard. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.[13] The basic

[6] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0018 (OMB Non-Applicability Letter).

[7] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0019 (OMB Negative Economic Impact Letter).

[8] Without this rule, the CAFE civil penalty rate would increase to $14 beginning with civil penalties assessed for model year 2019.

[9] OMB Non-Applicability Letter.

[10] 49 U.S.C. 32902.

[11] 49 U.S.C. 32911, 32912.

[12] Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year), *transferred* (from one fleet to another), or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903.

[13] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any

Continued

equation for calculating a manufacturer's civil penalty amount before accounting for credits, is as follows:

(penalty rate) × (amount of shortfall, in tenths of an mpg) × (number of vehicles in manufacturer's fleet).

Automakers have paid more than $890 million in CAFE civil penalties, up to and including model year (MY) 2014 vehicles.[14] On top of the costs of paying these civil penalties, manufacturers have also spent additional money towards generating overcompliance credits and purchasing credits from other manufacturers. Starting with the model year 2011, provisions in the CAFE program provided for credit transfers among a manufacturer's various fleets. Commencing with that model year, the law also provided for trading between vehicle manufacturers, which has allowed vehicle manufacturers the opportunity to acquire credits from competitors rather than paying civil penalties for non-compliance. Manufacturers are required to notify NHTSA of the volumes of credits traded or sold, but the agency does not receive any information regarding total cost paid or cost per credit. Thus, while NHTSA is not aware of the amount of money manufacturers spend on generating overcompliance credits or purchasing credits from other manufacturers, NHTSA believes it is likely that credit generation and credit purchases involve significant expenditures. Moreover, NHTSA expects that an increase in the penalty rate, which would apply to all manufacturers, would result in an increase in such expenditures.[15] Because of expected shortfalls in CAFE compliance in current and upcoming model years, the agency currently anticipates many manufacturers will face the possibility of larger expenditures on CAFE penalties or increased costs to acquire credits over the next several years than at present.[16]

NHTSA has long had authority under the Energy Policy and Conservation Act (EPCA) of 1975, Public Law 94–163, 508, 89 Stat. 912 (1975), to raise the amount of the penalty for CAFE shortfalls if it makes certain findings,[17] as well as the authority to compromise and remit such penalties under certain circumstances.[18] Recognizing the economic harm that increases in CAFE civil penalties could have on the automobile industry and the economy as a whole, Congress capped any increase in the original statutory penalty rate at $10 per tenth of a mile per gallon. Further—and significantly—Congress has forbidden NHTSA from increasing the CAFE civil penalty rate under EPCA unless NHTSA concludes through rulemaking that the increase in the penalty rate both (1) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed, *and* (2) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of the State. A finding of ''no substantial deleterious impact'' may only be made if NHTSA determines that it is likely that the increase in the penalty (A) will not cause a significant increase in unemployment in a State or a region of a State, (B) adversely affect competition, or (C) cause a significant increase in automobile imports. Nowhere does EPCA define ''substantial'' or ''significant'' in the context of this provision.

The authority to compromise and remit penalties is extremely limited and must be applied on a case-by-case basis. If NHTSA seeks to compromise or remit penalties for a given manufacturer, a rulemaking is not necessary, but the amount of a penalty may be compromised or remitted only to the extent (1) necessary to prevent a manufacturer's insolvency or bankruptcy, (2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire, or (3) the Federal Trade Commission certifies that a reduction in the penalty is necessary to prevent a substantial lessening of competition. NHTSA has never previously attempted to undertake this process. To date, NHTSA has never utilized its ability to compromise or remit a CAFE civil penalty. These various statutory provisions and requirements, coupled with the formula for determining the total potential civil penalty due from a manufacturer, demonstrate the unique nature of the CAFE civil penalty provision and distinguish it from a typical civil penalty provision that merely sets forth an amount to be paid for a regulatory violation.

2. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Inflation Adjustment Act or 2015 Act), Public Law 114–74, Section 701, was signed into law. The 2015 Act required Federal agencies to make an initial ''catch-up'' adjustment to the ''civil monetary penalties,'' as defined, they administer through an interim final rule and then to make subsequent annual adjustments for inflation.[19] The amount of increase for any ''catch-up'' adjustment to a civil monetary penalty pursuant to the 2015 Act was limited to 150 percent of the then-current penalty. Unless an exception applied, agencies were required to issue an interim final rule for the initial ''catch-up'' adjustment—without providing the opportunity for public comment ordinarily required under the Administrative Procedure Act (APA)—by July 1, 2016.[20]

given model year—a domestic passenger car fleet, an import passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

[14] Penalty reporting for MY15 and newer vehicles was not reported at the time of this rule. The highest CAFE penalty paid to date for a shortfall in a single fleet was $30,257,920, paid by DaimlerChrysler for its import passenger car fleet in MY 2006. Since MY 2012, only Jaguar Land Rover and Volvo have paid civil penalties. *See https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[15] *See* 83 FR 13904, 13916 (Apr. 2, 2018) (''[I]ncreasing the penalty rate to $14 would lead to significantly greater costs than the agency had anticipated when it set the CAFE standards because manufacturers who had planned to use penalties as one way to make up their shortfall would now need to pay increased penalty amounts, purchase additional credits at likely higher prices, or make modifications to their vehicles outside of their ordinary redesign cycles. NHTSA believes all of these options would increase manufacturers' compliance costs, many of which would be passed along to consumers.''). NHTSA did not receive any comments providing information to the contrary.

[16] NHTSA's ''Manufacturer Projected Fuel Economy Performance Report'' indicates that the total U.S. fleet projected fuel economy value fails to meet the standards for model year 2017 and increasingly so for model year 2018. Available at *https://one.nhtsa.gov/CAFE_PIC/MY_2017_and_2018_Projected_Fuel_Economy_Performance_Report.pdf* (Apr. 30, 2018).

[17] 49 U.S.C. 32912.

[18] 49 U.S.C. 32913.

[19] A '''civil monetary penalty' means any penalty, fine, or other sanction'' that meets three requirements: the ''penalty, fine, or other sanction'' must be ''for a specific monetary amount as provided by Federal law'' or have ''a maximum amount provided for by Federal law''; the ''penalty, fine, or other sanction'' must be ''assessed or enforced by an agency pursuant to Federal law''; and the ''penalty, fine, or other sanction'' must be ''assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.'' 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[20] The 2015 Act authorized full notice-and-comment rulemaking procedures if the head of an agency was adjusting the amount of a civil monetary penalty by less than the otherwise required amount because she determined either that increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact or that the social costs of increasing the civil monetary penalty by the otherwise required amount outweighed the benefits. Such a determination required the concurrence of the Director of the Office of Management and Budget. 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c).

The method of calculating inflationary adjustments in the 2015 Act differs substantially from the methods used in past inflationary adjustment rulemakings conducted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Inflation Adjustment Act), Public Law 101–410. Civil penalty adjustments under the 1990 Inflation Adjustment Act were conducted under rules that sometimes required significant rounding of figures. For example, any increase determined under the 1990 Inflation Adjustment Act had to be rounded to the nearest multiple of $25,000 in the case of penalties greater than $200,000. Under these rules, NHTSA never adjusted the CAFE civil penalty rate above $5.50.

The 2015 Act altered these rounding rules. Now, penalties are simply rounded to the nearest $1. Furthermore, the 2015 Act ''resets'' the inflation calculations by excluding prior inflationary adjustments under the 1990 Inflation Adjustment Act. To do this, the 2015 Act requires agencies to identify, for each civil monetary penalty, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (*i.e.,* originally enacted by Congress) or last adjusted other than pursuant to the 1990 Inflation Adjustment Act.

Significantly, Congress also included a provision in the 2015 Act that directed the Director of OMB to issue periodic guidance to agencies implementing the inflation adjustments required under the 2015 Act. The Director of OMB provided initial guidance to agencies in a February 24, 2016 memorandum.[21] In that guidance, OMB specifically instructed agencies to identify the penalties to which the 2015 Act would apply among the penalties that each agency is responsible for administering, and noted that:

> Agencies with questions on the applicability of the inflation adjustment requirement to an individual penalty, should first consult with the Office of General Counsel of the agency for the applicable statute, and then seek clarifying guidance from OMB if necessary.[22]

Subsequent guidance from OMB reiterated agencies' responsibility to identify applicable penalties and to consult with the individual agency's Office of General Counsel and to seek clarifying guidance from OMB with questions regarding the applicability of the 2015 Act to particular penalties.[23]

For those penalties subject to the statute's definition of ''civil monetary penalties,'' the memorandum provided guidance on how to calculate the initial adjustment required by the 2015 Act. The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI–U. The February 24, 2016 memorandum contains a table with a multiplier for the change in CPI–U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty, the agency must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the 1990 Inflation Adjustment Act, by the multiplier for the increase in CPI–U from the year the penalty was established or adjusted as provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary increase to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, the agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI–U in Table A of the February 24, 2016 memorandum or an amount equal to 250% of the current penalty.

Additionally, the 2015 Act gives agencies discretion to adjust the amount of a civil monetary penalty by less than otherwise required if the agency determines that increasing the civil monetary penalty by the otherwise required amount will have either a negative economic impact or if the social costs of the increased civil monetary penalty will outweigh the benefits.[24] In either instance, the agency must publish a notice, take and consider comments on this finding, and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

3. NHTSA's Actions to Date Regarding CAFE Civil Penalties

a. Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, without notice and comment, adopting inflation adjustments for civil penalties under its administration, following the procedure and the formula in the 2015 Act. NHTSA did not analyze at that time whether the 2015 Act applied to all of its civil penalties. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE non-compliance from $5.50 to $14.[25] NHTSA also indicated in that notice that the maximum penalty rate that the Secretary is permitted to establish for such violations would increase from $10 to $25, although this was not codified in the regulatory text.[26] NHTSA made these adjustments without seeking public comment and without discussing with the Department of Transportation Office of General Counsel whether the 2015 Act applied to these rates, whether the adjustments conflict with EPCA's penalty rate increase procedures, or whether making the adjustments would have negative economic consequences. NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to $40,000.[27]

In response to the changes to the CAFE penalty provisions issued in the interim final rule, the Alliance of Automobile Manufacturers (Alliance) and the Association of Global Automakers (Global) jointly petitioned NHTSA for reconsideration (the Industry Petition).[28] The Industry

[21] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf* (last accessed May 22, 2018).

[22] *Id.*

[23] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf* (last accessed July 10, 2018); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2017), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf* (last accessed July 10, 2018); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019).

[24] Public Law 114–74, Sec. 701(c).

[25] 81 FR 43524 (July 5, 2016). This interim final rule also updated the maximum civil penalty amounts for violations of all statutes and regulations administered by NHTSA, and was not limited solely to penalties administered for CAFE violations.

[26] For the reasons described in Section D.5, the maximum penalty rate that the Secretary is permitted to establish for such violations is $10.

[27] 81 FR 43524 (July 5, 2016).

[28] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016 interim final rule raising the same concerns as those raised in the Industry Petition.

Continued

Petition raised concerns with the significant impact, which they estimated to be at least $1 billion annually, that the increased penalty rate would have on CAFE compliance costs. Specifically, the Industry Petition raised: The issue of retroactivity (applying the penalty increase associated with model years that have already been completed or for which a company's compliance plan had already been ''set''); which ''base year'' (*i.e.,* the year the penalty was established or last adjusted) NHTSA should use for calculating the adjusted penalty rate; and whether an increase in the penalty rate to $14 would cause a ''negative economic impact.''

b. Final Rule

In response to the Industry Petition, NHTSA issued a final rule on December 28, 2016.[29] In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete would be inappropriate, given how courts generally disfavor the retroactive application of statutes. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. NHTSA therefore stated that it would not apply the inflation-adjusted penalty rate of $14 until model year 2019, as the agency believed that would be the first year in which product changes could be made in response to the higher penalty rate.

Beginning in January 2017, NHTSA took action to delay the effective date of the December 2016 final rule.[30] As a result of a recent decision of the United States Court of Appeals for the Second Circuit, that December 2016 final rule is now in force.[31] That decision by the Second Circuit does not affect NHTSA's authority to reconsider the applicability of the 2015 Act to the EPCA CAFE civil penalty provision through notice-and-comment rulemaking and to issue this final rule.[32] Absent this final rule determining that the 2015 Act does not apply to the CAFE civil penalty rate, the rate would have increased beginning with model year 2019 for noncompliances that will likely be determined in approximately late 2020.[33]

c. Initial Reconsideration and Request for Comments

In light of CAFE compliance data submitted by manufacturers to NHTSA showing that many automakers would begin to fall behind in meeting their applicable CAFE standards beginning in model years 2016 and 2017,[34] in July 2017, the agency indicated it was reconsidering its earlier decision in the July 2016 interim final rule to increase the CAFE civil penalty rate. In that reconsideration announcement, the agency explained that it was, for the first time, seeking public comment on the legal, factual, and policy issues implicated by the question of whether the rate should be increased. NHTSA requested public comment on whether and, if so, how to amend the CAFE civil penalty rate.[35]

d. Notice of Proposed Rulemaking

On April 2, 2018, NHTSA published a notice of proposed rulemaking (NPRM) announcing that it had tentatively determined, upon reconsideration, that the 2015 Act should not be applied to the CAFE civil penalty formula provision found in 49 U.S.C. 32912 and proposed to retain the current civil penalty rate of $5.50 per .1 of a mile per gallon, rather than to increase it to $14 beginning in model year 2019.[36] Through its reconsideration of the applicability of the 2015 Act to the CAFE civil penalty rate, NHTSA is carrying out its responsibility, as OMB instructed in its guidance, to determine whether the penalties under its jurisdiction are ''civil monetary penalt[ies]'' as defined by the 2015 Act.[37] The agency's proposal is based on a legal determination, after reconsideration, that the CAFE civil penalty rate is not a ''civil monetary penalty'' as contemplated by the 2015 Act and that therefore the 2015 Act does not apply to the NHTSA CAFE civil penalty formula. Specifically, NHTSA proposed that the formula is not a ''penalty, fine, or other sanction'' that is either ''a specific monetary amount'' or ''a maximum amount.'' Instead, as OMB highlights in the docketed opinion,[38] Congress expressly described the rate in the CAFE statute as an ''amount . . . to be used in calculating a civil penalty,'' not a ''civil penalty'' itself.[39] The CAFE statute outlines a process that NHTSA uses to determine a potential penalty and that manufacturers use to determine their specific penalty. In particular, the $5.50 per .1 mile is merely a rate that goes into a complex, statutory formula used to calculate a potential penalty amount, but the actual civil penalty amount ultimately depends on the decisions of both the violator and potentially other manufacturers.

This proposal reflected a change in NHTSA's position on this issue from when NHTSA previously adjusted the CAFE civil penalty rate from $5 to $5.50. Mindful of the Alliance and Global's comment that ''the practical and legal issues implicated by such a reduction may prove to be insuperable,'' [40] at this time, NHTSA is

Both petitions, along with a supplement to the Industry Petition, can be found in Docket ID NHTSA–2016–0075 at *www.regulations.gov.*

[29] 81 FR 95489 (December 28, 2016). The December 2016 final rule did not impact the portions of the July 5, 2016 interim final rule not dealing with CAFE, which are expected to be finalized as part of NHTSA's 2019 inflationary adjustments.

[30] 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017).

[31] Order, ECF No. 196, *NRDC* v. *NHTSA,* Case No. 17–2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC* v. *NHTSA,* Case No. 17–2780, at 44 (2d Cir., June 29, 2018) (''The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.'').

[32] NHTSA is permitted to issue this final rule for the reasons explained in Section D.1.

[33] *See* 81 FR 95489, 95492 (Dec. 28, 2016). Civil penalties are determined after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA), *i.e.,* no earlier than April 2020 for model year 2019 noncompliance. *See* 77 FR 62624, 63126 (Oct. 15, 2012).

[34] ''MYs 2016 and 2017 Projected Fuel Economy Performance Report,'' February 14, 2017, available at *https://one.nhtsa.gov/cafe_pic/AdditionalInfo.htm.*

[35] 82 FR 32140 (July 12, 2017). Comments on this document can be found at: *https://www.regulations.gov/docket?D=NHTSA-2017-0059.* In the NPRM, NHTSA generally described the comments it received in response to its reconsideration notice, including that ''[v]ehicle manufacturers, either directly or via their respective representing organizations, also expressed support for the reconsideration of the 2016 final rule.'' 83 FR 13904, 13907 (Apr. 2, 2018). NHTSA did not intend to suggest, as one commenter to the NPRM read it, that *all* ''the vehicle manufacturers who submitted comments uniformly supported reconsideration of the CAFE penalty increase.'' Comment by Workhorse Group Inc., NHTSA–2018–0017–0010 (Workhorse Comment), at 2 n.3. NHTSA acknowledges that one electric vehicle manufacturer, Faraday Future, submitted a comment to the reconsideration notice requesting that NHTSA consider the economic impact of a change to the CAFE civil penalty rate on electric vehicle manufacturers. *See* Docket ID NHTSA–2017–0059–0016. NHTSA discusses this issue below.

[36] NHTSA's reconsideration authority is discussed in Section D.1.

[37] OMB's February 2016 guidance confirms that each agency is ''responsible for identifying the civil monetary penalties that fall under the statutes and regulations [it] enforce[s].'' Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Feb. 24, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[38] OMB Non-Applicability Letter, at 4–5.

[39] 49 U.S.C. 32912(c)(1)(A).

[40] Comment by Alliance of Automobile Manufacturers and Association of Global Automakers, NHTSA–2018–0017–0011 (Alliance and Global Comment), 18 n.75. Because of these practical and legal issues and because the agency is ''reluctant to draw inferences from Congress' failure to act,'' *Schneidewind* v. *ANR Pipeline Co.,*

exercising its judgment not to revisit its determination from more than twenty years ago to increase the rate by fifty cents, even if that decision did not take into account the agency's considered interpretation of the statute.[41]

Even if one were to assume that the CAFE penalty rate was subject to the 2015 Act, NHTSA proposed in the alternative to maintain the current $5.50 civil penalty rate based on a tentative finding that—either in light of the statutory factors Congress requires NHTSA to analyze under EPCA in determining whether an increase in the civil penalty rate will have ''a substantial deleterious impact on the economy'' or otherwise—increasing the CAFE civil penalty rate would result in a ''negative economic impact.'' Pursuant to OMB's guidance, NHTSA consulted with OMB before proposing this reduced catch-up adjustment determination and submitted its NPRM to the Office of Information and Regulatory Affairs (OIRA) for review. In any event, NHTSA proposed that any adjustment would be capped by the $10 limit in 49 U.S.C. 32912(c)(1)(B), which would remain unadjusted.

NHTSA also proposed to finalize the 2017 and 2018 inflationary adjustments for the maximum penalty for general CAFE violations in 49 U.S.C. 32912(a).[42]

C. Overview of the Comments

NHTSA received sixteen comments on the NPRM. NHTSA received comments from the following entities and individuals: The Alliance of Automobile Manufacturers; the Association of Global Automakers; Jaguar Land Rover North America LLC; Center for Biological Diversity; Natural Resources Defense Council; Sierra Club (and some of its members); the Union of Concerned Scientists; Center for American Progress; Attorneys General of New York, California, Delaware, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Vermont, Virginia, and Washington; the California Air Resources Board; the California Department of Transportation; the District of Columbia Department of Energy and Environment; the New Jersey Department of Environmental Protection; the Institute for Policy Integrity at New York University School of Law; Workhorse Group Inc.; and other individuals.

D. Response to the Comments

1. NHTSA's Reconsideration Authority

As a threshold matter, NHTSA must address the various comments submitted regarding the agency's ability to reconsider its previous rules on this issue and upon reconsideration, change its position regarding the applicability of the 2015 Act to the CAFE civil penalty rate and the need to invoke the ''negative economic impact'' exception.[43] NHTSA, like all agencies, is permitted to change its views based upon its experience and expertise, provided that the requirements of the APA and other governing statutes are met. To do so, an agency must show that it is aware it is changing its position and provide a reasoned explanation for the change.[44] This holds true even if the agency's position has been ''longstanding,'' as some commenters characterized here,[45] because the agency must continually consider varying interpretations and reassess their validity.[46]

Here, NHTSA expressly acknowledged in the NPRM that its tentative determination that the CAFE civil penalty rate is not a ''civil monetary penalty'' subject to inflationary adjustment under the 2015 Act ''reflects a change in NHTSA's position on this issue.''[47] As NHTSA explained in the NPRM, NHTSA proposed the change because it previously ''did not consider'' the issue and had proceeded in the July 2016 interim final rule ''without analysis'' of the statutory interpretation and policy issues considered in this rulemaking and without the benefit of public comment.[48] Accordingly, after providing a comprehensive ''reasoned explanation'' in the NPRM,[49] NHTSA reached a tentative determination that a change was appropriate and that its proposed change was justified—an analysis upon which it then sought comment.[50]

485 U.S. 293, 306 (1988), Congress not reinstating the $5 rate—in 2007 in EISA or otherwise—means little, contrary to the suggestion of some commenters. *See* Comment by California Air Resources Board, California Department of Transportation, District of Columbia Department of Energy and Environment, and New Jersey Department of Environmental Protection, NHTSA–2018–0017–0014 (CARB Comment), at 20; Comment by Attorneys General of New York, California, Delaware, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Vermont, Virginia, and Washington, NHTSA–2018–0017–0015 (Attorneys General Comment), at 8, 9–10.

[41] In light of the conclusions that NHTSA reaches in this final rule and the agency's decision to maintain the current $5.50 civil penalty rate at this time, rather than increase it to $14 beginning in MY 2019, any modifications to the civil penalty rate, as appropriate, would be more properly the subject of future rulemakings. As stated in the NPRM, NHTSA is considering a separate rulemaking to determine whether the CAFE civil penalty rate should be reduced to $5, in light of NHTSA's decision here that the 2015 Act should not be applied to the CAFE civil penalty rate. In addition, some commenters here have contended that the CAFE civil penalty rate of $5.50 should be *increased* under EPCA, even if the 2015 Act is not applied. *See infra* at Section D.4.a. NHTSA plans to consider these potentially conflicting positions and any further changes to the CAFE civil penalty rate that might be appropriate in a future rulemaking.

[42] In this final rule, NHTSA also finalizes the 2019 inflationary adjustments for the general CAFE maximum penalty.

[43] *See, e.g.,* Workhorse Comment, at 3; Comment by Center for American Progress, NHTSA–2018–0017–0013 (CAP Comment), at 3; Attorneys General Comment, at 6; Comment by Institute for Policy Integrity at New York University School of Law, NHTSA–2018–0017–0017 (IPI Comment), at 2–3.

[44] Alliance and Global Comment, at 4–5 (citing *Encino Motorcars LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009)).

[45] *See, e.g.,* Workhorse Comment, at 3; Attorneys General Comment, at 6; IPI Comment, at 1.

[46] *Rust* v. *Sullivan,* 500 U.S. 173, 186–87 (1991); *see also Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2126 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Nat'l Cable & Telecommunications Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 981 (2005); *GenOn REMA, LLC* v. *U.S. E.P.A.,* 722 F.3d 513, 525 (3d Cir. 2013) (An agency ''is not forever held to its prior interpretations, as the continued validity and appropriateness of the agency's rules is an evolving process.''); *Strickland* v. *Comm'r, Maine Dep't of Human Servs.,* 48 F.3d 12, 18 (1st Cir. 1995) (''[A]n explained modification, even one that represents a sharp departure from a longstanding prior interpretation, ordinarily retains whatever deference is due.''). Given that the current penalty rate has been in effect since it was set decades ago, however, NHTSA will apply its new position on a prospective basis only from the effective date of this final rule.

[47] 83 FR 13904, 13908 (May 2, 2018). As established in OMB's opinion and explained further below, NHTSA's changed position comports with OMB's interpretation of the 2015 Act—that is, the interpretation provided by the office designated by Congress to issue guidance to all agencies on how the 2015 Act should be implemented. OMB Non-Applicability Letter.

[48] 83 FR 13904, 13904–05 (May 2, 2018). Comments noting that NHTSA has previously ''acknowledged'' that the 2015 Act applies to the CAFE civil penalty rate, Comment by Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, and the Union of Concerned Scientists, NHTSA–2018–0017–0012 (CBD Comment), at 9; *see also* CARB Comment, at 6; IPI Comment, at 2, miss the point: NHTSA expressly recognized its past position in the NPRM, but the agency noted that it had adopted that position without analyzing the issue. After appropriate examination, NHTSA changed its position to comport with the applicable statutes. It is irrelevant that ''none of the commenters who responded to NHTSA's [previous] request for comments offered the legal interpretation that NHTSA is now proposing,'' Workhorse Comment, at 3–4, or that the Alliance and Global have previously stated that ''NHTSA is not empowered to exempt the CAFE program from th[e] directive'' of the 2015 Act, Industry Petition, at 1. NHTSA is permitted to—and, in fact, has the responsibility to—interpret Federal statutes related to matters under its purview, *see U.S. ex rel. Hall* v. *Payne,* 254 U.S. 343, 347–48 (1920) (''[The Secretary of the Interior] could not administer or apply the act without construing it.''), and the public has now had a full opportunity to comment on the proposed interpretation.

[49] 83 FR 13904, 13908–11 (May 2, 2018).

[50] One commenter noted that ''NHTSA did not consult with the Department of Justice or any other

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To the extent that NHTSA's ''prior policy has engendered serious reliance interests that must be taken into account,'' NHTSA has provided ''a more detailed justification'' than what sufficed to create its previous policy.[51] As explained in the NPRM and further below, NHTSA did not previously consider the issue at all and thus any explanation is ''more detailed'' than the one it previously provided. Regardless, ''reliance does not overwhelm good reasons for a policy change,'' even in instances that would ''necessitate systemic, significant changes'' to regulated entities' practices.[52] NHTSA believes that correcting an erroneous legal interpretation of a statute to align its practice with what Congress required and exercising authority conferred by Congress to avoid a ''negative economic impact'' both constitute ''good reasons for a policy change.'' Moreover, ''the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue,'' [53] and only one regulated entity submitted a comment containing any argument that its reliance on NHTSA's previous policy supports an increase in the CAFE civil penalty rate to $14.[54] The reliance argued in this single comment does not override NHTSA's obligation to apply the 2015 Act as enacted or to act in accord with the statute—and with OMB's concurrence [55]—to avoid imposing a ''negative economic impact.''

It is of no consequence that the 2015 Act does not expressly state that NHTSA may reconsider its previous rules on the initial inflation adjustment. For one, the APA defines ''rule making''—the mechanism mandated by the 2015 Act for enacting the initial catch-up adjustment and for invoking the ''negative economic impact'' exception—to include the process of ''amending, or repealing a rule.'' [56] But in any event, no specific statutory or codified regulatory authority is required. It is well-established that agencies have various inherent powers.[57] And it has been affirmed repeatedly that, in the absence of a Congressional prohibition, agencies have the inherent power to reconsider their own decisions.[58] This inherent authority encompasses an agency reconsidering how it previously interpreted a statute and amending an

agencies besides DOT and OMB in crafting its interpretation of the Inflation Adjustment Act applicable to the entire federal government,'' as evidence that NHTSA's interpretation does not merit deference. Workhorse Comment, at 3. As noted above, OMB has provided its views on the applicability of the 2015 Act to the CAFE civil penalty rate in a comprehensive opinion included in the docket for this rulemaking. OMB Non-Applicability Letter. In addition, as part of its review of the NPRM before publication in the **Federal Register**, OIRA within OMB managed an interagency review process, in which the Department of Justice and other agencies were able to review and provide comments on NHTSA's proposal. Moreover, consultation principally with OMB was appropriate as the 2015 Act directed OMB to provide guidance to agencies on implementing the inflation adjustments required under the 2015 Act.

[51] *Fox,* 556 U.S. at 515.

[52] *Navarro,* 136 S. Ct. at 2128 (2016) (Ginsburg, J., concurring).

[53] *Id.* at 2128 n.2.

[54] *See* Workhorse Comment, at 3.

[55] OMB Negative Economic Impact Letter.

[56] 5 U.S.C. 551(5) (''[R]ule making' means agency process for formulating, amending, or repealing a rule.''). Moreover, NHTSA's regulations provide that ''[t]he Administrator may initiate any further rulemaking proceedings that he finds necessary or desirable.'' 49 CFR 553.25.

[57] *See, e.g., Vermont Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 544 (1978) (noting ''the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure''); *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974) (''The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.''); *Gadda* v. *Ashcroft,* 377 F.3d 934, 948 n.8 (9th Cir. 2004) (''Of course, our statutory and inherent powers to regulate attorneys admitted to the Ninth Circuit bar coexist with the separate, independent powers of federal administrative agencies to do the same. . . . In the case of agencies, this power, though limited, exists whether or not expressly authorized by statute.''); *Ober* v. *Whitman,* 243 F.3d 1190, 1194–95 (9th Cir. 2001) (indicating that agencies have the inherent authority to exempt *de minimis* violations from regulation if not prohibited by statute); *Tate & Lyle, Inc.* v. *C.I.R.,* 87 F.3d 99, 104 (3d Cir. 1996) (''Inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress.'') (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984)); *Nat. Res. Def. Council, Inc.* v. *Sec. & Exch. Comm'n,* 606 F.2d 1031, 1056 (D.C. Cir. 1979) (''An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in [a]ny proceeding.'').

[58] *See, e.g., Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983) (''[A]n agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' '' (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968))); *Am. Trucking Associations* v. *Atchison, T. & S. F. Ry. Co.,* 387 U.S. 397, 416 (1967) (''We agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.'') (cleaned up); *Cobra Nat. Res., LLC* v. *Fed. Mine Safety & Health Review Comm'n,* 742 F.3d 82, 101 (4th Cir. 2014) (''[A]n administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action because of a mistaken action on its part in the past.'' (quoting *NLRB* v. *Balt. Transit Co.,* 140 F.2d 51, 55 (4th Cir. 1944))); *Kindred Nursing Centers E., LLC* v. *N.L.R.B.,* 727 F.3d 552, 560 (6th Cir. 2013) (''An agency may depart from its precedents, and provided that the departure from precedent is explained, our review is limited to whether the rationale is so unreasonable as to be arbitrary and capricious. An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.'') (cleaned up); *ConocoPhillips Co.* v. *U.S. E.P.A.,* 612 F.3d 822, 832 (5th Cir. 2010) (''Embedded in an agency's power to make a decision is its power to reconsider that decision.''); *Tokyo Kikai Seisakusho, Ltd.* v. *United States,* 529 F.3d 1352, 1360–61 (Fed. Cir. 2008) (''[A]dministrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.''); *Friends of Boundary Waters Wilderness* v. *Bosworth,* 437 F.3d 815, 823–24 (8th Cir. 2006) (''Agencies given the authority to promulgate a quota are presumed to have the authority to adjust that quota.''); *S. California Edison Co.* v. *F.E.R.C.,* 415 F.3d 17, 22–23 (D.C. Cir. 2005) (''[O]f course, agencies may alter regulations. Agencies may even alter their own regulations *sua sponte,* in the absence of complaints, provided they have sufficient reason to do so and follow applicable procedures.''); *Macktal* v. *Chao,* 286 F.3d 822, 825–26 (5th Cir. 2002) (''[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.''); *Harrington* v. *Chao,* 280 F.3d 50, 59 (1st Cir. 2002) (''Agencies do have leeway to change their interpretations of laws, as well as of their own regulations, provided they explain the reasons for such change and provided that those reasons meet the applicable standard of review.''); *Belville Mining Co.* v. *United States,* 999 F.2d 989, 997 (6th Cir. 1993) (''Even where there is no express reconsideration authority for an agency, [ ] the general rule is that an agency has inherent authority to reconsider its decision.''); *Rainbow Broad. Co.* v. *F.C.C.,* 949 F.2d 405, 409 (D.C. Cir. 1991) (''Agencies enjoy wide latitude when using rulemaking to change their own policies and the manner by which their policies are implemented. . . . According agencies the power to change their minds about their own policies, practices and procedures rests on a sound policy basis. Agencies need some flexibility in carrying out their authority.''); *Dun & Bradstreet Corp. Found.* v. *United States Postal Serv.,* 946 F.2d 189, 193 (2d Cir. 1991) (''It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.''); *Dawson* v. *Merit Sys. Prot. Bd.,* 712 F.2d 264, 267 (7th Cir. 1983) (describing ''the general rule that administrative agencies have the power to reconsider decisions on their own initiative''); *Dana Corp.* v. *ICC,* 703 F.2d 1297, 1305 (D.C. Cir. 1983) (''[T]he agency is entitled to have second thoughts, and to sustain action which it considers in the public interest upon whatever basis more mature reflection suggests.''); *Trujillo* v. *Gen. Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) (''Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.''); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.'') (quoting *Gratehouse* v. *United States,* 512 F.2d 1104, 1109 (Ct. Cl. 1975)); *Albertson* v. *FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950) (''The power to reconsider is inherent in the power to decide.'').

existing regulation by going through the notice-and-comment rulemaking process under the APA, particularly when its updated interpretation ''closely fits the design of the statute as a whole and its object and policy.'' [59]

It is common practice for agencies—including NHTSA—to exercise their inherent reconsideration authority.[60] That is because ''reconsideration is often the sole means of correcting errors of procedure or substance,'' and ''[t]here may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct.'' [61] In fact, agencies may even have a *duty* to reconsider their rules. As the Supreme Court has noted:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, *must* consider varying interpretations and the wisdom of its policy *on a continuing basis.*[62]

At bottom, ''[i]f an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience.'' [63]

OMB's February 2016 guidance on implementing the 2015 Act confirms that each agency is ''responsible for identifying the civil monetary penalties that fall under the statutes and regulations [it] enforce[s].'' [64] This is an ongoing responsibility for each agency, as confirmed in OMB's subsequent guidance in December 2016, December 2017, and December 2018.[65] In the docketed opinion regarding NHTSA's determination that the 2015 Act does not apply to the CAFE civil penalty rate, OMB affirms that it is appropriate for NHTSA to reconsider its previous interpretation of the 2015 Act.[66] NHTSA has specific statutory authority to administer the CAFE standards program [67] and retains general authority—beyond its inherent authority—to do so efficiently and in the public interest.[68] In the text of the 2015 Act, Congress did not prohibit or otherwise restrict agencies from reconsidering whether an initial catch-up adjustment is required or, if so, the magnitude of such an adjustment.

2. Applicability of the 2015 Act

Multiple commentators disagreed with NHTSA's proposed determination that the $5.50 civil penalty rate used in the formula for manufacturer violations of fuel economy standards in 49 U.S.C. 32912(b) is not a ''civil monetary penalty'' subject to adjustment under the 2015 Act.[69] After thorough consideration of all these comments, NHTSA adopts its tentative determination. To be a ''civil monetary penalty'' that must be adjusted for inflation under the 2015 Act, a ''penalty, fine, or other sanction'' must be, among other things, ''for a specific monetary amount as provided by Federal law'' or have ''a maximum amount provided for by Federal law.'' [70] The CAFE civil penalty rate is neither.

For one, the CAFE civil penalty rate is an input in a formula that is used to calculate a penalty. And although the CAFE civil penalty rate is capped at $10 by statute,[71] the civil penalty for manufacturers that violate an average fuel economy standards, as defined in 49 U.S.C. 32912(b), has no maximum amount. The higher the shortfall or the higher the number of vehicles in the fleet, the higher the potential penalty (before accounting for credits). This formula stands in stark contrast to the immediately preceding provision specifying the ''general penalty'' for

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[59] *Good Samaritan Hosp.* v. *Shalala,* 508 U.S. 402, 417–18 (1993) (cleaned up); *see also U.S. Telecom Ass'n* v. *F.C.C.,* 400 F.3d 29, 35 (D.C. Cir. 2005) (''[I]f an agency adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation,' notice and comment are required.'') (quoting *Shalala* v. *Guernsey Mem'l Hosp.,* 514 U.S. 87, 100 (1995)); *Nat'l Classification Comm.* v. *United States,* 22 F.3d 1174, 1177 (D.C. Cir. 1994) (''[A]n agency may depart from its past interpretation [of a statute] so long as it provides a reasoned basis for the change.'') (citing *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983)); *Torrington Extend-A-Care Employee Ass'n* v. *N.L.R.B.,* 17 F.3d 580, 589 (2d Cir. 1994) (similar).

[60] *See, e.g.,* 82 FR 14671, 14671 (Mar. 22, 2017) (''The EPA [in a joint notice with NHTSA] has inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation.'' (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009))); 76 FR 22565, 22578 (Apr. 21, 2011) (''An agency generally remains free to revise improperly promulgated or otherwise unsupportable rules, even in the absence of a remand from a Court. . . . Agencies have particularly broad authority to revise their regulations to correct their errors. . . . Moreover, an agency may reconsider its methodologies and application of its statutory requirements and may even completely reverse course, regardless of whether a court has determined that its original regulation is flawed, so long as the agency explains its bases for doing so.'') (citations omitted); 75 FR 6883, 6884 (Feb. 12, 2010) (''The Department [of Labor] has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA).''); 64 FR 60556, 60580 (Nov. 5, 1999) (NHTSA ''believe[s] that nothing in [the statute] derogates our inherent authority to make temporary adjustments in the requirements we adopt if, in our judgment, such adjustments are necessary or prudent to promote the smooth and effective achievement of the goals of the amendments.'').

[61] *Bookman* v. *United States,* 453 F.2d 1263, 1265 (Ct. Cl. 1972).

[62] *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 863–64 (1984) (emphasis added). In a subsequent case, the Supreme Court confirmed that such reconsiderations should be done, at a minimum, ''in response to changed factual circumstances, or a change in administrations.'' *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)).

[63] *Fla. Cellular Mobil Commc'ns Corp.* v. *F.C.C.,* 28 F.3d 191, 196 (D.C. Cir. 1994).

[64] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Feb. 24, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[65] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 16, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf* (''Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce.''); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 15, 2017), available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf* (''Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations within their jurisdiction.''); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019) (''Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations within their jurisdiction.'').

[66] *See generally* OMB Non-Applicability Letter.

[67] *See, e.g.,* 49 U.S.C. 32902, 32912. The Secretary's authority under EPCA is delegated to NHTSA. 49 CFR 1.95(a) (delegating authority to NHTSA to exercise the authority vested in the Secretary under chapter 329 of title 49 of the U.S. Code); *see also* 1.94(c).

[68] *See* 49 U.S.C. 302(a) (stating the Secretary of Transportation is governed by the transportation policy described in part in 49 U.S.C. 13101(b), which provides that oversight of the modes of transportation ''shall be administered and enforced to carry out the policy of this section and to promote the public interest''); 49 U.S.C. 322(a) (''The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.''); 49 U.S.C. 105(c)(2) (directing the NHTSA Administrator to ''carry out . . . additional duties and powers prescribed by the Secretary''); 49 CFR 1.81(a)(3) (''Except as prescribed by the Secretary of Transportation, each Administrator is authorized to . . . [e]xercise the authority vested in the Secretary to prescribe regulations under 49 U.S.C. 322(a) with respect to statutory provisions for which authority is delegated by other sections in this part.'').

[69] *See, e.g.,* Workhorse Comment, at 3; CBD Comment, at 7; CAP Comment, at 2–3; CARB Comment, at 7–8; Attorneys General Comment, at 7; IPI Comment, at 1.

[70] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[71] 49 U.S.C. 32912(c)(1)(B). The $10 cap is addressed further in Section D.5.

EPCA violations: ''A person that violates section 32911(a) of this title is liable to the United States Government for a civil penalty of not more than $10,000 for each violation.'' [72] The phrase ''not more than'' plainly denotes that the $10,000 civil penalty is a maximum amount for each violation, and, as such, this amount (as promulgated in 49 CFR 578.6(h)(1)) was properly adjusted pursuant to the 2015 Act.[73]

The $5.50 rate also is not a ''penalty'' for a ''specific monetary amount.'' Again, the rate is one factor in a complex formula that is used to calculate the penalty. Moreover, the portion of the penalty calculated by NHTSA is only the potential penalty. The ultimate penalty owed is determined by the manufacturer based on the statutory provision authorizing the deduction of ''the credits available to the manufacturer.'' [74] The CAFE civil penalty statute states expressly that this credit reduction process is part of the calculation of the civil penalty.[75] It is not, as some commenters suggested,[76] a distinct process that is conducted after the penalty has already been calculated.[77] The inputs to the civil penalty formula, including the reduction for available credits, are joined by the conjunctive ''and'' in the statute.[78] And while it is true, as one commenter noted, that ''a specific penalty amount will still result after manufacturer credits are taken into account,'' [79] that is not ''a specific monetary amount as provided by Federal law,'' as required by the 2015 Act. The amount is determined by a *process* codified in Federal law, but the specific final penalty *amount* itself is not ''provided by Federal law.'' The ''specific monetary amount'' is unknown until the manufacturer decides to use any available credits it has, or can acquire, to make up for the shortfall identified by NHTSA.[80] In fact, if a manufacturer has enough credits or has a plan to earn sufficient credits in the future, the penalty ultimately calculated may be zero.[81] It is the manufacturer who decides this, not the agency.[82]

Credit flexibilities were expressly included in the statute by Congressional design to give industry the ability to decide how to achieve the required fuel economy improvements efficiently. Notably, as mentioned in the NPRM, Congress gave manufacturers the ability to trade credits with other manufacturers in 2007 in EISA, introducing an additional level of complexity to the calculation process, which is different from other civil penalty calculations. This is far from a direction to the agency to execute a ''minor mathematic calculation used to figure up a total penalty number,'' as one commenter described it.[83]

As explained in the opinion included in the docket for the rule, OMB concurs with NHTSA's interpretation of the 2015 Act: OMB agrees that the CAFE civil penalty rate is not a ''penalty, fine, or other sanction'' that ''is for a specific monetary amount'' because EPCA distinguishes between the rate, the ''amount . . . used in calculating a civil penalty,'' and the ''civil penalty'' itself.[84] Nor does OMB believe that the CAFE penalty has a ''maximum amount provided for by Federal law'': There is no limit to the level of civil penalty that can be imposed under EPCA because the civil penalty rate is merely one factor in the formula used to calculate the potential civil penalty liability. OMB explains further that the $10 cap does not qualify as ''maximum amount provided for by Federal law'' because it limits the ''amount . . . used in calculating a civil penalty,'' not the ''civil penalty'' itself. Moreover, the $10 cap cannot be ''assessed or enforced'' at the time of the violation as required by the 2015 Act. Rather, it serves as a limitation on NHTSA's authority to alter the penalty rate.

Because of the changes that Congress enacted to the CAFE program through

[72] 49 U.S.C. 32912(a); *see also* 49 U.S.C. 30165(a) (establishing that violations of the National Traffic and Motor Vehicle Safety Act are generally subject to ''a maximum amount'' of ''not more than'' $21,000 per violation and a ''maximum penalty'' of $105 million for a related series of violations).

[73] 81 FR 43524, 43526 (July 5, 2016). The penalty in 49 U.S.C. 32912(a), promulgated in 49 CFR 578.6(h)(1), is subject to additional inflationary adjustments for 2017 and 2018, which were proposed in the NPRM, and for 2019, which is being finalized in this rule. Applying the multiplier for 2017 of 1.01636, as specified in OMB's December 16, 2016 guidance, results in an adjusted maximum penalty of $40,654. Applying the multiplier for 2018 of 1.02041, as specified in OMB's December 15, 2017 guidance, results in an adjusted maximum penalty of $41,484. NHTSA received no comments objecting to these proposed adjustments and finalizes those inflationary adjustments in this rule. Applying the multiplier for 2019 of 1.02522, as specified in OMB's December 14, 2018 guidance, results in an adjusted maximum penalty of $42,530. In accordance with the procedures provided in the 2015 Act, and confirmed by OMB's guidance on implementing the 2015 Act, NHTSA finalizes the 2019 adjustment for the general CAFE penalty through this final rule. 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(b)(2); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 4 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019) (''In accordance with the 2015 Act, agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act (APA). This means that the public procedure the APA generally requires (*i.e.,* notice, an opportunity for comment, and a delay in effective date) is not required for agencies to issue regulations implementing the annual adjustment.'') (footnote omitted).

[74] 49 U.S.C. 32912(b)(3).

[75] 49 U.S.C. 32912(b)(3). Section 32903(h) is not to the contrary, as one commenter suggested. *See* CAP Comment, at 2. That provision describes a refund process that is relevant only after ''a civil penalty has been collected,'' not before the civil penalty—including any credit reduction—is fully calculated.

[76] *See, e.g.,* CARB Comment, at 11 (''NHTSA knows exactly how much a manufacturer owes and must pay in civil penalties for failing to meet the CAFE standard—NHTSA calculates that amount. What NHTSA may not know is how exactly the manufacturer will satisfy that amount (direct payment vs. credits), but the specific amount owed, *i.e.,* the civil penalty, is very much known.''); Attorneys General Comment, at 7 (''Nor does the availability of a credit mechanism that allows a manufacturer an alternate means to fully or partially comply with the CAFE standards have any bearing on the nature of the penalty. . . .''); IPI Comment, at 3 (''Credit trading and transfers allow the manufacturer to reduce its incidence of non-compliance, but the penalty per incidence of non-compliance remains fixed and specific. . . .'').

[77] One commenter stated ''many, if not all, civil monetary penalties assessed by any agency depend, on some level, on the regulated entity's decisions about whether, and how, to comply with a regulatory standard.'' IPI Comment, at 2–3. The comment cited no specific examples, but regardless, the unique feature in the CAFE civil penalty scheme relevant in this context is that the calculation of the civil penalty amount expressly includes a reduction for the credits available to the manufacturer. A manufacturer could both decide not to meet an applicable CAFE standard and not to pay a civil penalty (or to pay a smaller penalty). Under other civil penalty schemes, a person who does not comply with a regulatory standard does not get to decide whether or how much of a penalty to pay.

[78] 49 U.S.C. 32912(b).

[79] CBD Comment, at 8. The comment further stated that ''[t]his is no different from other rate-based penalty systems which allow for some reduction of liability,'' but cited no example.

[80] NHTSA is able to request supplemental reports and audit a manufacturer's compliance plan, *see, e.g.,* 49 CFR 537.8, but ultimately, it is the manufacturer's decision on how to use the credits available to it.

[81] 49 CFR 536.5(d). A manufacturer may propose a plan to earn future credits within the subsequent three model years in order to comply with its regulatory obligations for the current model year, and NHTSA will not even initiate compliance proceedings until the time that the manufacturer's approved plan indicates that credits will be earned or acquired to achieve compliance. 49 CFR 536.7. Although many manufacturers have not met applicable standards, only one manufacturer paid civil penalties for MY 2014 and only two paid civil penalties for MYs 2012 and 2013. *See https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[82] Manufacturers instruct NHTSA on how they wish to allocate their credits or otherwise account for shortfalls. *See* 49 CFR 536.5(d)(2), (6).

[83] CARB Comment, at 9–10. Although the introductory language of the statutory provision may be ''similar'' to that of the general penalty for EPCA violations, as noted by the commenter, the process described for calculating the penalty is the material difference, as explained above.

[84] OMB Non-Applicability Letter, at 4–5.

EISA in 2007, Congress was not necessarily ''on notice'' that NHTSA would apply the 2015 Act to the CAFE civil penalty rate, as one comment stated, merely because it had done so in 1997.[85] In fact, NHTSA did not make any subsequent adjustments to the $5.50 rate, even as it repeatedly made adjustments to its other civil penalties—including an adjustment to the maximum general penalty under EPCA in 49 U.S.C. 32912(a).[86]

Apparently concerned about the ease with which the CAFE civil penalties program could damage the economy and the automobile industry in particular,[87] Congress imposed a strict, tailored procedure for adjusting the CAFE civil penalty rate, requiring robust substantive findings and specific procedures, including providing opportunity for the Federal Trade Commission to comment and requiring at least eighteen months before an increased rate can go into effect.[88] This process stands in stark contrast to the summary approach delineated in the 2015 Act, which presumptively requires an interim final rule without notice and comment for the initial catch-up adjustment and similarly requires subsequent adjustments to be made without the traditional notice-and-comment process outlined in the APA.[89]

One comment observed that ''the 2015 Act provides that an agency need not make inflation-based adjustments if it has implemented a discretionary adjustment . . . greater than the annual inflation adjustment.'' [90] NHTSA agrees with the general notion offered by the commenter that this provision suggests Congress intended the inflation adjustments required under the 2015 Act to coexist with discretionary adjustments provided for under other statutes. But as described in the NPRM and below—and recognized by OMB in the opinion included in the docket for this rulemaking [91]—the CAFE civil penalty program is unique—namely, that the amount in question is a single input in a complex market-based penalty program, and not the penalty amount itself. And as OMB further explains in its opinion, the statutory structure of EPCA itself strongly indicates that Congress did not intend the 2015 Act to apply to the CAFE civil penalty rate. Under EPCA, there is no automatic increase in the penalty rate, the burden is on the Secretary to demonstrate an absence of economic harm before increasing the rate, and any increase is capped at $10. In contrast, under the 2015 Act, increases are automatic, the Secretary has the burden of demonstrating economic harm to stop an initial increase and has no power to stop future increases, and the potential penalty increases are unlimited. It is highly unlikely that Congress intended to shift from the EPCA scheme to the 2015 Act scheme without any reference to EPCA. Accordingly, NHTSA determines that Congress did not intend for the 2015 Act to apply to the CAFE civil penalty rate.[92]

Some commenters noted that the 2015 Act is designed to keep civil monetary penalties at the same levels, in real terms, not increase them.[93] In response, NHTSA notes that the 2015 Act itself repeatedly refers to the adjustments as ''increases.'' [94] Accepting the commenters' point, however, would actually provide further support for NHTSA's determination that the 2015 Act does not apply to the CAFE civil penalty rate. Because of the unique nature of the CAFE civil penalty formula, applying the 2015 Act to it would exceed the purpose of the 2015 Act noted by those commenters to ''maintain'' the real value of civil monetary penalties: Instead, doing so would constitute an increase.[95] Moreover, as OMB noted in the opinion included in the docket, the unique features of EPCA also make the 2015 Act inconsistent with the CAFE civil penalty rate because, under EPCA, Congress required the Secretary of Transportation to regularly establish the maximum feasible fuel efficiency standards based on, among other things, developing technology, as opposed to applying a rote, formulaic increase to the penalty rate.[96] Rather than ''maintain[ing]'' the real value of the CAFE civil penalty formula through inflation adjustment procedures, Congress chose other means: The CAFE civil penalty formula is based in part on the amount of the manufacturer's shortfall, and Congress requires NHTSA to prescribe the maximum feasible average fuel economy standards annually.[97] If a manufacturer failed to

[85] Attorneys General Comment, at 9.

[86] 64 FR 37876 (July 14, 1999); 66 FR 41149 (Aug. 7, 2001); 69 FR 57864 (Sept. 28, 2004); 70 FR 53308 (Sept. 8, 2005); 71 FR 28279 (May 16, 2006); 73 FR 9955 (Feb. 25, 2008) (adjusting maximum general penalty under EPCA and another NHTSA penalty); 75 FR 5244 (Feb. 2, 2010).

[87] *See, e.g.,* ''Energy Initiatives of the 95th Congress,'' S. Rep. No. 96–10, at 175–76 (1979) (''Representative Dingell (D-Mich.), concerned that increasing the penalties could lead to layoffs in the automobile industry, insisted that raising the penalties be contingent upon findings by the Secretary of Transportation that increasing the penalties would achieve energy savings and would not be harmful to the economy.''); H.R. Rep. No. 94–340, at 87 (1975) (''The automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles.''); 121 Cong. Rec. 18675 (June 12, 1975) (statement of Rep. Sharp) (''[W]e recognize that we have serious unemployment in the American auto industry and we want to preserve this important segment of the economy.'').

[88] *See* 49 U.S.C. 32912(c).

[89] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(b).

[90] Attorneys General Comment, at 9 (citing 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(d)).

[91] OMB Non-Applicability Letter, at 4–6.

[92] To the extent the 2015 Act does apply to the CAFE civil penalty rate, EPCA prohibits NHTSA from increasing the CAFE civil penalty rate—for an inflation adjustment or otherwise—at this time, for the reasons described below.

[93] *See, e.g.,* CBD Comment, at 7; CAP Comment, at 3–4; CARB Comment, at 13; IPI Comment, at 19–20. One of these commenters claimed that ''Congress especially intended inflationary adjustments to apply in areas of heightened regulatory concern, such as health and safety, the environment, and consumer protection.'' CBD Comment, at 6 (citing James Ming Chen, *Inflation-Based Adjustments in Federal Civil Monetary Penalties,* 34 Yale L. & Pol'y Rev. 1, 3 (2015)). There is nothing in the 2015 Act that supports this claim. The original source cited by the comment's cited source is not the legislative history of the 2015 Act—or even the 1990 Inflation Adjustment Act—but a **Federal Register** notice from 1973, identifying various recommendations from the Administrative Conference of the United States. 38 FR 19782, 19792 (July 23, 1973). The recommendation in question had nothing to do with inflation adjustments; the Administrative Conference merely noted that ''[i]n many areas of increased concern (*e.g.,* health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.'' 38 FR 19782, 19792 (July 23, 1973).

[94] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c), 5(a), 5(b)(2)(C), 6.

[95] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 2(b)(2). One commenter noted that ''remedial legislation should be construed broadly to effectuate its purposes.'' CARB Comment, at 10, 16–17 (quoting *Tcherepnin* v. *Knight,* 389 U.S. 332, 336 (1967)). As one of the cases cited by this commenter expressly affirms, ''[t]hat principle, however, 'does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress.' '' *Belland* v. *Pension Ben. Guar. Corp.,* 726 F.2d 839, 844 (D.C. Cir. 1984) (quoting *Symons* v. *Chrysler Corp. Loan Guar. Bd.,* 670 F.2d 238, 241 (D.C. Cir. 1981)).

[96] OMB Non-Applicability Letter, at 6.

[97] 49 U.S.C. 32902(a). One commenter noted that ''[w]hile Congress has directed NHTSA to set CAFE standards at the maximum feasible level, this does not necessarily amount to 'continuous fuel standard increases,'' pointing out that ''CAFE standards have once decreased and otherwise, until a few years ago, remained the same for 20 years.'' CARB Comment, at 13. This is an accurate but misleading characterization. What the comment failed to mention was that it was Congress' decision to keep the standards flat over this period, not the agency's. For a significant portion of this period, Congress prohibited NHTSA from using funds ''to prepare, propose, or promulgate any regulations . . . prescribing corporate average fuel economy standards for automobiles . . . in any model year that differs from standards promulgated for such automobiles prior to enactment of this section.'' Public Law 104–50, Sec. 330; *see also* Public Law 104–205, Sec. 323; Public Law 105–66, Sec. 322;

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adapt to the increasing standards, its shortfall—and in turn, its penalty calculation (before accounting for credits)—increases automatically.[98] Requiring an inflation adjustment on top of that would be gratuitous. The fact that Congress deliberately enacted a mechanism that would increase the potential CAFE penalty amounts without requiring inflation adjustments—fully ''aware that inflation would effectively reduce the real value of the [CAFE] civil penalty rate over time'' [99]—indicates that Congress did not intend for the CAFE civil penalty rate to be subject to inflation adjustments and thus that the 2015 Act was not intended to apply to that calculation.[100]

It is important to keep in mind that the overarching purpose of the CAFE program is to conserve petroleum. Thus, although the penalty is expressed based on the shortfall from the standard rather than the additional amount of fuel that will be consumed as a result of the shortfall, the cost of the penalty per increased gallon consumed shows how the actual penalty rate for excessive fuel consumption has increased as the standards themselves have increased.

Assume the CAFE civil penalty rate is fixed at $5, and consider two cases. In the first case, Manufacturer A has a fuel economy shortfall of 1.0 mpg and a production volume of 1 million passenger cars for MY 1978 in which the applicable CAFE standard is 18.0 mpg. Before accounting for credits, the civil penalty for MY 1978 would be $50 million [= (10 tenths of a mile per gallon shortfall) × ($5.00 per tenth of a mile per gallon shortfall) × (1,000,000 vehicles)]. Assuming an average lifetime of 130,000 miles for Manufacturer A's vehicles, the fuel use over the lifetimes of all of Manufacturer A's vehicles would be 7.65 billion gallons [= (130,000 miles)/(17 miles per gallon) × (1,000,000 vehicles)]. Had Manufacturer A met the CAFE standard of 18.0 mpg, the total fuel use would have been 7.22 billion gallons [= (130,000 miles)/(18 miles per gallon) × (1,000,000 vehicles)]. Thus, the increased fuel use impact on society attributed to the CAFE non-compliance would be 0.43 billion gallons [= (7.65 billion gallons) − (7.22 billion gallons)]. This means that the penalty cost per gallon is $0.116.

In the second case, Manufacturer A's MY 2017 vehicle attribute-based CAFE standard is 36.0 mpg, double the MY 1978 standard. Holding everything else identical, Manufacturer A's fuel economy shortfall would have to be 3.8 mpg (for a fuel economy of 32.2 mpg) to produce the same 0.43 billion gallons of societal impact of increased fuel use: Assuming the same average lifetime of 130,000 miles for Manufacturer A's vehicles, the fuel use over the lifetimes of all of Manufacturer A's vehicles would be 4.04 billion gallons [= (130,000 miles)/(32.2 miles per gallon) × (1,000,000 vehicles)]. Had Manufacturer A met the CAFE standard of 36.0 mpg, the fuel use would have been 3.61 billion gallons [= (130,000 miles)/(18 miles per gallon) × (1,000,000 vehicles)]. The increased fuel use impact on society attributed to the CAFE non-compliance would be 0.43 billion gallons [= (4.04 billion gallons) − (3.61 billion gallons)]. With this 3.8 mpg shortfall, Manufacturer A would incur, before accounting for credits, a civil penalty of $190 million [= (38 tenths of a mile per gallon shortfall) × ($5.00 per tenth of a mile per gallon shortfall) × (1,000,000 vehicles)]. For the same impact on societal fuel use, Manufacturer A's MY 2017 potential civil penalty is 3.8 times higher than the MY 1978 potential civil penalty, meaning that the penalty cost per gallon is $0.442.

Three comments argued that Congress demonstrated it knew how to exempt statutes from the application of the 2015 Act by expressly excepting statutes like the Internal Revenue Code of 1986 and the Tariff Act of 1930 from the adjustment process.[101] But the penalties under these statutes are not exempted from the definition of ''civil monetary penalty''; rather, Congress acknowledged that the penalties under these statutes are ''civil monetary penalties'' that would otherwise need to be adjusted but for Congress' express exemption. In contrast, NHTSA's determination is that the CAFE civil penalty rate does not satisfy the definition of ''civil monetary penalty'' given by Congress and thus does not need to be exempted from Congress' adjustment mandate.

One comment noted ''on a fundamental level that Congress specifically designated the CAFE penalty as 'a civil penalty.' '' [102] As NHTSA noted in its NPRM, however, ''EPCA's use of the terminology 'civil penalty' in 49 U.S.C. 32912(b) is not dispositive. The 2015 Act does not apply to all civil penalties, but rather 'civil monetary penalties,' a defined term.'' [103] Moreover, as explained above, the ''civil penalty'' referenced in 32912(b) is not referring to the $5.50 rate, but the result of the entire complex calculation and credit application process.

Several commenters pointed out that other agencies adjusted civil penalties for inflation under the 2015 Act that involved what the commenters characterized as a rate or formula.[104] In support, these commenters provided numerous examples of penalties involving a simple multiplier that other agencies adjusted for inflation. The examples involve maximum penalties

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Public Law 105–277, Sec. 322; Public Law 106–69, Sec. 321; Public Law 106–346, Sec. 320. Moreover, from 1985 until EISA was signed into law in 2007, Congress set the average fuel economy standard for passenger automobiles at 27.5 miles per gallon by default and did not require any increases—annually or otherwise, or to the maximum feasible level or otherwise. *See* Public Law 94–163, Sec. 301; Public Law 103–272, Sec. 1(d). Instead, Congress permitted, but did not require, that NHTSA establish a higher or lower standard for passenger cars if the agency found that the maximum feasible level of fuel economy is higher or lower than 27.5 miles per gallon.

[98] *See, e.g.,* Workhorse Comment, at 1 (''In effect, increasing the civil penalty rate increases the stringency of the CAFE Standards.''). This mechanism also counters the argument that a CAFE civil penalty rate of $5.50 ''effectively stall[s] fuel economy.'' CARB Comment, at 10; *see also* CAP Comment, at 2 (''[R]educing the penalty below the statutorily-mandated rate will likely lead to many more manufacturers electing to pay penalties rather than to comply with the law.''). The CAFE civil penalty formula enacted by Congress already incentivizes automakers to improve fuel economy without the need to conduct inflation adjustments—a reality that the same commenter that made this argument appeared to recognize just a few pages later: ''Increases in the CAFE standards reflect continuing improvements in the technological ability of manufacturers to increase fuel economy, as reflected in the fact that most manufacturers have been meeting or exceeding the CAFE standards in recent years even as the standards have been increasing.'' CARB Comment, at 13.

[99] 83 FR 13904, 13910–11 (May 2, 2018).

[100] One commenter argued that ''other agencies have had no trouble applying inflation adjustments to the civil penalties associated with'' regulatory standards that ''undergo statutorily required reviews at regular intervals to increase stringency.'' IPI Comment, at 4. The comment only cited one example: An adjustment by the Department of Energy to the maximum civil penalties it can impose for violations of its energy efficiency standards, among other violations. *See* 83 FR 1289, 1291 (Jan. 11, 2018) (''Any person who knowingly violates any provision of § 429.102(a) may be subject to assessment of a civil penalty of no more than $449 for each violation.''; ''In accordance with sections 333 and 345 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $449 for each violation.''). This example is wholly distinct from the CAFE civil penalty calculation, in which the increased stringency is expressly included as a factor.

[101] CBD Comment, at 6; CARB Comment, at 8; Attorneys General Comment, at 9.

[102] CARB Comment, at 9 (quoting 49 U.S.C. 32912(b)); *see also* Attorneys General Comment, at 7 (''Congress expressly designated the CAFE penalty, which is monetary, as 'a civil penalty.' '').

[103] 83 FR 13904, 13908 n.24 (Apr. 2, 2018).

[104] CBD Comment, at 8 (citing numerous examples of agencies adjusting ''rate-based penalties'' to account for inflation); CAP Comment, at 3; CARB Comment, at 8–9; Attorneys General Comment, at 8.

per violation and/or per day.[105] NHTSA did not and does not take the position that any penalty involving a multiplier is not a ''civil monetary penalty'' subject to inflationary adjustment under the 2015 Act. Indeed, most of the civil penalties that NHTSA properly adjusted for inflation under the 2015 Act in its interim final rule are like the examples provided by commenters: Maximum penalties involving a simple multiplier.[106] NHTSA acknowledged in the NPRM that these types of maximum penalties are subject to inflationary adjustment.[107] As NHTSA explained in its NPRM: ''One example of a penalty that is for 'a maximum amount' is the 'general penalty' in EPCA for violations of 49 U.S.C. 32911(a). That 'general penalty' is 'a civil penalty of not more than $10,000 for each violation.' This sets 'a maximum amount' of $10,000 per violation. . . . Accordingly, this civil penalty level was properly adjusted. . . .'' [108] NHTSA is finalizing its inflationary adjustment of that maximum penalty per violation in this final rule. NHTSA also adjusted many non-CAFE penalties that are maximum penalties that use a simple multiplier of the number of violations or number of days.[109]

NHTSA agrees with commenters that maximum penalties such as these are properly subject to inflationary adjustment. But the penalty for violations of CAFE standards is not a maximum penalty that uses a simple multiplier. As a threshold matter, the CAFE civil penalty rate alone is not a ''civil monetary penalty'' as defined by the 2015 Act. The CAFE statute expressly states that the rate is an ''amount . . . to be used in calculating a civil penalty,'' not a ''civil penalty'' on its own.[110] In any event, unlike maximum penalties that use a simple multiplier, the CAFE civil penalty rate is not subject to inflation as a ''maximum amount provided by federal law.'' Other penalties expressly include language, such as ''a maximum civil penalty'' or a ''civil penalty of not more than'' a specified value per violation, which indicate they are for a maximum amount.[111] No such language is included for the CAFE penalty, which instead expressly may not ''be compromised or remitted'' except in extremely rare circumstances.[112] This stands in stark contrast to maximum penalties, where the agency has authority to determine the appropriate penalty amount.[113]

Additionally, the penalty for violating a CAFE standard does not use a simple multiplier comparable to the examples provided by commenters. For the examples provided, as well as the penalties NHTSA properly adjusted for inflation, the agency can readily determine the penalty inputs by adding up the number of violations and/or the number of days as appropriate under the statute. The multiplier for a regulated entity that violated a provision of law can only go up (if the penalty uses a multiplier of the number of days); it cannot go down. Even if there were a set penalty per day (as opposed to a maximum), that is a certain penalty: For every day that an entity violates the law, it must pay the specific penalty set by law.

None of this is true of the penalty for violations of CAFE standards. Unlike other penalties, the entity that violated the law can take unilateral action to decrease or eliminate the penalty.[114] A reduction in the control of the entity that violated the law means the penalty is not for ''a specific monetary amount.'' The agency cannot readily calculate the penalty inputs: It needs instructions from the regulated entity to do so. That makes this a complex formula unlike any other. The CAFE penalty is not a fixed penalty based on the number of violations and amount of time that has passed. The law allows manufacturers to base their penalty on future actions (a carry-back plan or acquisition of credits from a competitor), on actions unrelated to the specific violation at issue (transfers or trades), or even to obtain a refund of a civil penalty previously paid.[115] The multipliers in other penalty schemes relate to how much the entity violated the law (how many violations, or for how long). The CAFE penalty calculation, on the other hand, includes a reduction unrelated to the manufacturer's actions to meet the standard. A manufacturer can intentionally design its vehicles to exceed the standard and yet still not pay a penalty. But that decision is up to the manufacturer, not the agency—which is compelled by law to reduce the penalty if the manufacturer elects to use credits available to it. NHTSA is not aware of any comparable penalty structure with a similarly complex statutory formula that must factor in decisions of the violator and third-party actors (*i.e.,* other manufacturers), and no commenter has provided an example of one.

The Institute for Policy Integrity critiqued NHTSA for relying on the Congressional Budget Office's (CBO's) assessment of the 2015 Act's revenue effects across all applicable penalties for ten years.[116] Some courts have relied on CBO cost estimates to determine legislative intent.[117] The Institute for Policy Integrity provided no evidence that the CBO's assessment was flawed nor did it provide its own calculation of the amount of fines NHTSA should expect to collect to compare to the CBO estimate, much less one that would offset the significant disparity between the CBO's estimate and the Alliance and Global's calculation as described in the NPRM.[118] OMB has reviewed CBO's assessment and, as stated in its opinion, reached the same conclusion as NHTSA: The billions of dollars estimated to be paid in CAFE civil penalty payments grossly exceeds CBO's projection of additional revenue that would be collected across the entire Federal Government under the 2015 Act over the same time period—an analysis Congress was aware of when it enacted the 2015 Act.[119] Regardless, the CBO estimate is not the sole support NHTSA relied on to make its determination that

[105] *See* CBD Comment, at 8; CAP Comment, at 3; CARB Comment, at 8–9; Attorneys General Comment, at 8.

[106] NHTSA is not reconsidering portions of the interim final rule (81 FR 43524 (July 5, 2016)) that address non-CAFE penalties. Most of the penalties adjusted for inflation are maximum penalties that involve a multiplier. For example, NHTSA adjusted the penalties for school bus-related violations of the National Traffic and Motor Vehicle Safety Act from a maximum of $10,000 per violation, as set by statute, to a maximum of $11,940 per violation. *Id.* at 43525 (adjusting 49 CFR 578.6(a)(2)) A separate violation occurs for each school bus or item of school bus equipment, ''and for each failure or refusal to allow or perform a required act.'' 49 CFR 578.6(a)(2).

[107] *See* 83 FR at 13909.

[108] 83 FR at 13909 (citations omitted).

[109] *See* 81 FR 43524 (July 5, 2016).

[110] 49 U.S.C. 32912(c)(1)(A).

[111] *See, e.g.,* 49 U.S.C. 30165(a)(3); 32912(a).

[112] *See* 49 U.S.C. 32913(a). Contrast this constraint with the broad, discretionary authority delegated by Congress for NHTSA's other civil penalties: ''The Secretary of Transportation may compromise the amount of a civil penalty imposed under this section.'' 49 U.S.C. 30165(b)(1).

[113] *See, e.g.,* 49 U.S.C. 30165(c). Statutory schemes that allow for mitigation, as pointed out by commenters, are not comparable because those are for maximum penalties, and thus subject to inflationary adjustment. Moreover, it is up to the agency to determine the appropriate mitigation. Under the CAFE penalty, it is the violator who determines how much to pay, based on use of credits, not the agency.

[114] *See* 49 U.S.C. 32912(b)(3).

[115] 49 U.S.C. 32903(f), (g), (h); 32912(b).

[116] IPI Comment, at 5.

[117] *See, e.g., Nunes-Correia* v. *Haig,* 543 F. Supp. 812, 815 (D.D.C. 1982) (''[T]he Congressional Budget Office ('CBO') cost estimates . . . demonstrate that Congress clearly intended the Act to apply retroactively.'')

[118] 83 FR 13904, 13911 (Apr. 2, 2018). CARB and the co-signatories to its comment similarly failed to provide such evidence when they asserted that ''the costs estimated by the automakers are not just the cost of facing an adjusted penalty but also include technology costs and other costs such as insurance, financing, and taxes—with the latter two (technology and other costs) making up the bulk of the estimated costs.'' CARB Comment, at 11–12.

[119] OMB Negative Economic Impact Letter, at 5.

the 2015 Act is not applicable to the CAFE civil penalty rate; rather, it served as additional evidence—on top of the plain language of the statute, the unique complexity of the CAFE civil penalty scheme, the legislative history of EPCA, and other indicators—further justifying NHTSA's determination.

NHTSA also received some comments about the rounding rule in the 2015 Act, which provides that ''[a]ny increase determined under this subsection shall be rounded to the nearest multiple of $1.'' [120] NHTSA observed in the NPRM that this rounding rule suggests the Act was not intended to apply to the small dollar value CAFE civil penalty rate, since it would not serve a *de minimis* rounding function. As a practical matter, if the rounding rule applied to a small dollar penalty rate, it would prevent any annual inflationary increases (absent extraordinary inflation).[121]

One commenter argued that this interpretation ''ignores basic math because applying the [2015] Act results in more than a *de minimis* increase from $5.50.'' [122] This misconstrues NHTSA's point: NHTSA was referring to subsequent annual inflationary increases after the initial catch-up adjustment. For example, if the CAFE civil penalty rate was adjusted to $14 in the initial catch-up adjustment, the rate would not have been adjusted applying either the 2017, 2018, or 2019 multipliers (1.01636, 1.02041, and 1.02522, respectively) and rounding to the nearest dollar. If the original rate was $6, the last time the multiplier would have allowed an inflation adjustment to $7 under the rounding rule was 1981, during a time of significant inflation.[123]

Another commenter conceded that ''such rounding may prevent some annual inflationary adjustment for small penalties,'' but nonetheless observed that ''[i]f Congress had wanted small penalties to be excluded . . . , it would have explicitly said so.'' [124] But statutes must be read to avoid rendering provisions ''insignificant, if not wholly superfluous.'' [125] As NHTSA has shown, having to apply the statute's rounding rule to such a small rate would violate that principle, particularly when the rounding rule is viewed, as NHTSA must, in ''context'' and in line with the ''overall statutory scheme.'' [126]

The same commenter also asserted that even ''if the rounding rule does trap small penalties at their catch-up adjustment level, agencies can always adjust them through their own penalty adjustment procedures.'' [127] True enough, but the commenter went on to claim that in this specific case, ''this would just be an inflation adjustment, [so] NHTSA should not have difficulty with satisfying [the EPCA] factors.'' [128] This heavily underestimates the burden required by statute to increase the CAFE civil penalty rate,[129] discussed in more detail in the NPRM and below. And this burden is there for a reason: Given that the CAFE civil penalty rate serves as one element in a formula that yields an actual potential penalty, rounding the rate to the nearest dollar has outsized impacts that must be carefully considered. For instance, rounding the current $5.50 rate to $6.00 is not merely a $0.50 increase in a penalty, but a 9% increase. An automaker who sells 100,000 vehicles of a single model that fails to meet its target fuel economy standard by one mile per gallon would face a potential penalty of $6,000,000 instead of $5,500,000. This is not a minor difference.

Because NHTSA is not ''increas[ing]'' the CAFE civil penalty rate—because the 2015 Act does not apply or because doing so would have a negative economic impact—the rounding rule is inapplicable.[130]

3. Harmonizing the 2015 Act and EPCA

In the alternative, even if the 2015 Act did apply, the ''negative economic impact'' exception of the 2015 Act is best read in harmony with EPCA to ensure both statutes are given meaning. A few commenters argued that the 2015 Act and EPCA should not be read together because they have different purposes.[131] NHTSA agrees that the overarching purposes of the two statutes are different. But that does not obviate the need to harmonize the statutes. Indeed, both statutes recognize the importance of limiting increases to penalties to avoid damaging the economy. Although the statutes may have different ultimate objectives, they share that motivating concern and should be read together, as part of a unified code of Federal law, with the goal of upholding that common principle. NHTSA believes its interpretation achieves that goal.

Relatedly, NHTSA is mindful of the comments that argued that the *in pari materia* canon of statutory interpretation may not be the perfect tool for the interpretive question here.[132] But as NHTSA noted in the NPRM, the ''principles underlying'' this canon—most notably, that the statutes enacted by Congress should be read as a whole and interpreted harmoniously—provided further support for NHTSA's proposed position, which it now adopts.[133] None of the comments objected to NHTSA's point that ''[t]his approach to statutory interpretation is consistent with NHTSA's past practice.'' [134]

Here, NHTSA is interpreting a statutory provision about whether increasing a civil monetary penalty by the otherwise required amount will have a negative economic impact. Even statutes that apply broadly across agencies must be interpreted and reconciled with other Federal laws. NHTSA must presume that Congress knew each agency would have to determine what ''negative economic impact'' meant and whether raising any of its civil monetary penalties by the otherwise required amount would cause one. And NHTSA must also presume that in passing the 2015 Act, Congress was aware of the longstanding CAFE civil penalty scheme it had previously enacted, including the constraints it imposed on raising the penalty rate if doing so would have a substantial deleterious impact on the economy.[135] Congress established these specific

[120] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 5(a).

[121] 83 FR 13904, 13911 (Apr. 2, 2018).

[122] IPI Comment, at 5.

[123] Data available at *https://data.bls.gov/pdq/SurveyOutputServlet.*

[124] CARB Comment, at 12.

[125] *Duncan* v. *Walker,* 533 U.S. 167, 174 (2001); *see also Green* v. *Bock Laundry Mach. Co.,* 490 U.S. 504, 509 (1989) (rejecting an interpretation that ''would compel an odd result'').

[126] *Davis* v. *Michigan Dep't of Treasury,* 489 U.S. 803, 809 (1989) (citing *United States* v. *Morton,* 467 U.S. 822, 828 (1984)).

[127] CARB Comment, at 12.

[128] CARB Comment, at 13.

[129] *See* 49 U.S.C. 32912(c).

[130] *See* Alliance and Global Comment, at 16–17. If the 2015 Act applies to the CAFE civil penalty rate, rounding up to the nearest dollar would constitute an increase in the rate that would be permissible only if NHTSA made the requisite findings—and followed the congressionally-mandated procedure—under EPCA, discussed further below.

[131] *See, e.g.,* CAP Comment, at 4; Attorneys General Comment, at 11; IPI Comment, at 4.

[132] *See, e.g.,* CARB Comment, at 15; Attorneys General Comment, at 11.

[133] 83 FR 13904, 13912 (Apr. 2, 2018).

[134] 83 FR 13904, 13912 (Apr. 2, 2018) (citing 80 FR 40137, 40171 (Aug. 12, 2015) (interpreting a term in EISA by looking to how the term is defined in the Motor Vehicle Safety Act, ''[g]iven the absence of any apparent contrary intent on the part of Congress in EISA'')).

[135] As NHTSA noted in the NPRM, the CAFE civil penalty structure is also constrained by NHTSA's exceptionally—and atypically—limited ability to compromise or remit CAFE civil penalties. 83 FR 13904, 13912 (Apr. 2, 2018). One commenter sought to minimize the effect of this constraint by noting ''the CAFE program's numerous built-in compliance flexibility mechanisms which soften the sting of the penalties.'' Attorneys General Comment, at 11–12. But the ''compliance flexibility mechanisms'' described by the commenter are all actions taken by the manufacturer, not NHTSA.

constraints for a reason, and without any evidence that Congress intended to override those constraints, NHTSA cannot do so unilaterally. Most importantly, no commenter provided persuasive argument or evidence that NHTSA's interpretation was contrary to the plain meaning of the 2015 Act or Congress' intent.

One comment challenged NHTSA's position that a broad interpretation of the 2015 Act would be ''punitive,'' instead characterizing CAFE civil penalties as ''safety valves, because they allow the car manufacturers to avoid the requirements imposed by vehicle standards in case compliance costs are too high.'' [136] But whether or not the effect is properly understood as punitive, if compliance costs and the calculated levels of civil penalties are both ''too high,'' then the ''safety valve'' is not so ''safe'': Either option would impose a ''negative economic impact.'' With respect to the CAFE civil penalty rate specifically, the statutory civil penalty formula already provides for increases over time, as described above. Construing ''negative economic impact'' to require a full inflation adjustment to the CAFE civil penalty rate—on top of the built-in adjustment to the standards themselves—would subject manufacturers to unduly harsh levels of civil penalties (before accounting for credits). As discussed in the NPRM, it is particularly important to avoid a punitive interpretation here because ''the inflation adjustment essentially acts as a 'one-way ratchet,' where all subsequent annual adjustments will be based off this 'catch-up' adjustment with no ensuing opportunity to invoke the 'negative economic impact' exception.'' [137] EPCA itself imposes a similar ''one-way ratchet'' constraint.[138]

One comment argued that ''Congress . . . intended the Inflation Adjustment Act to apply broadly and uniformly to federal civil monetary penalties across all agencies unless specifically exempted, regardless of how the subject penalty programs are structured.'' [139] Even though Congress did not ''specifically exempt[ ]'' CAFE by name in the 2015 Act, Congress unquestionably recognized that some penalty schemes would not be covered: For example, it defined ''civil monetary penalty'' to exclude some penalties, fines, and other sanctions.[140] Nonetheless, NHTSA agrees that Congress intended the 2015 Act to apply ''broadly''—and in practice, the 2015 Act has applied broadly, across other penalties administered by NHTSA and across a wide swath of Federal agencies. But the unique nature of the CAFE program commands a different result. Indeed, as NHTSA explained in the NPRM, the ''broad'' scope of the 2015 Act reinforces NHTSA's determination that when one of the statutes is generalized and passed later—like the Inflation Adjustment Act—it cannot be read to implicitly repeal an earlier, more specific statute—like EPCA's establishment of the CAFE civil penalties structure. This approach to statutory interpretation is consistent with NHTSA's past practice.[141]

The same reasoning responds to those commenters that argued the 2015 Act controls because it was passed more recently than EPCA and EISA.[142] Indeed, the sole case cited by one of the commenters purportedly to support its point makes this clear: The more recent act can only constitute an implied repeal if the intent of the legislature to repeal is ''clear and manifest.'' [143] No such intention is apparent here at all.

4. ''Negative Economic Impact''

Some comments noted that NHTSA did not previously invoke the ''negative economic impact'' exception before the deadline to complete the initial catch-up adjustment expressed in the 2015 Act or by the date suggested in OMB's initial guidance on the statute.[144] But the passage of that deadline does not deprive an agency of its statutory authority to act under the statute, including its authority to reconsider its initial decision to issue an interim final rule and to seek public comment on complex legal, factual, and policy questions related to that action. An agency would not be prohibited from making an otherwise required initial catch-up adjustment simply because it did not meet the statutory deadline: It would still need to complete the process.[145] And there is no separate statutory deadline for when agencies needed to invoke the ''negative economic impact'' exception: It is part of making the initial catch-up adjustment. Congress could have established a separate deadline for invoking the exception prior to the deadline for making the initial catch-up adjustment if it deemed it necessary, but it did not. Instead, Congress impliedly linked the determination of the initial catch-up adjustment and exercise of the ''negative economic impact'' exception, and it established a procedure through which the OMB Director would be required to concur with NHTSA's assessment that adjusting the penalty the otherwise required amount would have a negative economic impact before the agency could rely on the exception. As the docketed opinion indicates, OMB has concurred with NHTSA's assessment here.[146] Notably, OMB staff indicated to the Government Accountability Office that ''[b]ecause of the complex nature of the initial catch-up inflation adjustments, . . . its preference was for federal agencies to take the necessary time to publish accurate and complete initial catch-up inflation adjustments . . . even if agencies were not able to meet the Inflation Adjustment Act publication deadline.'' [147]

Moreover, nothing in the 2015 Act prohibits the head of an agency from reconsidering its initial decision about the economic impact of making the otherwise required initial adjustment to a civil monetary penalty. To the contrary, Congress committed the authority to make such a determination—with no substantive constraints—to the head of each agency, provided that the agency head publishes an NPRM, provides an opportunity for comment, and obtains concurrence from

[136] IPI Comment, at 15–16.

[137] 83 FR 13904, 13913 (Apr. 2, 2018).

[138] H.R. Rep. No. 95–1751, at 113 (1978) (Conf. Rep.) (''No provision [in EPCA] is made for lowering the penalty.'').

[139] Attorneys General Comment, at 11–12.

[140] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[141] 83 FR 13904, 13912 (Apr. 2, 2018).

[142] *See, e.g.,* Workhorse Comment, at 1 (''Because the Inflation Adjustment Act was enacted more recently than EPCA and EISA, the Inflation Adjustment Act controls.''); Attorneys General Comment, at 9 (''[B]ecause the penalty adjustments in the 2015 Act are both mandatory and were enacted more recently than EPCA, they should be given controlling effect.'') (citing *Kremer* v. *Chem. Constr. Corp.,* 456 U.S. 461, 468 (1982)).

[143] *Kremer* v. *Chem. Constr. Corp.,* 456 U.S. 461, 468 (1982) (cleaned up).

[144] *See, e.g.,* CARB Comment, at 14; Attorneys General Comment, at 10, 14.

[145] Multiple agencies were unable to complete their initial catch-up adjustments by the deadline identified in the 2015 Act, but later completed those adjustments. U.S. Gov. Accountability Office, GAO–17–634, ''Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements, at 6 (2017).

[146] OMB Negative Economic Impact Letter. Nothing about OMB's concurrence with NHTSA's determination here calls into question OMB's guidance that it ''expects determination concurrences to be rare.'' Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 3 (Feb. 24, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf* (last accessed May 22, 2018). NHTSA is not aware of any other agency that even sought such a concurrence determination. Thus, while OMB's concurrence here is ''rare,'' it is appropriate given the uniqueness of the CAFE civil penalty scheme.

[147] U.S. Gov. Accountability Office, GAO–17–634, ''Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements, at 6 (2017).

the OMB Director.[148] NHTSA has satisfied those procedural steps in this rulemaking. As noted in the NPRM, ''[p]ursuant to OMB's guidance, NHTSA has consulted with OMB before proposing this reduced catch-up adjustment determination and submitted this notice of proposed rulemaking (NPRM) to the Office of Information and Regulatory Affairs (OIRA) for review.'' [149] To the extent that NHTSA's interpretation of ''negative economic impact'' represents a change in position, the agency has explained the reasons for that change, and its position in this final rule is well-supported by the record and by careful legal analysis.[150]

The OMB Director's concurrence in NHTSA's determination not only resolves the comments about NHTSA not meeting OMB's deadline, but also carries considerable weight in establishing that NHTSA acted appropriately with regards to the 2015 Act's deadline. Congress not only provided the OMB Director with the authority to determine whether a negative economic impact exists, but also expressly authorized the OMB Director to issue guidance to agencies on implementing the 2015 Act, both of which establish that Congress conferred significant deference to OMB's interpretation of the statute.[151]

Some comments stated or implied that the $14 rate is currently in effect.[152] That is wrong and misunderstands the effect of prior agency actions. As a result of a recent decision by the United States Court of Appeals for the Second Circuit, NHTSA's December 28, 2016 final rule is now in force.[153] Pursuant to that rule, the current CAFE civil penalty rate is $5.50 for model years before model year 2019 and, but for NHTSA's reconsideration, would not increase to $14 until penalties are assessed for MY 2019.[154] Thus, this final rule—which maintains the $5.50 rate through model year 2019 and beyond—does not serve as a reduction as applied to any shortfalls for vehicles fleets in those model years.[155] Although NHTSA's December 2016 final rule had set a $14 CAFE civil penalty rate that—but for NHTSA's reconsideration—would go into effect beginning with MY 2019, that announcement had no practical effect before 2020—the earliest that CAFE civil penalties could be assessed for noncompliance in MY 2019.[156] Nothing in the CAFE statute or the 2015 Act precludes the agency from reconsidering its earlier decision before that decision has any practical significance. Indeed, NHTSA's earlier reconsideration decision in December 2016, which recently took effect, did just that.[157]

A few commenters critiqued NHTSA's proposed interpretation of the 2015 Act in light of EPCA as ''invert[ing] the burden of proof'' required by the 2015 Act.[158] These comments misconstrued NHTSA's interpretation. To determine whether increasing the CAFE civil penalty rate by the amount calculated under the inflation adjustment formula would have a ''negative economic impact,'' NHTSA must first interpret the term ''negative economic impact.'' The statute does not define ''negative economic impact.'' OMB issued a memorandum providing guidance to the heads of executive departments and agencies on how to implement the Inflation Adjustment Act, but the guidance does not define ''negative economic impact'' either.[159] Instead, Congress expressly delegated the authority to determine whether adjusting the amount of any given civil monetary penalty by the otherwise required amount would have a negative economic impact to the head of each agency. Without further guidance about what constitutes a ''negative economic impact,'' each agency has to make an independent determination of what constitutes a ''negative economic impact'' and whether one would result from making each adjustment within its purview.

For NHTSA to determine whether increasing the CAFE civil penalty rate by the otherwise required amount would have a ''negative economic impact,'' it considered what Congress had previously identified for it in EPCA—in the context of establishing the statutory standard required to raise the CAFE civil penalty rate—as constituting a ''substantial deleterious impact on the economy.'' Specifically, Congress had decreed—unchanged for decades before the 2015 Act—that (i) a significant increase in unemployment in a State or a region of a State, (ii) an adverse effect on competition, or (iii) a significant increase in automobile imports would represent ''a substantial deleterious impact on the economy.''

Additionally, Congress established in EPCA that, by requiring such a substantial showing, the burden to increase the CAFE civil penalty rate is heavy. NHTSA determined, as explained in the NPRM, that it is reasonable to expect that, taking the EPCA factors into account, increasing the CAFE civil penalty rate to $14 would result in a ''negative economic impact.'' Without sufficient data to the contrary, NHTSA's determination remains unchanged: The likely effects raising the CAFE civil penalty rate to $14 would have on unemployment, competition, and automobile imports lead NHTSA to conclude that increasing the CAFE civil penalty rate by the otherwise required amount would have a negative economic impact.[160]

[148] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c).

[149] 83 FR 13904, 13908 (Apr. 2, 2018).

[150] Alliance and Global Comment, at 5 (citing *FCC* v. *Fox Television Stations,* 556 U.S. 502, 515–16 (2009); *Philip Morris USA* v. *Vilsack,* 736 F.3d 284, 290 (4th Cir. 2013)).

[151] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 7(a).

[152] *See, e.g.,* CAP Comment, at 2 (describing NHTSA's proposed action as ''reducing the penalty below the statutorily-mandated rate''); CARB Comment, at 6, 14, 16 (''NHTSA's NPRM, therefore, is improperly characterized as 'retaining' the $5.50 penalty per tenth of a mpg when in fact NHTSA would be decreasing from $14 back to $5.50. . . .''; ''NHTSA's adjustment to $14 in its interim final rule in July 2016 is already in effect anyway.''; characterizing ''what NHTSA is attempting to do here'' as ''a CAFE penalty decrease . . . to lower the penalty from $14 to $5.50'').

[153] Order, ECF No. 196, *NRDC* v. *NHTSA,* Case No. 17–2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC* v. *NHTSA,* Case No. 17–2780, at 44 (2d Cir., June 29, 2018) (''The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.'').

[154] 81 FR 95489, 95492 (Dec. 28, 2016).

[155] Because this final rule does not prescribe ''a higher amount'' for the CAFE civil penalty rate, 49 U.S.C. 32912(c)(1)(D), NHTSA does not need to give 18 months' lead time before it becomes effective.

[156] 82 FR 32139, 32140 (July 12, 2017).

[157] 81 FR 95489, 95491 (Dec. 28, 2016).

[158] CBD Comment, at 12; *see also* CARB Comment, at 15–16 (''[T]he statutes build in opposing presumptions and require opposite findings. . . .''); Attorneys General Comment, at 12–13 (''NHTSA impermissibly inverts the presumption Congress built into the 2015 Act . . . .'').

[159] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[160] One commenter asserted, without any citations or reasoning, that to keep the CAFE civil penalty rate at $5.50, the ''negative economic impact'' exception of the 2015 Act requires NHTSA to show that *any* upward adjustment to the CAFE civil penalty rate will have a negative economic impact and that NHTSA failed to meet this burden. CBD Comment, at 23; *see also* Attorneys General Comment, at 16 (arguing that, if necessary, NHTSA should ''reduce the catch-up inflation adjustment by as little as possible . . . based on an analysis of the relevant factors, including but not limited to an estimate of compliance costs, the number and types of vehicles affected, the average increased cost to consumers, and how that cost compares to fuel cost savings''). No such showing is required. The 2015 Act authorizes the head of each agency to ''adjust the amount of a civil monetary penalty by less than the otherwise required amount'' if the ''negative economic impact'' exception is satisfied (with the OMB Director's concurrence). But neither the statute nor OMB guidance establish any standards that the agency must use in determining how much less than the otherwise required amount to make the adjustment. As NHTSA stated in the NPRM, ''[w]ithout any statutory direction or OMB guidance

Some commenters contended that NHTSA's interpretation would make it ''impossible'' for the CAFE civil penalty to ever be increased.[161] NHTSA acknowledges that it may be difficult to meet the high standard Congress established in EPCA. In fact, NHTSA has never been able to make the findings required to increase the rate before. However, nothing in the 2015 Act relieves NHTSA of its statutory obligation to make those findings as a prerequisite for increasing the CAFE civil penalty rate.

One commenter argued that EPCA's specific definitions of ''substantial deleterious impact on the economy'' should not be carried over to the 2015 Act's term ''negative economic impact'' because the 2015 Act is ''is intended for broad application across a range of regulatory schemes'' and the EPCA factors ''may simply be irrelevant in enforcing compliance with other regulatory systems.'' [162] The fact that the EPCA factors are irrelevant to determinations by other agencies (which do not administer the same statutory program) does not make them irrelevant to NHTSA's determination, which requires the agency to reconcile multiple statutory provisions. And both the 2015 Act and EPCA address the effect on the economy as part of their respective statutory standards for determining the appropriateness of an increase in a penalty rate.

Although the 2015 Act applies across all agencies, it is up to the head of agency to determine whether ''increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact.'' Each agency head must determine how to interpret that statutory standard in light of other statutory constraints and any other factors that may be appropriate for each agency to consider.[163]

Regardless, the concern about the possibility of inconsistent interpretations of ''negative economic impact'' is purely hypothetical: As far as NHTSA is aware, no other agency has invoked the ''negative economic impact'' exception. Moreover, NHTSA's interpretation has now gone through the notice-and-comment process, as required by the 2015 Act, and comports with the interpretation provided by OMB—the agency that Congress vested with the authority to issue guidance on implementing the statute.[164] OMB has also concurred with NHTSA's ultimate determination regarding the ''negative economic impact'' of increasing the CAFE civil penalty rate for the reasons explained in its opinion included in the docket for this rulemaking.[165]

One commenter challenged NHTSA's proposed interpretation that '' 'negative economic impact,' as used in the Inflation Adjustment Act, need not mean 'net negative economic impact,' '' [166] arguing that the exception must be read to account for a net weighing of the positive and negative impacts and that it would be arbitrary and capricious for NHTSA to ignore the benefits of a regulatory action.[167] NHTSA disagrees. As NHTSA noted in the NPRM, the very next provision of the 2015 Act—the other exception to conducting the otherwise required initial catch-up adjustment—depends upon a determination of whether ''the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits.'' [168] Congress could have stated the ''negative economic impact'' exception using similar phrasing: ''the negative economic impact of increasing the civil monetary penalty by the otherwise required amount outweighs the positive economic impact.'' But it did not do so, implying that it must mean something different. The commenter asserted that Congress' use of the term ''negative'' ''must entail some analysis of what it means to be 'negative,' '' and ''the only rational way of understanding that term is to look at it in comparison to the benefits.'' [169] NHTSA did analyze what ''negative'' means, thoroughly explaining its reasoning in the NPRM and in this final rule. The agency can readily consider the economic harms that would likely be caused by increasing the CAFE civil penalty rate to $14—such as those identified in the EPCA factors—without needing to compare them to any potential benefits.

a. EPCA Factors

i. Unemployment

Some commenters provided data purporting to show that increasing the CAFE civil penalty rate will not increase unemployment.[170] These comments omitted the larger employment context: employment across the entire U.S. economy has grown over the period in question as the economy recovered from the recession. Employment in the automobile industry sector had plummeted during the recession, as new

on how much to adjust the rate, if at all, it falls to NHTSA to determine the appropriate adjustment—and NHTSA has wide discretion in making this determination.'' 83 FR 13904, 13916 (Apr. 2, 2018) (citing *Nat'l Shooting Sports Found., Inc.* v. *Jones,* 716 F.3d 200, 214–15 (D.C. Cir. 2013)); *see also* Alliance and Global Comment, at 15 & n.63. Nonetheless, NHTSA believes it has made an adequate showing that any increase in the CAFE civil penalty rate would have a ''negative economic impact'' for the reasons detailed in the NPRM and throughout this final rule. *See, e.g.,* 83 FR 13904, 13916 (Apr. 2, 2018) (''In light of the regulatory concerns described above, and in consideration of the unique regulatory structure with non-discretionary penalties tied to standards that increase over time, NHTSA is proposing to keep the CAFE civil penalty rate at $5.50 because it tentatively concludes that retaining the $5.50 rate would avoid the 'negative economic impact' caused by any adjustment upwards.'').

[161] Workhorse Comment, at 4; *see also* CARB Comment, at 18.

[162] CBD Comment, at 13.

[163] *See Sutton* v. *United States,* 65 Fed. Cl. 800, 806 (2005) (deferring to the Army's interpretation of a statute that is administered on a shared basis with the other military services because ''there is no inconsistency'' between its interpretation and that of another military branch and because the statutory language ''confers plenary discretion on each individual service secretary to develop whatever procedures he or she deems appropriate''); *Bd. of Trade of City of Chicago* v. *SEC.,* 187 F.3d 713, 719 (7th Cir. 1999) (''[I]t is possible to defer simultaneously to two incompatible agency positions.''); *see also F.T.C.* v. *Ken Roberts Co.,* 276 F.3d 583, 593 (D.C. Cir. 2001) (''Because we live in 'an age of overlapping and concurring regulatory jurisdiction,' a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.'' (quoting *Thompson Med. Co.* v. *FTC,* 791 F.2d 189, 192 (D.C. Cir. 1986))); *National Ass'n of Cas. & Sur. Agents* v. *Bd. of Governors of Fed. Reserve Sys.,* 856 F.2d 282, 287 (D.C. Cir. 1988) (upholding different agency interpretations of the same phrase because of ''their different economic impact''); *cf. Citizens Awareness Network, Inc.* v. *United States,* 391 F.3d 338, 349 (1st Cir. 2004) (''The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.'') (citation omitted). The Second Circuit asserted in its opinion on the indefinite delay rule that NHTSA's interpretation of the 2015 Act is entitled to no deference because ''the [2015] Act applies to all federal agencies, meaning NHTSA has no special expertise in interpreting its language.'' Opinion, ECF No. 205, *NRDC.* v. *NHTSA,* Case No. 17–2780, at 34 n.10 (2d Cir., June 29, 2018) (citations omitted). To support this dictum, the Court cited only *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984), which predates all of the cases just cited. The issue was not briefed to the Second Circuit, which gave no indication that it considered NHTSA's position.

[164] *See generally* OMB Negative Economic Impact Letter.

[165] *Id.*

[166] 83 FR 13904, 13913 (Apr. 2, 2018).

[167] IPI Comment, at 11–12; *see also id.* at 5–10 (arguing that ''NHTSA has caused forgone benefits'' and its ''failure to address the forgone benefits is arbitrary and capricious''); *cf.* Workhorse Comment, at 2–3 (arguing that setting the CAFE civil penalty rate at $5.50 would have a negative economic impact on companies in the electric vehicle industry and that NHTSA must quantify the economic impact on all businesses, including manufacturers that will be selling credits).

[168] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c)(1)(B). NHTSA has not invoked this social costs exception, so comments that discussed a social cost-benefit analysis are irrelevant and do not merit a response. *See, e.g.,* CBD Comment, at 20–23; IPI Comment, at 6–10.

[169] IPI Comment, at 12.

[170] *See, e.g.,* Workhorse Comment, at 1; CBD Comment, at 14; CARB Comment, at 17.

vehicle sales dropped. After the economy recovered, automobile sales and industry employment nearly doubled relative to the recession, but are only marginally higher than historical levels.[171]

The data provided also should be viewed cautiously. For example, the Synapse Energy Economics study cited acknowledges that positive employment impacts it identifies that will result from implementation of federal and state fuel economy standards ''are not large in the context of the national economy''—''less than 0.2 percent of current U.S. employment levels.'' [172] But the study only discusses the net employment effect on the United States as a whole; it does not discuss unemployment in every state or every region of a state at all, as NHTSA is required to consider under EPCA.[173] As NHTSA explained in the NPRM, job losses resulting from an increase in the CAFE civil penalty rate ''may be concentrated in particular States and regions within those States where automobile manufacturing plants are located [such as those] located in the Midwest and Southeastern U.S.'' [174] The Synapse study does nothing to disprove this point.[175]

Another commenter argued that ''the $14 penalty has been in effect since August 2016 . . . , and there is no evidence that this has caused an increase in the national unemployment rate or the unemployment rate in any State or region of a State.'' [176] The premise is faulty: NHTSA disputes that ''the $14 penalty has been in effect since August 2016,'' as explained above. Furthermore, the comment only cited as evidence the national unemployment rate for one month and a single state's unemployment rate for one month, ''both of which are comparatively low and reflect a robust economy.'' [177] ''[C]omparatively low'' compared to what? The comment provided no evidence of what the unemployment rates it cites would be with a different CAFE civil penalty rate in effect.

Another commenter offered that ''a recent survey of Tier 1 automotive suppliers conducted by Ricardo concluded that the increased stringency of the CAFE Standards encouraged job growth at their companies.'' [178] In fact, the survey question did not specifically ask about ''the increased stringency of the CAFE standards.'' Rather, the survey question asked, ''[i]n general, do US policies that encourage or force the uptake of new technologies also encourage job growth for your company in the US?'' [179] Only 23 respondents answered out of the 143 potential participants who received the survey, including two that believed ''[a]dapting to such policies does not change the number of jobs at our company.'' [180] The suppliers were not asked to and did not provide any empirical data supporting their opinions nor were they asked to quantify the level of job growth they believed was encouraged by the increased stringency. Additionally, the geographical breakdown of the respondents was not provided. Without any sense of magnitude or location, there is no way to evaluate the economic impact on the United States, any State, or any region of a State.

Note also that economic harms suffered by suppliers may be different from those suffered by OEMs. In fact, a separate survey question did ask specifically about the CAFE standards in connection to the effect on employment nationally: ''Will the current 2025 standards help encourage job growth in the wider US economy?'' [181] In response to this question, less than half of the respondents agreed that ''such policies tend to encourage job growth in the industry overall.'' [182]

In any event, the data provided conflicts with other available studies, such as the peer-reviewed Indiana University study, which shows the planned vehicle standards will result in short-term macroeconomic losses, including job losses.[183] Specifically, the study concludes that ''the vehicle price effects, which increase as standards become more stringent, cause significant losses of employment, GDP, and disposable income through a decline in new vehicle sales and higher vehicle prices for consumers, which in turn curbs spending on other goods and services,'' potentially for more than a decade.[184] The study indicates that the negative economic effects hit Illinois, Indiana, Michigan, Ohio, and Wisconsin particularly hard, with the region taking longer than the national average to recover, and that Arkansas, Louisiana, Oklahoma, and Texas never fully recover.[185] Without a clearer picture, NHTSA does not have the evidence needed to make the determination required under EPCA to raise the CAFE civil penalty rate.

One commenter quoted EPA as projecting ''job growth in the automotive manufacturing sector and automotive parts manufacturing sector due specifically to the need to increase expenditures for the vehicle technologies needed to meet the standards.'' [186] EPA's employment projection came with a number of caveats that the commenter omitted. EPA was unable to ''quantitatively estimate the total effects of the standards on the automobile industry, due to the significant uncertainties underlying any estimate of the impacts of the standards on vehicle sales.'' [187] EPA also could not ''quantitatively estimate the total effects on employment at the national level, because such effects depend heavily on the state of overall employment in the economy,'' but noted that, under conditions of full employment, any changes in employment in the regulated sector would primarily be offset by changes in

[171] Employment and sales data available at *https://fred.stlouisfed.org/series/N4222C0A173NBEA* and *https://fred.stlouisfed.org/series/ALTSALES*.

[172] Synapse Energy Economics, *Cleaner Cars and Job Creation: Macroeconomic Impacts of Federal and State Vehicle Standards,* at 17 (Mar. 27, 2018), available at *http://www.synapseenergy.com/sites/default/files/Cleaner-Cars-and%20Job-Creation-17-072.pdf*. The study also acknowledges that its results ''are necessarily uncertain, especially farther out in the modeling period.''

[173] The EPCA requirement to consider the impact on the economy of states and regions of states also demonstrates why the comment arguing that NHTSA must ''us[e] an economy-wide analysis'' to measure employment effects is misplaced. IPI Comment, at 17. By statute, NHTSA is prohibited from only considering the impact of raising the CAFE civil penalty rate on national unemployment. Moreover, as noted in the NPRM, NHTSA also believes ''it is appropriate to consider the impact raising the CAFE civil penalty rate would have on individual manufacturers who fall short of fuel economy standards, and those affected, such as dealers''—an impact that the Synapse study also fails to discuss. 83 FR 13904, 13913 (Apr. 2, 2018).

[174] 83 FR 13904, 13914 (Apr. 2, 2018).

[175] The reports from the Blue Green Alliance cited in a couple of comments suffers from similar shortcomings.

[176] CARB Comment, at 17.

[177] CARB Comment, at 17 n.64.

[178] Workhorse Comment, at 1 (citing Ricardo Energy & Environment, *Survey of Tier 1 automotive suppliers with respect to the US 2025 LDV GHG emissions standards* (Feb. 21, 2018), available at *http://www.calstart.org/Libraries/CALSTART_Press_Releases/CALSTART_Report_Supplier_Survey_Final_for_Web.sflb.ashx*) (Ricardo Report).

[179] Ricardo Report, at 20.

[180] Ricardo Report, at 2, 40.

[181] Ricardo Report, at 20.

[182] Ricardo Report, at 41.

[183] Sanya Carley, Denvil Duncan, John D. Graham, Saba Siddiki & Nikolaos Zirogiannis, *A Macroeconomic Study of Federal and State Automotive Regulations* (Mar. 2017) (''IU Study''). Revised/corrected versions of this report that ultimately come to the same conclusions are also available at *https://spea.indiana.edu/doc/research/working-groups/comet-2018.pdf* (Jan. 2018), and *https://spea.indiana.edu/doc/research/working-groups/comet-022018.pdf* (Feb. 2018).

[184] IU Study, at 3.

[185] IU Study, at 3, 103.

[186] CBD Comment, at 14 (quoting ''Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation,'' available at *https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf* (Final Determination), at 26).

[187] Final Determination, at 26.

employment in other sectors.[188] Ultimately, EPA concluded that it would be unable to distinguish the effect of the standards on employment ''from other factors affecting employment, especially macroeconomic conditions and their effect on vehicle sales.'' [189]

Regardless, since that projection, EPA—in reconsidering the emission standards for model year 2022–2025 light-duty vehicles that were ''based on outdated information''—has concluded that ''a more rigorous analysis of job gains and losses is needed to determine the net effects of alternate levels of the standards on employment and believes this is an important factor to consider in adopting appropriate standards.'' [190]

The same commenter also highlighted that ''industry groups like the Motor and Equipment Manufacturers Association, and the Manufacturers of Emissions Controls have expressed grave concerns about potential rollbacks of federal standards, which would threaten the technological and manufacturing investments they have already made.'' [191] Notably, neither of these industry groups submitted a comment on the NPRM. Regardless, this rulemaking does not involve ''rollbacks of federal standards.'' It relates to civil penalties for those who violate the standards.

ii. Competition

As a threshold matter, one commenter contested NHTSA's understanding of the competition factor in EPCA: ''EPCA *does not* inquire into competitive effects among manufacturers. To the contrary, EPCA expressly acknowledges that CAFE standards will treat different manufacturers differently.'' [192] EPCA does not define ''competition,'' and Congress gave sole discretion to the Secretary of Transportation to decide whether it is likely that an increase in the CAFE civil penalty rate would adversely affect competition, along with the determinations of the other EPCA factors.[193] In applying EPCA, ''NHTSA has consistently evaluated risks to competition, including the potential effects on individual automakers.'' [194] NHTSA has adopted and followed this approach for decades. Accordingly, NHTSA believes that it is appropriate for it to continue analyzing the potential effect of its regulations on competition in this ''broad manner.'' [195]

In any event, NHTSA also explained in the NPRM how increasing the CAFE civil penalty rate could also adversely affect competition through ''an impact on the market itself by limiting consumer choice involving vehicles and vehicle configurations that would otherwise be produced with penalties at their current values.'' [196] The same commenter disputed this effect on consumer choice, declaring—without evidence—that having the CAFE civil penalty rate at $5.50 ''disadvantages consumers by reducing the number of more fuel-efficient vehicle choices in the marketplace.'' [197] NHTSA disagrees. The CAFE standards—and the natural competitive incentive for manufacturers to design vehicles that allow consumers to pay less for fuel—already ensure a significant variety of fuel efficient vehicles in the marketplace, and those manufacturers are unlikely to change a course if that CAFE civil penalty rate is not increased. As NHTSA described in the NPRM, increasing the CAFE civil penalty rate could actually have the opposite effect of that described by the commenter, for example if a manufacturer ''decide[s] that it makes financial sense to shift resources from its planned investments in capital towards payment of possible future penalties,'' or ''[i]f the possibility of paying penalties looms too large,'' driving the manufacturer out of business entirely.[198]

Another commenter argued that ''[a]llowing the penalty to remain indexed to inflation as mandated by Congress does not adversely affect competition, but actively changing the rate to a lower value does,'' by ''express[ing] a preference for companies that have failed or will fail to comply with the standards and disrupt[ing] the normal market competition by effectively subsidizing these companies.'' [199] As explained above, NHTSA is not ''actively changing the rate to a lower value''; the rate was $5.50 during reconsideration, the rate is currently $5.50, and the rate will continue to be $5.50 as a result of this final rule, rather than increasing to $14 beginning with MY 2019. But NHTSA agrees with the general principle that ''actively changing the rate'' would ''disrupt[ ] the normal market competition.'' For the reasons described in the NPRM, NHTSA believes that ''an increase in the CAFE penalty rate could distort the normal market competition that would be expected in a free market by favoring one group of manufacturers over another.'' [200] Thus, to avoid adversely affecting competition by interfering, NHTSA will not increase the CAFE civil penalty rate.

Relatedly, one commenter argued that polling, reinforced by sales data, shows that ''consumers value access to fuel-efficient vehicles.'' [201] If true, then normal market competition will incentivize non-compliant manufacturers to invest in increasingly efficient technology and increasing compliance with the standards. NHTSA would have no need to increase the CAFE civil penalty rate if it would never be applied because market forces would ensure compliance.

The same commenter also argued that increasing the CAFE civil penalty rate ''enhances the competitiveness of U.S.-made vehicles in domestic and global markets.'' [202] Specifically, the commenter maintained that ''more U.S. fuel-efficient vehicles means fewer consumer and production shifts when gas prices are volatile, and more efficient fleets have increased chances of competing with the tighter standards set in Europe and Asia, allowing automakers to build global vehicle platforms and significantly reduce their costs.'' For similar reasons as described above, automakers are already naturally incentivized to ''reduce their costs.'' If becoming increasingly efficient would

[188] Final Determination, at 26.

[189] Final Determination, at 26.

[190] 83 FR 16077, 16077, 16086 (Apr. 13, 2018).

[191] CBD Comment, at 14.

[192] CBD Comment, at 15 (citing, as an example, 49 U.S.C. 32903, ''providing for credit trading, and allowing manufacturers who have over-complied with standards to trade credits with manufacturers who have failed to meet fuel economy requirements'').

[193] 49 U.S.C. 32912(c)(1)(C)(ii).

[194] 83 FR 13904, 13914 (Apr. 2, 2018).

[195] 83 FR 13904, 13914 (Apr. 2, 2018).

[196] 83 FR 13904, 13915 (Apr. 2, 2018).

[197] CBD Comment, at 23.

[198] 83 FR 13904, 13915 (Apr. 2, 2018); *see also* Comment by Jaguar Land Rover North America LLC, NHTSA–2018–0017–0016, at 1 (''A significant increase in the CAFE penalty rate would fundamentally change the dynamics of how companies may make investment decisions, and would force IVM specialist manufacturers to disregard consumer demand by restricting the availability of vehicles that consumers want.''). The commenter noted that EPA has previously stated that under the standards, ''consumers can continue to have a full range of vehicle choices that meet their needs.'' CBD Comment, at 16 (quoting Final Determination, at 9). But EPA has since reconsidered the emission standards for model year 2022–2025 light-duty vehicles, which were ''based on outdated information.'' 83 FR 16077, 16077 (Apr. 13, 2018). Accordingly, EPA cannot be held to its earlier forecast regarding choices available to consumers.

[199] CAP Comment, at 4; *see also* CBD Comment, at 15 (reasoning that keeping the rate ''artificially low'' would ''create an unfair market environment,'' in which less established, innovative companies that have invested in technology to meet the standards would find themselves at a competitive disadvantage to more established, larger companies that may be more willing to pay penalties, rather than comply).

[200] 83 FR 13904, 13914 (Apr. 2, 2018).

[201] CBD Comment, at 16.

[202] CBD Comment, at 15–16. This argument overlaps to some extent with the imports EPCA factor.

allow them to do so—and sell more vehicles in Europe and Asia—they will do so. As explained in more detail below, domestic manufacturers already must overcome hurdles that foreign manufacturers do not face, such as a separate minimum standard for domestically-manufactured passenger automobiles and prohibiting manufacturers from using traded credits to satisfy a shortfall of passenger automobiles manufactured domestically.

Another commenter challenged NHTSA's rationale on the competition factor, arguing that ''if the stringency of the penalty is not maintained over time . . . , then manufacturers increasingly have the incentive merely to pay the penalty and not further invest in greater fuel efficiency.'' [203] This is a moot point because the stringency of CAFE civil penalties is maintained over time, just not through inflation adjustments. As explained above, Congress chose an alternative mechanism for ensuring that the CAFE stringency retains its salience over time, by requiring the fuel economy standards to be set at the maximum feasible level for each model year, rather than requiring adjustments for inflation of the penalty rate alone. Consequently, increasing the penalty rate would serve to ''adversely impact the affected manufacturers through higher prices for their products (without corresponding benefits to consumers), restricted product offerings, and reduced profitability''—*i.e.,* adversely affecting competition.[204]

iii. Imports

One commenter argued that ''if anything, the proper inflation adjustment would aid domestic manufacturing,'' rather than cause a significant increase in automobile imports.[205] Specifically, the comment noted that ''historically, the only manufacturers to pay fines for non-compliance have been those who import a large fraction (and, in many cases, all) of the vehicles sold in the United States.'' [206] This misses a key part of the picture. In the NPRM, NHTSA noted that ''[f]inal model year fuel economy performance reports published by NHTSA indicate import passenger car fleets are performing better than domestic passenger car fleets.'' Since then, the model year 2016 fleet performance report has been made available, indicating that the performance of the import passenger car fleet again has an advantage over the domestic passenger car fleet, now almost a full mile per gallon difference.[207] Although the magnitude of the advantage has varied, the import passenger car fleet has consistently had a superior fuel economy performance to the domestic passenger car fleet for over ten years. Because of that existing advantage, increasing the CAFE civil penalty rate would likely have a harsher impact on domestic manufacturers, who would need to invest more to reduce fuel economy shortfalls. As those increased investments get translated into higher prices for vehicles, relatively cheaper imported vehicles become more attractive to consumers. The comment seemed to grasp this point in its very next paragraph, describing a situation in which ''a higher fine is going to either push a manufacturer to deploy more technology to comply . . . or ensure that domestic production of more efficient cars is sufficient to offset the shortfall of its domestically produced'' vehicles—both of which must be paid for somehow.[208]

Moreover, the comment fails to mention that domestic manufacturers face some heavier statutory burdens. For example, manufacturers are barred by statute from using traded credits to satisfy a shortfall for ''the category of passenger automobiles manufactured domestically.'' [209] Passenger automobiles manufactured internationally are not subject to the same limitation, affording foreign manufacturers a competitive advantage. Domestically-manufactured passenger automobiles are also subject to a minimum standard, beyond the general average fuel economy standards: 27.5 miles per gallon or ''92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year,'' whichever is greater.[210] In fact, this statutory domestic passenger vehicle requirement has already resulted in the imposition of record penalties for model year 2016. As noted in NHTSA's MY 2011–2018 Industry CAFE Compliance report, one manufacturer paid over $77 million in civil penalties for failing to meet or exceed the minimum domestic passenger car standard for MY 2016—the single highest civil penalty assessed in the history of the CAFE program. NHTSA anticipates that such penalties will increase as stringency levels continue to rise. These disparities against the domestic passenger automobile industry increase the likelihood that an upward adjustment to the CAFE civil penalty rate will create greater incentives for manufacturers to shift their production of passenger vehicles overseas to avoid such penalties, and that would have a negative economic impact on the United States—one that is likely to hit particularly hard on states and regions of states where domestic passenger automobile manufacturing is concentrated.

The comment also cited the ''history of Detroit manufacturing'' as another illustration for how ''adjusting the fine upward acts to pull manufacture of more efficient vehicles into domestic production as opposed to overseas production and imported.'' [211] The comment's portrayal of history, however, omitted that many of the most efficient vehicles already had thin margins and production had been moved, at least in part, to plants in Mexico to reduce costs. Moreover, the strength of the connection between the civil penalty rate and domestic production is tenuous. An alternative explanation is that higher fuel prices allow manufacturers to charge more for fuel efficient vehicles. Consequently, manufacturers can spend more on production domestically without having to shift production abroad for cheaper.

b. Other Economic Considerations

Even if the EPCA factors do not apply, NHTSA concludes that raising the CAFE civil penalty rate to $14 would have a ''negative economic impact'' for the reasons explained in the NPRM.[212] One comment asserted that NHTSA ''has not identified any facts or analysis that would support its belated invocation of the 'negative economic impact' provision.'' [213] This comment ignores that the NPRM expressly stated that it was relying on ''the estimate provided by industry showing annual costs of at least one billion dollars.'' [214]

[203] CARB Comment, at 18.

[204] 83 FR 13904, 13914 (Apr. 2, 2018).

[205] CBD Comment, at 18–19.

[206] CBD Comment, at 18 (citing CAFE Public Information Center, available at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html*).

[207] Available at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_fleet_LIVE.html* (last accessed May 22, 2018).

[208] CBD Comment, at 18.

[209] 49 U.S.C. 32903(f)(2); *see also* 49 CFR 536.9(c).

[210] 49 U.S.C. 32902(b)(4). Since the minimum standard for domestically-produced passenger automobiles was promulgated, the ''92 percent'' has always been greater than 27.5 mpg. For model year 2016, the most recent year for which data is publicly available, some manufacturers were unable to meet the domestic passenger car fleet standard. CAFE Public Information Center, *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Mfr_LIVE.html.*

[211] CBD Comment, at 18–19.

[212] 83 FR 13904, 13916 (Apr. 2, 2018).

[213] Attorneys General Comment, at 14.

[214] 83 FR 13904, 13916 (Apr. 2, 2018).

Some commenters challenged NHTSA's reliance on the Alliance and Global's estimate of annual costs of at least one billion dollars under NHTSA's augural standards for MY 2022 to 2025, largely relying on the Union of Concerned Scientists' (UCS's) critique of the estimate.[215] The Alliance and Global addressed UCS's criticisms in their comment.[216] Specifically, the Alliance and Global observed that ''UCS did not factor in the costs of CAFE penalties in their analysis,'' as NHTSA has in its analyses of the economic impact of CAFE standards.[217] Consistent with NHTSA's past methodology and in light of the particular question at issue here, NHTSA continues to agree that it was appropriate to incorporate the costs of civil penalties in an analysis to determine whether raising the CAFE civil penalty rate would have a ''negative economic impact.''

One commenter argued, relying on the July 2016 Draft Technical Assessment Report (TAR), that because ''the model year 2022–25 greenhouse gas/CAFE standards were technologically feasible at reasonable cost for auto manufacturers . . . the industry's $1 billion penalty estimates are unreasonable since any 'massive' increase would be the result of the manufacturers' deliberate non-compliance rather than any inability to comply.'' [218] Since the draft TAR, however, the EPA Administrator has reconsidered the emission standards for model year 2022–2025 light-duty vehicles and determined that they ''are based on outdated information, and that more recent information suggests that the current standards may be too stringent.'' [219] Accordingly, EPA announced that it ''will initiate a notice and comment rulemaking in a forthcoming **Federal Register** notice to further consider appropriate standards for model year 2022–2025 light-duty vehicles, as appropriate,'' in partnership with NHTSA.[220] In particular, EPA observed that due to a variety of challenges of feasibility and practicability, many companies have already started to rely on banked credits to remain in compliance, which may be increasingly difficult to continue as the stringency standards tighten.[221] To the extent that the draft TAR expressed that ''the model year 2022–25 greenhouse gas/CAFE standards were technologically feasible at reasonable cost for auto manufacturers,'' that conclusion is no longer operative.

Another commenter identified purported ''substantial shortcomings'' with the CAFE model used by the Alliance and Global to formulate generate its cost estimates, which it claimed ''will tend to overestimate fuel economy costs.'' [222] NHTSA disagrees strongly with that statement. As the comment itself noted, ''the [CAFE] model is one of the best publicly available tools for analyzing the effects of fuel economy regulation and offers substantial transparency and comparability for the analyses.'' [223] Further, the CAFE model has been used in numerous fuel economy rulemakings. Finally, the commenter did not provide an alternative calculation of what it believes the additional costs associated with increasing the CAFE civil penalty rate would be. As such, NHTSA's reliance on the CAFE model is eminently reasonable, and the agency continues to believe that ''the estimate provided by the Alliance and Global showing annual costs of at least one billion dollars is a reasonable estimate'' of what would occur if the CAFE civil penalty rate was increased to $14 under the agency's augural standards and that this would constitute a ''negative economic impact'' under the 2015 Act.[224]

Some commenters argued that even assuming the Alliance and Global's analysis was accurate, the impact of the additional costs it calculates is minimal when spread across the industry.[225] These arguments gloss over the fact that if the Alliance and Global's analysis is correct, there is a ''negative economic impact.'' Instead, these comments seem to be directed towards the irrelevant question of how ''negative'' the ''economic impact'' would be.[226]

Other commenters criticized NHTSA for purportedly not conducting a sufficiently thorough analysis of the negative economic impact of the increased penalty rate, asserting that NHTSA must consider factors, such as ''which vehicles would be subject to penalties, how much of the costs would be passed through to consumers, and whether the average per vehicle cost would have any impact at all on consumer demand for vehicles.'' [227] The 2015 Act does not require such an analysis to determine whether making an otherwise required adjustment would have a ''negative economic impact.'' As NHTSA explained in the NPRM and above, because the term ''negative economic impact'' is not defined nor any guidance provided by Congress or OMB, NHTSA has broad discretion to determine how to determine whether a ''negative economic impact'' would result from such an adjustment.[228]

Contrast the ''negative economic impact'' exception in the 2015 Act with the statutory provision describing the relevant factors that Congress requires NHTSA to consider in determining the amount of a civil penalty imposed for a variety of violations of the Safety Act.[229] Congress has demonstrated that it can, and will, delineate specific factors agencies should consider in making comparable determinations. It chose not to do so in the 2015 Act, affording agencies the ability to determine what would be most appropriate for each.

Imposing an additional billion dollars in costs to the automobile industry—

[215] *See, e.g.,* CBD Comment, at 19; Attorneys General Comment, at 10; IPI Comment, at 13–14. UCS's critique of the Alliance and Global's analysis is available at *https://www.regulations.gov/document?D=NHTSA-2017-0059-0019.*

[216] Alliance and Global Comment, at 17–18.

[217] Alliance and Global Comment, at 17–18 (citing 77 FR 62624, 63047 (Oct. 15, 2012)). Contrary to one comment's critique, Attorneys General Comment, at 15; *cf.* IPI Comment, at 16 (''[A]ny negative effects of higher penalties on profits would be experienced only by those firms that, in the absence of the inflation adjustment, would not comply with the standards. . . .''), the Alliance and Global's analysis did account for the increased costs to manufacturers that would comply with the fuel economy standards.

[218] Attorneys General Comment, at 10.

[219] 83 FR 16077, 16077 (Apr. 13, 2018).

[220] 83 FR 16077, 16077 (Apr. 13, 2018). As part of this reconsideration, ''NHTSA is obligated to conduct a *de novo* rulemaking, with fresh inputs and a fresh consideration and balancing of all relevant factors, to establish final CAFE standards for [MYs 2022–2025].'' 82 FR 34740, 34741 (July 26, 2017).

[221] 83 FR 16077, 16079 (Apr. 13, 2018).

[222] IPI Comment, at 13–14.

[223] IPI Comment, at 13.

[224] 83 FR 13904, 13916 (Apr. 2, 2018).

[225] *See, e.g.,* Comment by Kendl Kobbervig, NHTSA–2018–0017–0009, at 1; Attorneys General Comment, at 14–15; IPI Comment, at 15; *cf.* IPI Comment, at 16 (arguing that ''the increase in costs should not be thought of as severe'' because the total additional costs due to an increase in the CAFE civil penalty ''will occur mostly for luxurious and sports cars'').

[226] This question is irrelevant for the reasons discussed in footnote 160: once NHTSA determines that increasing the civil penalty to $14 would have a negative economic impact, it has broad discretion to determine how much less than the otherwise required amount the adjustment, if any, should be.

[227] Attorneys General Comment, at 13–14; *see also* CARB Comment, at 19 (commenting that NHTSA did ''not provide an estimate of the increased compliance costs, the number and types of vehicles affected, the average increased costs that consumers would bear, the price sensitivity of consumers of the affected vehicles, or how the cost increase compares to fuel cost savings and other benefits to consumers resulting from increased compliance'').

[228] *See* 83 FR 13904, 13916 (Apr. 2, 2018) (citing *Nat'l Shooting Sports Found., Inc.* v. *Jones,* 716 F.3d 200, 214–15 (D.C. Cir. 2013)); Alliance and Global Comment, at 15 & n.63.

[229] *See* 49 U.S.C. 30165(c) (requiring the Secretary to ''consider the nature, circumstances, extent, and gravity of the violation'' in determining the amount of a civil penalty under that section and detailing specific factors the Secretary must include, as appropriate, in making such determination).

every year—would have the type of ''negative economic impact'' envisioned by Congress when it provided this exception, and this negative economic impact is magnified by the statutory domestic minimum standard for passenger vehicles, whose penalties cannot be avoided with credits. In fact, in other instances when Congress has imposed additional procedural requirements on agencies, it has drawn the line at economic impacts around $100 million.[230] It appears reasonable that a projected economic impact ten times the amount required for a rule to be considered ''major'' under the Congressional Review Act would be more than enough to reach this threshold. Furthermore, as noted above, it is apparent that a significant part of the negative impact would occur within the United States—and specifically within regions of the United States where traditional automobile manufacturing is concentrated—because raising the penalty rate would not only harm manufacturers generally. It would also create a specific incentive for manufacturers to shift domestic production of small, low-profit-margin passenger vehicles either to Mexico (where production costs are lower) or outside of North America (because those vehicles would not be subject to the domestic minimum standard).

Another commenter alleged that NHTSA did ''not analyze the obvious alternative available to manufacturers who want to avoid the higher penalty: compliance with the fuel economy standards'' and ''entirely fail[ed] to address'' how increasing the CAFE civil penalty rate to $14 would raise the value of credits, ''making violations more expensive for those manufacturers that voluntarily choose not to comply with the CAFE standards.'' [231] This comment is wrong: In the NPRM, NHTSA expressly acknowledged manufacturers' option to comply with the applicable fuel economy standards, the resulting effect on the value of credits, and the economic impact.[232] Further, the $1 billion estimate was for total costs, including technology costs, not just increased penalty payments.

Therefore, the agency continues to believe that the estimate provided by the Alliance and Global is a reasonable estimate of the economic impact of increasing the penalty rate under the augural standards—perhaps even be understated—and that this impact is sufficient for the agency to conclude that the CAFE civil penalty rate statute falls within the ''negative economic impact'' exception to the 2015 Act.

In addition, two recent NHTSA publications—NHTSA and EPA's Safer Affordable Fuel-Efficient (SAFE) Vehicles proposed rule as well as the MY 2011–2018 Industry CAFE Compliance Report—provide further confirmation for NHTSA's conclusion that increasing the CAFE civil penalty rate pursuant to the 2015 Act would have a ''negative economic impact.'' [233] The SAFE Vehicles rule proposed CAFE and greenhouse gas (GHG) standards for model years 2020 through 2026 and used the most recent version of the CAFE model. As discussed in greater detail in that rulemaking, at a high level, the CAFE model is the tool the agencies use to determine how the industry could respond to potential standards. It includes a wide range of assumptions on the cost, effectiveness, and availability of different technologies, and then a decision-making tool to determine how each manufacturer could apply technologies, while accounting for various considerations that manufacturers typically evaluate when establishing, choosing, and incorporating the technologies. In the case of the CAFE standards, the model also estimates when a manufacturer is likely to use existing credits or pay penalties in lieu of meeting the required standards. Using the same publicly-available modeling and underlying data as that relied upon in the SAFE Vehicles NPRM, the negative economic impact of increasing the CAFE civil penalty rate to $14 remains apparent. Analyses conducted for the SAFE Vehicles NPRM to determine the effect of other inputs—in this case, the CAFE civil penalty rate—on the sensitivity of results show that, as seen in Table 1 in Appendix A, under the augural standards, manufacturers are projected to face more than $500 million in additional civil penalty liability before accounting for credits every year through at least MY 2026 if the rate is increased to $14 in MY 2019, as compared to retaining the rate at $5.50—with the added burden exceeding $1 billion for some model years.[234] Even under the proposed standards,[235] which were the least stringent option analyzed in that rule, the additional projected penalty liability before accounting for credits from an increase in the rate to $14 would be substantial: Over $750 million in the first model year for which the increase would be in effect and over $100 million every year through model year 2025, as shown in Table 2 in Appendix A. These additional penalties are on top of any increased costs manufacturers would incur in making technological or design changes to reduce their shortfalls—costs that would likely be passed along to consumers. It is important to note that, as described above, these added potential penalties could be offset through the application

[230] *See, e.g.,* 5 U.S.C. 804(2)(A).

[231] Attorneys General Comment, at 15–16.

[232] *See, e.g.,* 83 FR 13904, 13916 (Apr. 2, 2018) (''[I]ncreasing the penalty rate to $14 would lead to significantly greater costs than the agency had anticipated when it set the CAFE standards because manufacturers who had planned to use penalties as one way to make up their shortfall would now need to pay increased penalty amounts, purchase additional credits at likely higher prices, or make modifications to their vehicles outside of their ordinary redesign cycles. NHTSA believes all of these options would increase manufacturers' compliance costs, many of which would be passed along to consumers.'').

[233] 83 FR 42986 (Aug. 24, 2018). Although the SAFE Vehicles NPRM and the CAFE Compliance Report were published after the comment period in this rulemaking had closed, ''an agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown.'' *Solite Corp.* v. *U.S. E.P.A.,* 952 F.2d 473, 484 (D.C. Cir. 1991) (cleaned up) (citing *Cmty. Nutrition Inst.* v. *Block,* 749 F.2d 50, 57–58 (D.C. Cir. 1984)). Moreover, since the SAFE rule was published, NHTSA has not received any additional comments on—or any requests to re-open the comment period for—this CAFE civil penalty rate rulemaking. Pursuant to NHTSA's regulations, ''[l]ate filed comments will be considered to the extent practicable.'' 49 CFR 553.23.

[234] A description of the modeling assumptions and parameters for the SAFE NPRM are located at 83 FR 43000- 43188 (Aug. 24, 2018) (''Technical Foundation for NPRM Analysis''). The data supporting the calculations presented here are available at *https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system* in the ''Central Analysis'' and ''Sensitivity Analysis'' for the ''2018 NPRM for Model Years 2021–2026 Passenger Cars and Light Trucks.'' The data utilized are the same data presented in the SAFE Vehicles NPRM ''Sensitivity Analysis'' section (beginning at 83 FR 43352), but tabulated to show the impacts of this particular action. The calculations here specifically compare the total projected fines across all manufacturers and all fleets, both under the augural standards and the proposed standards, in the central analysis that assumes the rate will remain at $5.50 and the sensitivity analysis that, holding all else in the central analysis the same, assumes the rate would be increased to $14. The numbers presented here are based on the ''unconstrained'' analysis of the CAFE model—which allows for the possibility that credits may be earned, transferred, and applied to CAFE shortfalls—rather than the standard-setting analysis—which assumes that each fleet must comply with the CAFE standard separately in each year because of the statutory limitation in EPCA and EISA that prohibits NHTSA from considering the availability of credits when setting standards—but the magnitudes of the amounts and the trends are similar under both analyses. For additional information about the assumptions underlying this data, please refer to the Preliminary Regulatory Impact Analysis (PRIA) and the NPRM for the SAFE Vehicles rulemaking, both available at *https://www.nhtsa.gov/corporate-average-fuel-economy/safe.*

[235] The analysis provided by the Alliance and Global was conducted and submitted before the proposed standards were publicly available.

of credits earned, transferred, or traded in ways the model cannot predict—subject to the limitations on domestic fleets described above—but NHTSA expects that if the civil penalty rate was increased, the price of credits would increase as well.

Moreover, the MY 2011–2018 Industry CAFE Compliance report recently published by NHTSA shows that the number of fleets with credit shortfalls has substantially increased since 2011, while the number of fleets generating credit surpluses has decreased, leading to the MY 2018 estimate of 28 fleets with projected shortfalls and only 11 with projected surpluses.[236] While most manufacturers have so far avoided making civil penalty payments by using earned and traded credits, more manufacturers are expected to need to pay penalties going forward because credit surpluses across the entire fleet are diminishing; [237] manufacturers will no longer be able to use their own credits or purchase credits from other entities to fully satisfy their shortfalls. The shrinking credit surplus is particularly challenging for domestic fleets: The MY 2011–2018 Industry CAFE Compliance report shows that the remaining surplus credits for domestically-produced vehicles were cut nearly in half from MY 2014 to MY 2016.[238] In addition, since non-compliance with the domestic passenger car minimum standard required by 49 U.S.C. 32903(g)(3) and 49 CFR 536.9 cannot be covered with credits acquired by another automaker or transferred from another fleet, shortfalls for domestic vehicles must be covered by penalty payments when a manufacturer's domestic surplus credits run out. Manufacturers are already beginning to realize this impact: As noted above, one manufacturer paid over $77 million in civil penalties for failing to meet the minimum domestic passenger car standard for MY 2016, which is the single highest civil penalty assessed in the history of the CAFE program. These facts show that the estimate provided by the Alliance and Global is supported by the actual behavior of the industry in the face of increasing standards, which bears out the conclusions already reached by NHTSA in this rulemaking.

5. $10 Cap

Two comments claimed that NHTSA failed to provide a ''reasoned explanation'' for why it departed from its previous position that the $10 cap for the CAFE civil penalty rate, established by Congress in 1978 in 49 U.S.C. 32912(c)(1)(B), needs to be adjusted pursuant to the 2015 Act.[239] As explained above, NHTSA is permitted to change its views. And in doing so here, NHTSA provided a ''reasoned explanation'' in its NPRM: The $10 cap is not ''assessed or enforced'' and thus is not a ''civil monetary penalty'' that requires adjustment under the 2015 Act.

Multiple commenters disagreed with NHTSA's proposed determination in the alternative that any potential adjustment NHTSA makes to the CAFE civil penalty rate be capped by the $10 limit, without adjusting the cap to $25.[240] These comments—including those that had argued that NHTSA's adjustment in 1997 from $5 to $5.50 constitutes evidence that an adjustment is warranted here—almost unanimously ignored that this cap was not adjusted when the previous inflation adjustment was made in 1997. These comments also failed to reconcile the fact the $10 cap was left intact when Congress amended the civil penalty provision by enacting EISA in 2007.

Instead, the comments focused largely on the ''maximum amount'' provision of definition of ''civil monetary penalty'' in the 2015 Act. One comment observed that the statutory language establishing the $10 cap is ''virtually identical'' to the statutory language establishing the general EPCA penalty of $10,000, which NHTSA adjusted, only identifying the shared phrase ''not more than'' to indicate that they are both maximum amounts.[241] But NHTSA did not, and still does not, dispute that the $10 cap is a ''maximum amount.'' Rather, NHTSA tentatively determined, and today finalizes, that the $10 cap is not ''assessed or enforced'' as required to be a ''civil monetary penalty'' under the 2015 Act.[242] Other penalties that have a maximum amount, such as the general EPCA penalty, can actually be ''assessed or enforced'': A violator could theoretically be assessed a civil penalty of the now-adjusted maximum amount.

Only two comments provided any argument on this specific point.[243] One of those comments conceded that the cap ''is not being assessed or enforced now.'' [244] Nonetheless, that comment maintained that the cap ''may'' be assessed or enforced ''in the future if [NHTSA] exercises its discretionary authority to increase the penalty to further energy conservation.'' [245] Similarly, the other comment asserted that ''the condition of contemporaneous enforceability of the statutory maximum amount is not a condition precedent in order to qualify as a 'civil monetary penalty.' . . . [T]he maximum itself does not need to be actively assessed or enforced.'' [246] Even setting aside the hypothetical circumstances that NHTSA would need to establish to raise the EPCA rate all the way to the cap (discussed above), it is not the cap that is ever ''assessed or enforced''; it is the ''civil penalty,'' as defined in 49 U.S.C. 32912(b). The statutory cap merely sets a limit to which the $5.50 multiplier—which is used to calculate the ''civil penalty''—can be raised.

Other commenters discussed how the $10 cap must be adjusted to avoid undermining the purpose of the 2015 Act.[247] As discussed above, NHTSA disagrees that retaining the CAFE civil penalty rate runs counter to the purposes of the 2015 Act, even if the 2015 Act applies to the CAFE civil penalty rate. Congress chose means other than inflation adjustments to maintain the deterrent effect of the CAFE civil penalty formula over time (and to incentivize energy conservation under EPCA). Regardless, the purpose of the statute would not justify completing an adjustment unauthorized by Congress. The $10 cap does not satisfy the definition of a ''civil monetary penalty'' required by Congress to be

[236] NHTSA, ''MY 2011–2018 Industry CAFE Compliance,'' *https://one.nhtsa.gov/cafe_pic/MY%202011%20-%20MY%202018%20Credit%20Shortfall%20Report.pdf* (Dec. 21, 2018).

[237] *Id.*

[238] *Id.*

[239] CBD Comment, at 23; Attorneys General Comment, at 17. The Attorneys General comment also claimed that NHTSA adjusted the cap from $10 to $25 in its interim final rule and that this adjustment ''has never been suspended or reversed, and remains in effect.'' Attorneys General Comment, at 16. As NHTSA noted in its NPRM, however, while NHTSA did announce in the interim final rule that the adjusted maximum civil penalty would be increased from $10 to $25, 81 FR 43524, 43526 (July 5, 2016), ''this change was never formally codified in the Code of Federal Regulations nor adopted by Congress.'' 83 FR 13904, 13916 n.96 (Apr. 2, 2018). Regardless, NHTSA gave notice that ''[e]ven if the adjustment is considered to have been adopted, however, NHTSA is now reconsidering that decision for the reasons explained'' in the notice. 83 FR 13904, 13916 n.96 (Apr. 2, 2018).

[240] *See, e.g.,* CAP Comment, at 3; CBD Comment, at 23.

[241] CARB Comment, 9.

[242] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2)(B), (C).

[243] CARB Comment, at 9; Attorneys General Comment, at 17.

[244] Attorneys General Comment, at 17.

[245] Attorneys General Comment, at 17.

[246] CARB Comment, at 9.

[247] *See, e.g.,* CARB Comment, at 19–20 (Not adjusting the $10 cap ''would completely defeat the purpose of the 2015 Act in avoiding the eroded value and deterrence of penalties by inflation.''); Attorneys General Comment, at 17 (''[T]o read the 2015 Act as *not* applying to the CAFE standards' statutory maximum would undermine the purpose of both the 2015 Act *and* EPCA.''); IPI Comment, at 4 (''[I]f the $10 maximum were a permanent cap never subject to inflation, that would defeat Congress's stated purposes for the 2015 Act. . . .'').

adjusted, and therefore, the 2015 Act is not a basis for NHTSA to adjust the $10 cap.

One commenter proposed the $10 cap be subject to an inflationary adjustment calculated from 2007.[248] Because NHTSA has concluded that the $10 cap should not be adjusted at all under the 2015 Act, it is unnecessary for NHTSA to determine what the appropriate base year would be if such an adjustment were required, and NHTSA declines to do so.

E. Rulemaking Analyses and Notices

1. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document has been considered a ''significant regulatory action'' under Executive Order 12866. NHTSA believes that this rulemaking is ''economically significant'' because this rule avoids imposing a future economic impact of $100 million or more annually.

Certain commenters criticized the agency's decision to not include a separate economic analysis. The agency notes first that nothing in either the 2015 Act or EPCA require that NHTSA conduct a cost-benefit analysis when determining issues related to CAFE penalties. Further, the agency's first argument in this final rule that these penalties are not ''civil monetary penalties'' under the 2015 Act would not be affected by any cost-benefit analysis, as it relies on purely legal reasoning, not on any economic finding. Similarly, although one could argue that other arguments relied on in this final rule require some degree of analysis, the relevant statutes expressly identify specific factors the agency must consider, and the agency made the appropriate considerations of substantial deleterious harm under EPCA and negative economic impact under the 2015 Act. In addition, since this rule merely maintains the existing penalty rate, it has no economic impact. Certainly, some alternatives, particularly raising it to $14 or even just $10, would have had economic impacts, but analyzing the impacts of alternatives that would have changed the status quo is different than analyzing an actual rule that does so. In some ways, this compares to an agency's decision to deny a petition rulemaking, where the denial does not ordinarily include a thorough economic analysis, but any regulatory action in response granting a petition would likely benefit from some an analysis the reflects the impacts of any change. Finally, Executive Order 12866 by its own terms does not, ''does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.'' Therefore, whether the agency complies with the Order is not grounds for legal challenge. To the extent there is any ambiguity as to what analysis is required, OMB not only reviewed both the NPRM and final rule, but also affirmatively concurred with NHTSA's economic determination and the interpretations of the 2015 Act in this final rule.[249]

2. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a proposal will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the impacts of this notice under the Regulatory Flexibility Act and certifies that this rule would not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b).

The Small Business Administration's (SBA) regulations define a small business in part as a ''business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification (''SIC'') Codes. SIC Code 336211 ''Motor Vehicle Body Manufacturing'' applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (''NAICS''), Subsector 336—Transportation Equipment Manufacturing. This action is expected to affect manufacturers of motor vehicles. Specifically, this action affects manufacturers from NAICS codes 336111—Automobile Manufacturing, and 336112—Light Truck and Utility Vehicle Manufacturing, which both have a small business size standard threshold of 1,500 employees.

Though civil penalties collected under 49 CFR 578.6(h)(1) and (2) apply to some small manufacturers, low volume manufacturers can petition for an exemption from the Corporate Average Fuel Economy standards under 49 CFR part 525. This would lessen the impacts of this rulemaking on small business by allowing them to avoid liability for penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

3. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the

[248] Workhorse Comment, at 3.

[249] OMB Non-Applicability Letter; OMB Negative Economic Impact Letter.

relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

The reason is that this rule will generally apply to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive Order do not apply.

4. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rule does not include a Federal mandate, no Unfunded Mandates assessment will be prepared.

5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) requires Federal agencies to analyze the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment, as well as the impacts of alternatives to the proposed action.[250] When a Federal agency prepares an environmental assessment, the Council on Environmental Quality (CEQ) NEPA implementing regulations (40 CFR parts 1500–1508) require it to ''include brief discussions of the need for the proposal, of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.'' [251] Based on the environmental assessment, the agency must ''make its determination whether to prepare an environmental impact statement'' and ''prepare a finding of no significant impact . . . if the agency determines on the basis of the environmental assessment not to prepare a statement.'' [252] NHTSA prepared a Draft Environmental Assessment (Draft EA), which was included in the preamble of the NPRM. This section serves as the agency's Final Environmental Assessment (Final EA) and Finding of No Significant Impact (FONSI).

i. Purpose and Need

This final rule sets forth the purpose of and need for this action. NHTSA considered whether it is appropriate, pursuant to the Inflation Adjustment Act, to make an initial ''catch-up'' adjustment to the civil monetary penalties it administers for the CAFE program. Further, if the Inflation Adjustment Act does apply, it has considered the appropriate approach to undertake pursuant to the legislation and consistent with the agency's responsibilities under EPCA (as amended by EISA). NHTSA has considered the findings of this Final EA prior to selecting the $5.50 rate in this final rule.

ii. Alternatives

NHTSA considered a range of alternatives for this action, including a civil penalty amount of $5.50 per each tenth of a mile per gallon [253] and a civil penalty amount of $14.00 per each tenth of a mile per gallon.[254] NHTSA also considered a civil penalty amount of $6.00 per each tenth of a mile per gallon (rounding to the nearest dollar pursuant to the 2015 Act) and whether the civil penalty amount is capped at $10.00 per each tenth of a mile per gallon (pursuant to EPCA). This allowed the agency to consider selecting any value along this range of alternatives, including any civil penalty amount between $5.50 and $14.00. In consideration of the information presented in this Final EA, NHTSA is selecting a civil penalty rate of $5.50 per each tenth of a mile per gallon as its final rule. NHTSA is also increasing the ''general penalty'' to a maximum penalty of $42,530,[255] pursuant to the requirements of the Inflation Adjustment Act.

In the Draft EA, NHTSA identified $5.50 as the agency's No Action Alternative. Two commenters noted that, as a result of the U.S. Court Appeals for the Second Circuit decision, the $14 rate should be considered the agency's No Action Alternative.[256] NHTSA believes this notice adequately explains the complicated factual and legal circumstances that apply to this rulemaking. This Final EA considers the environmental impacts associated with the $5.50 and $14 rates in comparison with each other, thus allowing a reasoned consideration of the greatest potential environmental impacts regardless of which is appropriately considered the No Action Alternative.

iii. Environmental Impacts of the Proposed Action and Alternatives

NHTSA considered a range of alternatives from a rate of $5.50 to a rate of $14 as the civil penalty amount for a manufacturer's failure to meet its fleet's average fuel economy target (assuming the manufacturer does not have sufficient credits available to cover the shortfall). When deciding whether to add fuel-saving technology to its vehicles, a manufacturer might consider the cost to add the technology, the price and availability of credits, the potential reduction in its civil penalty liability, and the value to the vehicle purchaser of the change in fuel outlays over a specified ''payback period.'' A higher civil penalty amount could encourage manufacturers to improve the average fuel economy of their passenger car and light truck fleets if the benefits of installing fuel-saving technology (*i.e.,* lower civil penalty liability and increased revenue from vehicle sales) outweigh the costs of installing the technology.

However, there are many reasons why this might not occur to the degree anticipated. Apart from the civil penalty rate, as CAFE standards increase in stringency, manufacturers have needed to research and install increasingly less cost-effective technology that may not obtain levels of consumer acceptance necessary to offset the investment. A higher civil penalty amount combined with the value of the potential added fuel economy benefit of new, advanced technology to the vehicle purchaser may not be sufficient to outweigh the added technology costs (including both the financial outlays and the risk that consumers may not value the technology or accept its impact on the driving experience, therefore opting not to purchase those models). This may be especially true when gas prices are low. If the added cost in civil penalty payments is borne by the manufacturer, this may result in reduced investment in fuel saving technology or reduced consumer choice. If the added cost in

[250] 42 U.S.C. 4332(2)(C).

[251] 40 CFR 1508.9(b).

[252] 40 CFR 1501.4(c) & (e).

[253] As previously noted, the rate was $5.50 during reconsideration, the rate is currently $5.50, and the rate will continue to be $5.50 as a result of this final rule, rather than increasing to $14 beginning with MY 2019. Manufacturers would at no time be responsible for paying a higher civil penalty rate.

[254] Absent this final rule, the $14 rate would have gone into effect beginning with model year 2019.

[255] NHTSA adjusted this penalty to a maximum of $40,000 in its July 2016 IFR. Applying 1.01636 multiplier for 2017 inflationary adjustments, as specified in OMB's December 16, 2016 guidance, results in an adjusted maximum penalty of $40,654. Applying the multiplier for 2018 of 1.02041, as specified in OMB's December 15, 2017, results in an adjusted maximum penalty of $41,484. Applying the multiplier for 2019 of 1.02522, as specified in OMB's December 14, 2018, results in an adjusted maximum penalty of $42,530.

[256] IPI Comment, at 10; Attorneys General Comment, at 19.

civil penalty payments is passed on to the consumer, the consumer would see higher vehicle purchase costs without a corresponding fuel economy benefit or other benefits, resulting in fewer purchases of newer, more fuel-efficient vehicles. Based on the foregoing, NHTSA believes that the levels of compliance with the applicable fuel economy targets for each of the alternatives under consideration in this notice could result, at most, in relatively small differences in levels of compliance with the applicable fuel economy targets.

An increase in a motor vehicle's fuel economy is associated with reductions in fuel consumption and greenhouse gas (GHG) emissions for an equivalent distance of travel. Increased global GHG emissions are associated with climate change, which includes increasing average global temperatures, rising sea levels, changing precipitation patterns, increasing intensity of severe weather events, and increasing impacts on water resources. These, in turn, could affect human health and safety, infrastructure, food and water supplies, and natural ecosystems. Fewer GHG emissions would reduce the likelihood of these impacts. Changes in motor vehicle fuel economy are also associated with impacts on criteria and hazardous air pollutant emissions, safety, life-cycle environmental impacts, and more.

As part of recent rulemaking actions establishing CAFE standards, NHTSA evaluated the impacts of increasing fuel economy standards for passenger cars and light trucks on these and other environmental impact areas.[257] The analyses assumed a civil monetary penalty of $5.50 per each tenth of a mile per gallon. The agency has considered the information and trends presented in those Final Environmental Impact Statements (Final EISs). For example, the MY 2017–2025 CAFE EIS showed that the large stringency increases in the fuel economy standards as a result of that rulemaking would result in reductions of global mean surface temperature increases of no more than 0.016 °C by 2100. Further, that EIS showed those fuel economy standards resulting in modest nationwide reductions in most criteria pollutant emissions in 2040 (usually in ranges of 10% or less) and small increases or reductions in most toxic pollutant emissions in 2040 (usually in ranges of 3% or less). NHTSA believes the impacts on fuel economy resulting from this action would be very small compared to the impacts on fuel economy resulting from the stringency increases that were reported in those EISs. In fact, one commenter used NHTSA's CAFE Model from its most recent CAFE stringency rulemaking to approximate the potential impact on compliance.[258] That commenter concluded that, compared to a $14 rate, the $5.50 rate would ''cause average passenger car fuel economy to drop almost 5 mpg [in the year 2032], from a baseline scenario of 54.75 mpg to 49.75 mpg. . . . For the total fleet, the expected increased fuel consumption amounts to 54 billion gallons between 2017 and 2032.'' [259] In the MY 2017–2025 CAFE EIS, the final rule was associated with reductions in fuel consumption for calendar years 2017 through 2060 ranging from 585 billion gallons to 1,508 billion gallons, depending on the analysis. Thus, the commenter's analysis confirms that a civil penalty rate of $5.50, as compared to $14, would result in environmental impacts that are a fraction of those shown in the MY 2017–2025 CAFE EIS. Such impacts would mean global mean surface temperature increases even less than 0.016 °C by 2100, and criteria and toxic pollutant emissions changes well less than those reported in that EIS. Therefore, NHTSA anticipates that the environmental impacts resulting from any of the alternatives would be very small and consistent with, but to a much smaller degree than, the trends reported in the Final EISs associated with its stringency rulemakings.

As stated in the NPRM, NHTSA believes that the environmental impact trends reported in its recent Final EISs remain adequate and valid for purposes of this Final EA even if the particular values reported are no longer replicable due to updated assumptions and new information obtained since their publication. In fact, since the NPRM, NHTSA prepared a Draft EIS for its proposal for new CAFE standards, called the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.[260] The Draft EIS affirms NHTSA's reliance in this Final EA on its prior Final EISs as it reported similar environmental impact trends and values at a similar scale to those reported in those prior documents. NHTSA received public comments associated with the Draft EIS and is currently reviewing those comments in anticipation of issuing a Final EIS. The agency does not believe the civil penalty rate being finalized in this rulemaking will limit its ability to set ''maximum feasible'' standards pursuant to 49 U.S.C. 32902(b)(2)(B), nor will it unreasonably constrain the potential environmental outcomes associated with future rulemakings.

NHTSA is also finalizing an increase to the ''general penalty'' pursuant to the Inflation Adjustment Act. This increase is not anticipated to have impacts on the quality of the human environment. The ''general penalty'' is applicable to other violations, such as a manufacturer's failure to submit pre-model year and mid-model year reports to NHTSA on whether they will comply with the average fuel economy standards. These violations are not directly related to on-road fuel economy, and therefore the penalties are not anticipated to directly or indirectly affect fuel use or emissions.

iv. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB as described earlier in this preamble. NHTSA and DOT have also consulted with the U.S. Department of Justice and provided other Federal agencies with the opportunity to review and provide feedback on this rulemaking.

v. Conclusion

NHTSA has reviewed the information presented in this Final EA and concludes that the final rule and alternatives would have minimal impacts on the quality of the human environment. Regardless of whether a rate of $5.50 is considered no change, as compared to current law, or a reduction from a rate of $14, the environmental impacts are anticipated to be very small. Further, the change to the ''general penalty'' is not anticipated to affect on-road emissions.

vi. Finding of No Significant Impact

I have reviewed this Final EA. In determining whether this action ''significantly'' affects the quality of the human environment, I have considered 40 CFR 1508.27, in which CEQ explains that ''significantly . . . requires consideration of both context and intensity.'' In this action, the context for the environmental impacts includes localities for issues such as air pollutant emissions and the world as a whole for issues such as GHG emissions. In terms of intensity, the impacts of this rule would be spread across the entire nation or the entire world, depending on the particular environmental impact. Viewed in light of recent CAFE

[257] *See, e.g.,* NHTSA, *Final Environmental Impact Statement, Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2017–2025,* Docket No. NHTSA–2011–0056 (July 2012).

[258] IPI comment, at 11.

[259] *Id.*

[260] The Draft EIS is available on *http://www.regulations.gov,* Docket No. NHTSA–2017–0069–0178 and on NHTSA's website at *http://www.nhtsa.gov/safe.*

stringency rulemakings, the potential environmental impacts of this rule are expected to be small. Based on the Final EA, I conclude that implementation of any of the action alternatives (including the final rule) will not have a significant effect on the human environment and that a ''finding of no significant impact'' (*see* 40 CFR 1501.4(e)(1) and 1508.13) is appropriate. This statement constitutes the agency's ''finding of no significant impact,'' and an environmental impact statement will not be prepared.

6. Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Even if some MY 2019 vehicles are already being sold, compliance determinations will not be made until 2020 at the earliest, after this rule has gone into effect. Moreover, compliance determinations and penalty calculations are based on the average fuel economy of the fleet, not individual vehicles that have been sold prior to the rule going into effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702.

7. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

8. Privacy Act

Please note that anyone is able to search the electronic form of all submissions received into any of DOT's dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov.*

9. Executive Order 13771

This final rule is a deregulatory action under Executive Order 13771. Potential economic impacts are reported in Appendix A.

Appendix A

TABLE 1—PROJECTED ADDITIONAL PENALTIES UNDER AUGURAL STANDARDS IF RATE IS INCREASED

Model year	Projected penalties under $5.50 rate, central analysis (augural standards)	Projected penalties under $14 rate, sensitivity analysis (augural standards)	Difference (projected additional penalties if rate is increased)
2019	$402,661,295.97	$979,857,995.69	$577,196,699.71
2020	424,626,535.48	1,074,571,984.97	649,945,449.49
2021	296,664,715.42	858,535,520.00	561,870,804.58
2022	435,761,242.00	1,161,920,853.58	726,159,611.58
2023	493,426,421.72	1,323,396,714.35	829,970,292.63
2024	806,729,507.15	2,108,481,177.18	1,301,751,670.03
2025	1,038,128,818.83	2,695,259,330.77	1,657,130,511.93
2026	674,517,279.88	1,541,685,503.03	867,168,223.15
Total	4,572,515,816.46	11,743,709,079.56	7,171,193,263.09

Note: Projected penalties could be offset by the application of credits.

TABLE 2—PROJECTED ADDITIONAL PENALTIES UNDER PROPOSED STANDARDS IF RATE IS INCREASED

Model year	Projected penalties under $5.50 rate, central analysis (proposed standards)	Projected penalties under $14 rate, sensitivity analysis (proposed standards)	Difference (projected additional penalties if rate is increased)
2019	$505,612,917.19	$1,269,742,039.02	$764,129,121.83
2020	455,216,572.77	1,131,135,706.97	675,919,134.20
2021	302,262,154.89	704,833,149.24	402,570,994.35
2022	257,659,098.79	575,460,915.48	317,801,816.69
2023	188,672,069.76	384,423,537.48	195,751,467.72
2024	183,904,369.42	355,182,994.82	171,278,625.40
2025	165,483,877.30	312,608,273.21	147,124,395.91
2026	103,265,737.66	188,049,420.14	84,783,682.48
Total	2,162,076,797.79	4,921,436,036.37	2,759,359,238.58

Note: Projected penalties could be offset by the application of credits.

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Penalties, Rubber and rubber products, Tires.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 is revised to read as follows:

Authority: Pub. L. 101–410, 104 Stat. 890; Pub. L. 104–134, 110 Stat. 1321; Pub. L. 109–

59, 119 Stat. 1144; Pub. L. 114–74, 129 Stat. 584; Pub. L. 114–94, 129 Stat. 1312; 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

■ 2. Amend § 578.6 by revising paragraph (h) to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

* * * * *

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $42,530 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of $5.50 multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(i) Calculated under 49 U.S.C. 32904(a)(1)(A) or (B) for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(ii) Multiplied by the number of those automobiles; and

(iii) Reduced by the credits available to the manufacturer under 49 U.S.C. 32903 for the model year.

* * * * *

Issued in Washington, DC, under authority delegated in 49 CFR 1.81, 1.95, and 501.5.

Heidi R. King,

Deputy Administrator.

[FR Doc. 2019–15259 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 1511169999493–03]

RIN 0648–BF52

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Electronic Monitoring Program; Correction

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

ACTION: Final rule; correction.

SUMMARY: NMFS published a final rule on June 28, 2019, to implement an electronic monitoring (EM) program for catcher vessels in the Pacific whiting fishery and fixed gear vessels in the shorebased groundfish Individual Fishing Quota (IFQ) fishery. The final rule established an application process for interested vessel owners; performance standards for EM systems; requirements for vessel operators; a permitting process and standards for EM service providers; and requirements for processors (first receivers) for receiving and disposing of prohibited and protected species from EM trips. This action corrects the numbering of two paragraphs in the Code of Federal Regulations. These corrections are necessary so that the implementing regulations are accurate and implement the action as intended by the Pacific Fishery Management Council (Council).

DATES: This correction is effective on July 29, 2019.

FOR FURTHER INFORMATION CONTACT: Melissa Hooper, Permits and Monitoring Branch Chief, NMFS West Coast Region, phone: 206–526–4353, fax: 206–526–4461, or email: *Melissa.Hooper@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS published a final rule on June 28, 2019 (84 FR 31146), that established an EM program for the Pacific Coast groundfish fishery. That final rule is effective July 29, 2019.

Need for Correction

The June 28, 2019, final rule implemented an EM program in the Pacific Coast groundfish fishery, specifically for catcher vessels in the Pacific whiting fishery and fixed gear vessels in the shorebased groundfish IFQ fishery, and established requirements for service providers, vessel owners, vessel operators, and processors, to apply to and participate in the program. Two paragraphs in the requirements for vessel owners and operators were incorrectly numbered.

Section 660.604(h) lays out the effective dates and situations in which an EM Authorization may expire or become invalid, and how a vessel owner may apply for a new Authorization. The subordinate paragraphs should have followed in order (h)(1), (2), and (3). But paragraph (h)(3) was inadvertently numbered (h)(2)(iii). In order to clarify the order of the paragraphs, paragraph (h)(2)(iii) will be renumbered to (h)(3).

Section 660.604(p) lists the exceptions to the full retention requirement for Pacific whiting vessels while using EM. Two of the subordinate paragraphs were inadvertently numbered the same (p)(1)(iv). To clarify the order of the paragraphs, the final paragraph will be renumbered to (p)(1)(v).

All of these corrections are consistent with the Council action for the regulatory amendment to implement an EM program for the Pacific Coast groundfish fishery and are minor corrections necessary to correctly implement the Council's intent in their final action from April 2016.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries (AA) finds there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be unnecessary and contrary to the public interest. Notice and comment are unnecessary and contrary to the public interest because this action corrects minor and non-substantive errors in the June 28, 2019, final rule. Immediate notice of the errors and correction is necessary to prevent confusion among participants in the fishery that could result in issues with implementation of the requirements of the EM program. To effectively correct the errors, the changes in this action must be effective on July 29, 2019, which is the effective date of the June 28, 2019, final rule. Thus, there is not sufficient time for notice and comment due to the imminent effective date of the June 28, 2019, final rule. In addition, notice and comment is unnecessary because this document makes only minor changes to correct the final rule and does not change the substance of the rule. These corrections will not affect the results of analyses conducted to support management decisions in the Pacific Coast groundfish fishery.

For the same reasons stated above, the AA has determined that good cause exists to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d). This document makes only minor corrections to the final rule which will be effective July 29, 2019. Delaying effectiveness of these corrections would result in conflicts in the regulations and confusion among fishery participants. Because prior notice and an opportunity for public comment are not required to be provided for this rule by 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 not applicable. Accordingly, no Regulatory Flexibility Analysis is required for this rule and none has been prepared.

This final rule is not significant under Executive Order 12866.

Corrections

In FR Doc. 2019–13324, appearing on page 31146 in the **Federal Register** of Friday, June 28, 2019, the following corrections are made:

■ 1. On page 31166, starting at the end of the second column, § 660.604(h) is corrected to read as follows:

§ 660.604 [Corrected]

* * * * *

(h) *Effective dates.* (1) The EM Authorization is valid from the effective date identified on the Authorization until the expiration date of December 31. EM Authorization holders must renew annually by following the renewal process specified in paragraph (e) of this section. Failure to renew annually will result in expiration of the EM Authorization and endorsements on the Authorization expiration date.

(2) NMFS may invalidate an EM Authorization if NMFS determines that the vessel, vessel owner, and/or operator no longer meets the eligibility criteria specified at paragraph (e)(1) of this section. NMFS would first notify the vessel owner of the deficiencies in writing and the vessel owner must correct the deficiencies following the instructions provided. If the deficiencies are not resolved upon review of the first trip following the notification, NMFS will notify the vessel owner in writing that the EM Authorization is invalid and that the vessel is no longer exempt from observer coverage at §§ 660.140(h)(1)(i) and 660.150(j)(1)(i)(B) for that authorization period. The holder may reapply for an EM Authorization for the following authorization period.

(3) A vessel owner holding an expired or invalidated authorization may reapply for a new EM Authorization at any time consistent with paragraph (e) of this section.

* * * * *

■ 2. On page 31168, in the third column, § 660.604(p)(1) is corrected to read as follows:

§ 660.604 [Corrected]

* * * * *

(p) *Retention requirements*—(1) *Pacific whiting IFQ and MS/CV vessels.* The operator of a vessel on a declared limited entry midwater trawl, Pacific whiting shorebased IFQ trip or limited entry midwater trawl, Pacific whiting mothership sector (catcher vessel or mothership) trip, EM trip must retain all fish until landing, with exceptions listed in paragraphs (p)(1)(i) through (v) of this section.

(i) Minor operational discards are permitted. Minor operational discards include mutilated fish; fish vented from an overfull codend, fish spilled from the codend during preparation for transfer to the mothership; and fish removed from the deck and fishing gear during cleaning. Minor operational discards do not include discards that result when more catch is taken than is necessary to fill the hold or catch from a tow that is not delivered.

(ii) Large individual marine organisms (*i.e.,* all marine mammals, sea turtles, and seabirds, and fish species longer than 6 ft (1.8 m) in length) may be discarded.

(iii) Crabs, starfish, coral, sponges, and other invertebrates may be discarded.

(iv) Trash, mud, rocks, and other inorganic debris may be discarded.

(v) A discard that is the result of an event that is beyond the control of the vessel operator or crew, such as a safety issue or mechanical failure, is permitted.

* * * * *

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

Dated: July 23, 2019.

Samuel D. Rauch, III,

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

[FR Doc. 2019–15908 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 84, No. 144
Friday, July 26, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[Docket No. PRM–50–117; NRC–2019–0063]

Criteria To Return Retired Nuclear Power Reactors to Operations

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of docketing and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) received a petition for rulemaking from Mr. George Berka (the petitioner), dated December 26, 2018, requesting that the NRC amend its regulations to establish criteria to return retired nuclear power reactors to operations. The petition was docketed by the NRC on February 19, 2019 and has been assigned Docket No. PRM–50–117. The NRC is examining the merits of the issues raised in PRM–50–117 to determine whether the issues should be considered in rulemaking. The NRC is requesting public comment on this petition at this time.

DATES: Submit comments by October 9, 2019. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0063. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ilka Berrios, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2404, email: *Ilka.Berrios@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0063 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 *https://www.regulations.gov* and search for Docket ID NRC–2019–0063.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2019–0063 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. The Petitioner and Petition

The petition for rulemaking (PRM) was filed by George Berka, a private citizen. The petitioner is requesting that the NRC revise part 52 of title 10 of the *Code of Federal Regulations* (10 CFR) to establish criteria that would allow retired nuclear power reactors return to operation after the licensee has permanently ceased operations and permanently removed fuel from the reactor vessel, or when a final legally effective order to permanently cease operations has come into effect. In sum, the petitioner requests ''a fair, reasonable, and unobstructed opportunity to return a retired facility to full operational status, even if the operating license for the facility had previously been surrendered.'' The petitioner requests that the facility ''only have to meet the safety the standards that had been in place at the time the facility had last operated, and not the latest license standards.'' The petition may be found in ADAMS under Accession No. ML19050A507.

III. Discussion of the Petition

The petitioner requests that the NRC revise its regulations in 10 CFR part 52 to establish criteria to allow a retired nuclear power reactor to return to operations without meeting the latest

safety standards, but rather those standards in place at the time the facility had last operated. The petitioner requests that a nuclear power reactor be allowed to return to operational status if ''the facility had been in an operational condition at the time of retirement, had last operated no more than twenty-one (21) calendar years prior to the date of retirement,'' the facility ''remains intact,'' and the facility passes a ''general safety inspection.'' Alternatively, if the nuclear power reactor ''had not been in an operational condition at the time of retirement, had last operated more than twenty-one (21) calendar years prior to the retirement date, is not intact, and/or has had significant decommissioning and/or dismantling activities commence,'' then the nuclear power reactor must be repaired or rebuilt ''to the safety in standards that had been in place at the time the facility had last operated,'' and pass a safety inspection ''appropriate to the degree of repairs or reconstruction that had been performed,'' which would be, ''[a]t the very least . . . a general safety inspection.''

The petitioner states that this proposal would be '' 'pennies on the dollar,' compared to building new nuclear, or trying to replace the same capacity with wind or solar sources.'' The petitioner also states that through this proposal, ''several gigawatts of ultra-clean, and very low-carbon, electrical generating capacity could be restored to the electrical grid, which would help to reduce carbon dioxide levels in the atmosphere.'' The petitioner provides a calculation comparing the cost and time of the proposal to the cost and time required for replacing similar electrical generating capacity with renewables or new nuclear builds. The petitioner references the Clean Air Act, 42 U.S.C. 7401 *et seq.,* and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.,* to support the petitioner's climate change statements regarding reducing carbon dioxide emissions.

IV. Conclusion

The NRC has determined that the petition meets the threshold sufficiency requirements for docketing a petition for rulemaking under 10 CFR 2.803. The NRC is examining the merits of the issues raised in PRM–50–117 to determine whether these issues should be considered in rulemaking.

Dated at Rockville, Maryland, this 23rd day of July 2019.

For the Nuclear Regulatory Commission.

Richard J. Laufer,

Acting Secretary of the Commission.

[FR Doc. 2019–15934 Filed 7–25–19; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE–2017–BT–STD–0062]

RIN 1904–AD38

Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of data availability.

SUMMARY: The U.S. Department of Energy (DOE) is announcing this notice of data availability (''NODA'') regarding national energy savings estimates in past DOE energy conservation standards rulemakings. These data will help inform DOE's decision-making process as it considers whether to establish a significant energy savings threshold for setting energy conservation standards for consumer products and commercial and industrial equipment. DOE is seeking comment on these data.

DATES: Written comments and information are requested and will be accepted on or before August 9, 2019.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2017–BT–STD–0062, by any of the following methods:

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

2. *Email:* To *Process.Rule@ee.doe.gov.* Include EERE–2017–BT–STD–0062 in the subject line of the message.

3. *Postal Mail:* Ms. Sofie Miller, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Room 6A–013, Washington, DC 20585. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Sofie Miller, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–5000. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section III of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *https://www.regulations.gov/docket?D=EERE-2017-BT-STD-0062.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section III (Submission of Comments) for information on how to submit comments through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Ms. Sofie Miller, Senior Advisor, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–5000. Email: *Process.Rule@ee.doe.gov.*

Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–7432. Email: *Francine.Pinto@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

DOE generally uses the procedures set forth in 10 CFR part 430, subpart C, appendix A, *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products* (''Process Rule'') when prescribing energy conservation standards for both consumer products and commercial/industrial equipment pursuant to the Energy Policy and Conservation Act of 1975 (Pub. L. 94–163, codified at 42 U.S.C. 6291, *et seq.*) (''EPCA''). On February 13, 2019, DOE published a notice of proposed rulemaking (''NOPR'') to update and

modernize the Process Rule (''Process Rule NOPR''). 84 FR 3910. As part of the update, DOE is proposing to define an energy savings threshold to satisfy the requirement in EPCA that a new or amended energy conservation standard must result in a significant conservation of energy. (*See* 42 U.S.C. 6295(o)(3)(B)) Specifically, DOE is proposing to apply a threshold of 0.5 quad in energy savings or a 10% reduction in energy consumption over a 30-year analysis period to satisfy this requirement.

In proposing these thresholds, DOE took into consideration national energy savings estimates from past energy conservation standards rulemakings. 84 FR 3910, 3923 (Feb. 13, 2019). As a result of comments provided at two public meetings [1] DOE held on the proposal, DOE has subsequently determined that the national energy savings data from the 57 energy conservation standards rulemakings mentioned in the NOPR are a mixture of source and full-fuel-cycle energy savings. Since publication of the Process Rule NOPR, DOE has re-examined its use of source and full-fuel-cycle energy savings data in proposing a threshold for significant conservation of energy in order to provide a consistent accounting across rulemakings. Because EPCA uses a household energy consumption metric as a threshold for setting standards for new covered products (42 U.S.C. 6295(l)(1)), DOE believes that site energy would be the most appropriate metric for evaluating energy savings across rulemakings. As a result, DOE is providing national site energy savings data from its past rulemakings for public comment as it will help inform DOE's decision regarding whether (and how) to define a threshold for significant energy savings.

DOE notes that the rules reported and the data analyzed in the information provided with this NODA are identical to those provided with DOE's original proposal and discussed at the public meeting. However, DOE has now restated the results of each rulemaking on a site energy basis for the purpose of making an ''apples-to-apples'' comparison of the results of each rulemaking using the statutorily-required measure for setting energy conservation standards. DOE is not at this time making any determination regarding whether the use of full-fuel-cycle energy measures are an appropriate measure of the benefits of any prior rulemaking.

II. Site National Energy Savings From Prior DOE Rulemakings

As discussed in the Process Rule NOPR, DOE focused its analysis of national energy savings on energy conservation standards rulemakings conducted starting after the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355 (D.C. Cir. 1985) through a final rule establishing energy conservation standards for walk-in coolers and freezers on July 10, 2017. 84 FR 3910, 3923 (Feb. 13, 2019). After excluding instances where DOE set no-standard standards or adopted standard levels from the American National Standards Institute (''ANSI'')/American Society of Heating, Refrigerating, and Air-Conditioning Engineers (''ASHRAE'')/ Illuminating Engineering Society of North America (''IESNA'') Standard 90.1 (''ASHRAE Standard 90.1''), DOE set standards for covered products and equipment a total of 57 times. These 57 rules are listed in a document available in the docket at *https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0144.*

The document lists, among others things, the analysis period for each rule, the national site energy savings over the analysis period (converted as necessary from source energy savings estimates [2]), and the corresponding percentage reduction in energy use over the analysis period. In total, the 57 rules resulted in national site energy savings of 54.64 quads.[3] The average national site energy savings for these rules is 0.959 quad, while the median is 0.32 quad. The average percent reduction in national site energy use for these rules is 13.1%, while the median is 8.0%. Table II.1 contains the results of applying a variety of significant energy savings thresholds to these 57 rules.

TABLE II.1—APPLICATION OF VARIOUS SIGNIFICANT ENERGY SAVINGS THRESHOLDS

Significant energy savings threshold	No additional percentage threshold	10% Reduction in energy use over analysis period	7.5% Reduction in energy use over analysis period	5% Reduction in energy use over analysis period
1.00 Quad	21 of 57 rules meet this threshold for significance. These 21 rules account for 83.77% of the total energy savings from the 57 rules.	32 of 57 rules meet this threshold for significance. These 32 rules account for 90.71% of the total energy savings from the 57 rules.	35 of 57 rules meet this threshold for significance. These 35 rules account for 91.47% of the total energy savings from the 57 rules.	41 of 57 rules meet this threshold for significance. These 41 rules account for 94.77% of the total energy savings from the 57 rules.
0.75 Quad	24 of 57 rules meet this threshold for significance. These 24 rules account for 88.55% of the total energy savings from the 57 rules.	34 of 57 rules meet this threshold for significance. These 34 rules account for 93.87% of the total energy savings from the 57 rules.	37 of 57 rules meet this threshold for significance. These 37 rules account for 94.64% of the total energy savings from the 57 rules.	42 of 57 rules meet this threshold for significance. These 42 rules account for 96.29% of the total energy savings from the 57 rules.
0.50 Quad	26 of 57 rules meet this threshold for significance. These 26 rules account for 90.89% of the total energy savings from the 57 rules.	34 of 57 rules meet this threshold for significance. These 34 rules account for 93.87% of the total energy savings from the 57 rules.	37 of 57 rules meet this threshold for significance. These 37 rules account for 94.64% of the total energy savings from the 57 rules.	42 of 57 rules meet this threshold for significance. These 42 rules account for 96.29% of the total energy savings from the 57 rules.
0.40 Quad	27 of 57 rules meet this threshold for significance. These 27 rules account for 91.71% of the total energy savings from the 57 rules.	34 of 57 rules meet this threshold for significance. These 34 rules account for 93.87% of the total energy savings from the 57 rules.	37 of 57 rules meet this threshold for significance. These 37 rules account for 94.64% of the total energy savings from the 57 rules.	42 of 57 rules meet this threshold for significance. These 42 rules account for 96.29% of the total energy savings from the 57 rules.
0.30 Quad	31 of 57 rules meet this threshold for significance. These 31 rules account for 94.09% of the total energy savings from the 57 rules.	36 of 57 rules meet this threshold for significance. These 36 rules account for 95.01% of the total energy savings from the 57 rules.	39 of 57 rules meet this threshold for significance. These 39 rules account for 95.77% of the total energy savings from the 57 rules.	43 of 57 rules meet this threshold for significance. These 43 rules account for 96.84% of the total energy savings from the 57 rules.

[1] DOE convened public meetings to discuss the Process Rule NOPR on March 21, 2019 and April 11, 2019.

[2] For rules prior to 2001, the national site energy savings were not reported. For these rules, the national site energy savings are estimated using a single average national site-to-source energy savings multiplier of 2.78 for electricity, 1.09 for gas, or an average of the two for rules with mixed fuels. For all other rules, the national site energy savings are available in the technical support documents and/or the analytical tools.

[3] Six of the rules listed in the table identify a range of energy savings. For the purposes of this NODA, DOE assumes the maximum value for the energy savings in each of these six rules.

TABLE II.1—APPLICATION OF VARIOUS SIGNIFICANT ENERGY SAVINGS THRESHOLDS—Continued

Significant energy savings threshold	No additional percentage threshold	10% Reduction in energy use over analysis period	7.5% Reduction in energy use over analysis period	5% Reduction in energy use over analysis period
0.25 Quad	34 of 57 rules meet this threshold for significance. These 34 rules account for 95.61% of the total energy savings from the 57 rules.	38 of 57 rules meet this threshold for significance. These 38 rules account for 96.07% of the total energy savings from the 57 rules.	40 of 57 rules meet this threshold for significance. These 40 rules account for 96.30% of the total energy savings from the 57 rules.	43 of 57 rules meet this threshold for significance. These 43 rules account for 96.84% of the total energy savings from the 57 rules.
0.20 Quad	37 of 57 rules meet this threshold for significance. These 37 rules account for 96.78% of the total energy savings from the 57 rules.	41 of 57 rules meet this threshold for significance. These 41 rules account for 97.24% of the total energy savings from the 57 rules.	43 of 57 rules meet this threshold for significance. These 43 rules account for 97.48% of the total energy savings from the 57 rules.	46 of 57 rules meet this threshold for significance. These 46 rules account for 98.01% of the total energy savings from the 57 rules.
0.10 Quad	45 of 57 rules meet this threshold for significance. These 45 rules account for 98.93% of the total energy savings from the 57 rules.	49 of 57 rules meet this threshold for significance. These 49 rules account for 99.39% of the total energy savings from the 57 rules.	51 of 57 rules meet this threshold for significance. These 51 rules account for 99.62% of the total energy savings from the 57 rules.	52 of 57 rules meet this threshold for significance. These 52 rules account for 99.70% of the total energy savings from the 57 rules.

DOE seeks comment on the data presented in the docket and in Table II.1.

III. Submission of Comments

DOE invites all interested parties to submit in writing by the date listed in the **DATES** section at the beginning of this document, comments and information on matters addressed in this notice and on other matters relevant to DOE's consideration of the data related to this NODA. These comments and information will aid in DOE's decision with respect to its consideration of potentially setting a threshold for significant energy savings.

Submitting comments via http://www.regulations.gov. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not contain special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the

information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of the process for developing test procedures and energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the rulemaking process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this process should contact Appliance and Equipment Standards Program staff at (202) 287–1445 or via email at *Process.Rule@ee.doe.gov.*

Signed in Washington, DC, on July 22, 2019.

Daniel R. Simmons,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2019–15916 Filed 7–25–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF STATE

22 CFR Parts 120, 121, 122, 123, 124, 125, 126, 127, 128, 129 and 130

[Public Notice: 10799]

RIN 1400–AE29

Consolidation of Exemptions in the International Traffic in Arms Regulations

AGENCY: Department of State.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: As part of an ongoing effort to better organize the International Traffic in Arms Regulations (ITAR), the Directorate of Defense Trade Controls (DDTC) seeks public comment on consolidating and clarifying the various exemptions located throughout the regulations. DDTC does not seek input on whether individual exemptions in the ITAR should be expanded or eliminated, but rather requests comments regarding: Which exemptions, if any, are redundant or could be consolidated; and which exemptions, if any, contain language that introduces significant ambiguity or hinders the exemption's intended use.

DATES: The Department of State will accept comments in response to this notice until August 26, 2019.

ADDRESSES: Interested parties may submit comments by one of the following methods:

- *Email: DDTCPublicComments@state.gov* with the subject line, ''Request for Comments Regarding Consolidation of ITAR Exemptions.''
- *Internet:* At *www.regulations.gov,* search for this notice using its docket number, DOS–2019–0022.

Comments submitted through *www.regulations.gov* will be visible to other members of the public; the Department will publish responsive comments on the DDTC website (*www.pmddtc.state.gov*). Therefore, commenters are cautioned not to include proprietary or other sensitive information in their comments.

FOR FURTHER INFORMATION CONTACT: John Foster, Regulatory and Multilateral Affairs, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–2811 email *DDTCResponseTeam@state.gov.* ATTN: Consolidation of ITAR Exemptions.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC) of the Department of State regulates the export and temporary import of defense articles and services under the Arms Export Control Act (AECA) and its implementing regulations, the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). DDTC is engaged in an ongoing effort to organize the ITAR more effectively in order to further streamline and clarify the subchapter. As part of that effort, DDTC seeks public comment on various exemptions located throughout the ITAR. Exemptions authorize the export, reexport, retransfer, temporary import, or brokering of a specific defense article or defense service without a license (as defined in the ITAR) or other written authorization.

DDTC does not seek to broaden or eliminate (unless determined to be redundant) existing exemptions in a rulemaking on this issue. Instead, its goal is to consolidate the various exemptions located throughout the ITAR in a single location and to organize them more effectively. All commenters are encouraged to provide comments that are responsive specifically to the prompts set forth below.

The Department requests comment on the topics below. Excluding the exemptions currently located in Part 126 of the ITAR:

1. Which exemptions, if any, are redundant or could be consolidated?

2. Which exemptions, if any, contain language that introduces significant ambiguity or hinders the exemption's intended use?

If the Department issues a notice of proposed rulemaking on this topic, it will address responsive comments at that time.

R. Clarke Cooper,

Assistant Secretary, Political-Military Affairs, Department of State.

[FR Doc. 2019–15540 Filed 7–25–19; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 170

[190D0102 DRDS5A300000DR.5A311.IA000118]

RIN 1076–AF45

Tribal Transportation Program; Inventory of Proposed Roads

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is proposing a change to a provision in the Tribal Transportation Program regulations affecting proposed roads that are currently in the National Tribal Transportation Facility Inventory (NTTFI). Specifically, this proposed rule would delete the requirement for Tribes to collect and submit certain data in order to keep those proposed roads in the NTTFI. The requirement to collect and submit data to add new proposed roads to the NTTFI would remain in place.

DATES: Comments are due by September 24, 2019.

ADDRESSES: You may send comments, identified by number 1076–AF45, by any of the following methods:

—*Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for sending comments.

—*Email: comments@bia.gov.* Include the number 1076–AF45 in the subject line of the message.

—*Mail or hand-delivery:* Elizabeth Appel, Office of Regulatory Affairs &

Collaborative Action, U.S. Department of the Interior, 1849 C Street NW, MIB–4660–MS, Washington, DC 20240. Include the number 1076–AF45 in the subject line of the message.

Instructions: All submissions received must include ''Bureau of Indian Affairs'' and ''1076–AF45.'' All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for this rulemaking and considered.

Comments on the information collections contained in this proposed regulation (see ''Paperwork Reduction Act'' section, below) are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395–5806 or email to the OMB Desk Officer for the Department of the Interior at *OIRA_DOCKET@omb.eop.gov.* Please send a copy of your comments to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. LeRoy Gishi, Division of Transportation, Office of Indian Services, Bureau of Indian Affairs, (202) 513–7711, *leroy.gishi@bia.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of Rule

Regulations governing the Tribal Transportation Program were published in 2016. *See* 81 FR 78456 (November 7, 2016). The regulations became effective on December 7, 2016, except for § 170.443, which required Tribes' compliance one year later: On November 7, 2017. Section 170.443 required Tribes to collect data for proposed roads to be added to, or remain in, the NTTFI. BIA then further delayed the November 7, 2017, deadline for compliance with § 170.443 to November 7, 2019. *See* 82 FR 50312 (October 31, 2017), 83 FR 8609 (February 28, 2018). The purpose of the delay was to provide BIA with time to reexamine whether revision or deletion of the data collection requirements in § 170.443 would be appropriate. Since that time, BIA staff have engaged in outreach at several regional and national meetings with affected Tribes. BIA is now proposing to apply the data collection requirements going forward to any new proposed road submission, but not to proposed roads that were already in the NTTFI as of the date of publication of the regulations on November 7, 2016, unless any changes or updates were or are made after that date. BIA is making this proposal because Tribes added the proposed roads to the NTTFI under the rules that were in effect at the time, which did not require the significant data collection. Moving forward, however, BIA would require that new proposed roads include the back-up documentation identified by § 170.443 (a)(1)–(8) in order to be added to the NTTFI.

II. Tribal Consultation

We will be hosting the following Tribal consultation sessions at targeted locations throughout the country to discuss this proposed rule. The dates and locations for the consultation sessions are as follows:

Date	Time	Location
September 5, 2019	9:00 a.m.–12:00 (Local time)	Minneapolis, MN.
September 10, 2019	9:00 a.m.–12:00 (Local time)	Anchorage, AK.
September 12, 2019	9:00 a.m.–12:00 (Local time)	Denver, CO.

Please check the BIA's Consultations website, *https://www.bia.gov/as-ia/consultations,* for the most current consultation information.

III. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities and control regulatory costs. E.O. 13771, however, applies only to significant regulatory actions, as defined in Section 3(f) of E.O. 12866. Therefore, E.O. 13771 does not apply to this proposed rule.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of $100 million or more because it merely codifies eligibility requirements that were already established by past practice and a Federal District Court ruling.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only individuals' eligibility for certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects agreements between Tribes and the Department to allow Tribes to authorize individual leases, business agreements, and rights-of-way on Tribal land.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a monetarily significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable ''taking.'' A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only agreements entered into by Tribes and the Department. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because the rule affects what proposed roads will remain on the inventory of Tribal transportation facilities. The Department is hosting consultation sessions with Tribes (see ''II. Tribal Consultation'' above) and will be individually notifying each federally recognized Tribe of these opportunities to consult.

I. Paperwork Reduction Act

OMB Control No. 1076–0161 currently authorizes the collections of information contained in 25 CFR part 170, with an expiration of September 30, 2019. The current authorization totaling an estimated 23,446 annual burden hours. If this proposed rule is finalized, the annual burden hours will decrease by an estimated 2,520 hours. This decrease is due to the elimination of the requirement for Tribes to provide information on proposed roads that are already included on the inventory. This change would require a revision to an approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* for which the Department is requesting OMB approval.

OMB Control Number: 1076–0161.

Title: Tribal Transportation Program, 25 CFR 170.

Brief Description of Collection: The information submitted by Tribes allows them to participate in planning the development of transportation needs in their area; the information provides data for administration, documenting plans, and for oversight of the program by the Department. Some of the information such as the providing inventory updates (25 CFR 170.444), the development of a long range transportation plan (25 CFR 170.411 and 170.412), the development of a Tribal transportation improvement program (25 CFR 170.421), and annual report (25 CFR 170.420) are mandatory to determine how funds will allocated to implement the Tribal Transportation Program. Some of the information, such as public hearing requirements, is necessary for public notification and involvement (25 CFR 170.437 and 170.438), while other information, such as a request for exception from design standards (25 CFR 170.456), is voluntary. The revision accounts for updates made to § 170.443, removing the requirement to provide information for proposed roads that existed in the inventory as of November 7, 2016.

Type of Review: Revision of a currently approved collection.

Respondents: Federally recognized Indian Tribes.

Number of Respondents: 281 on average (each year).

Number of Responses: 1,504 on average (each year).

Frequency of Response: On occasion.

Estimated Time per Response: Varies from 0.5 hours to 40 hours.

Estimated Total Annual Hour Burden: 20,928 hours.

OMB Control No. 1076–0161 currently authorizes the collections of information contained in 25 CFR part 170. If this proposed rule is finalized, the annual burden hours for respondents will decrease by approximately 2,520 hours because Tribes will no longer be required to provide information that they would have been required to submit under the current estimates.

The recordkeeping requirements contained in section 170.472 are authorized under OMB Control No. 1076–0136, applicable to self-determination and self-governance contracts and compacts under 25 CFR 900 and 1000.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it displays a valid OMB Control Number.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

L. Clarity of this Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and,

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 25 CFR Part 170

Highways and roads, Indians-lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to amend 25 CFR part 170 as follows:

PART 170—TRIBAL TRANSPORATION PROGRAM

■ 1. The authority citation for part 170 continues to read as follows:

Pub. L. 112–141, Pub. L. 114–94; 5 U.S.C. 2; 23 U.S.C. 201, 202; 25 U.S.C. 2, 9.

■ 2. In § 170.443, revise paragraph (b) to read as follows:

§ 170.443 What is required to successfully include a proposed transportation facility in the NTTFI?

(a) * * *

(b) For those proposed roads that were included in the NTTFI as of November 7, 2016, the information in paragraphs (a)(1) through (a)(8) of this section may be submitted for approval to BIA and FHWA at any time, but is not required in order for those proposed roads to remain in the NTTFI, unless any changes or updates to the proposed road were (or are) made after that date.

Dated: July 3, 2019.

John Tahsuda,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2019–15928 Filed 7–25–19; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0565]

RIN 1625–AA00

Safety Zone; Charleston Harbor, Charleston, SC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary moving safety zone around the USS LA JOLLA as the vessel is towed to Joint Base Charleston, Charleston, SC. This action is necessary to provide for the safety of life on these navigable waters in Charleston Harbor, Charleston, SC on September 3, 2019. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Charleston or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before August 26, 2019.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0565 using the Federal eRulemaking Portal at *https://www.regulations.gov.* 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 about this proposed rulemaking, call or email Lieutenant Chad Ray, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843) 740–3184, email *Chad.L.Ray@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

On May 1, 2019, the United States Navy (USN) notified the Coast Guard that it would be towing the USS LA JOLLA into Charleston Harbor, to the vessel's new berth at Joint Base Charleston, as a Moored Training Ship for the USN's Nuclear Power Training Unit on September 3, 2019. The Captain of the Port Charleston (COTP) has determined a 200-yard safety zone is required for the safe transit of the towing vessel and USS LA JOLLA.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within a 200-yard radius of the towing vessel and USS LA JOLLA during their transit to Joint Base Charleston on the Cooper River. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The COTP is proposing to establish a temporary moving safety zone around the USS LA JOLLA on September 3, 2019 from 6:00 a.m. until 6:00 p.m. The safety zone would cover all navigable waters within 200 yards of the USS LA JOLLA and towing vessel. The duration of the zone is intended to ensure the safety of the towing vessel and the USS LA JOLLA during their transit to Joint Base Charleston on the Cooper River. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed 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 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 of the safety zone. Vessel traffic would be able to safely transit around this safety zone or wait for the USS LA JOLLA to pass. Because this is a moving safety zone, it would impact a small designated area of the Charleston Harbor for a short period of time. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

This proposed rule would 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 proposed 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 would 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 Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), 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 a moving safety zone lasting approximately 12 hours that would prohibit entry within 200 yards of the USS LA JOLLA. Normally such actions are categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures 5090.1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://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 *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *https://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 *https://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 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 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, 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.T07–0565 to read as follows:

§ 165.T07–0565 Safety Zone; Charleston Harbor, Charleston, SC.

(a) *Location.* The following area is a safety zone: The waters of Charleston Harbor, from surface to bottom, encompassed by a 200-yard radius around the towing vessel and USS LA JOLLA, commencing when the vessels reach Charleston Entrance Lighted Buoy ''C'' and terminating when the vessels reach Wharf A at Joint Base Charleston in the Cooper River.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a federal, state, and local officer designated by or assisting the Captain of the Port Charleston (COTP) in the enforcement of the safety zone.

(c) *Regulations.*

(1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by contacting Sector Charleston on VHF–FM Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 6 a.m. to 6 p.m. on September 3, 2019.

Dated: July 19, 2019.

John W. Reed,

Captain, U.S. Coast Guard Captain of the Port, Charleston.

[FR Doc. 2019–15885 Filed 7–25–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R10–UST–2019–0191; 9996–68–Region 10]

Oregon: Final Approval of State Underground Storage Tank Program Revisions, Codification, and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the State of Oregon's Underground Storage Tank (UST) program submitted by the State. This action is based on EPA's determination that the State's revisions satisfy all requirements for UST program approval. This action also proposes to codify Oregon's State program as revised by Oregon and approved by the EPA and to incorporate by reference the State regulations that we have determined meet the requirements for approval. The State's federally-authorized and codified UST program, as revised pursuant to this action, will remain subject to the EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA Subtitle I and other applicable statutory and regulatory provisions.

DATES: Send written comments by August 26, 2019.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.

2. *Email: wilder.scott@epa.gov.*

3. *Mail:* Scott Wilder, Enforcement and Compliance Assurance Division (ECAD 20–C04) EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, Washington 98101.

4. *Hand Delivery or Courier:* Deliver your comments to Scott Wilder, Enforcement and Compliance Assurance Division (ECAD 20–C04), EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, Washington 98101.

Instructions: Direct your comments to Docket ID No. EPA–R10–UST–2019–0191. The EPA's policy is that all comments received will be included in the public docket without change and may be available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or email. The Federal *http://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* then your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, then the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, then the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this action and associated publicly available materials from 8:30 a.m. to 4:00 p.m. Monday through Friday at the following location: EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, phone number (206) 553–6693. Interested persons wanting to examine these documents should make an appointment with the office at least 2 days in advance.

FOR FURTHER INFORMATION CONTACT: Scott Wilder, (206) 553–6693, Region 10, Enforcement and Compliance Assurance Agreement, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, email address: *wilder.scott@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Authority: This rule is issued under the authority of Sections 2002(a), 9004, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Dated: June 27, 2019.

Chris Hladick,

Regional Administrator, EPA Region 10.

[FR Doc. 2019–15310 Filed 7–25–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 190514453–9453–01]

RIN 0648–XH043

Fisheries of the Northeastern United States; Summer Flounder, Scup, Black Sea Bass, and Atlantic Bluefish Fisheries; 2020–2021 Specifications

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2020 specifications for the summer flounder, scup, black sea bass, and bluefish fisheries and projects 2021 summer flounder specifications. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan and the Atlantic Bluefish Fishery Management Plan require us to publish specifications for the upcoming fishing year for each of these species and to provide an opportunity for public comment. This action is intended to inform the public of the proposed specifications for the start of the 2020 fishing year for these four species and announces the projected 2021 summer flounder specifications.

DATES: Comments must be received on or before August 26, 2019.

ADDRESSES: An environmental assessment (EA) for the summer flounder specifications was prepared for this action that describes the proposed measures and other considered alternatives, and provides an analysis of the impacts of the proposed measures and alternatives. A Supplemental Information Report (SIR) was prepared for the scup, black sea bass, and bluefish specifications. Copies of the EA and SIR, are available on request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The EA is also accessible via the internet at *http://www.mafmc.org/s/SF_2020-2021_specs_EA.pdf.*

You may submit comments on this document, identified by NOAA–NMFS–2019–0067, by either of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0067,*

2. Click the ''Comment Now!'' icon, complete the required fields, and

3. Enter or attach your comments.

-OR-

Mail: Submit written comments to Michael Pentony, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on the Proposed Rule for the Summer Flounder, Scup, Black Sea Bass, and Bluefish Specifications.''

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Emily Gilbert, Fishery Policy Analyst, (978) 281–9244.

SUPPLEMENTARY INFORMATION:

General Background

The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission) cooperatively manage the summer flounder, scup, black sea bass, and bluefish fisheries. The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) and Atlantic Bluefish FMP outline the Council's process for establishing specifications. The FMPs require the specification of the acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quotas, recreational harvest limit, and other management measures, for up to three years at a time. This action proposes summer flounder specifications for the 2020–2021 fishing years and also proposes interim scup, black sea bass, and bluefish 2020 specifications that will be replaced in early 2020 following the results of an operational assessment for all three species. These specifications are consistent with the recommendations made by the Commission and Council at the March 2019 joint meeting.

Proposed Interim 2020 Scup, Black Sea Bass, and Bluefish Specifications

There is no regulatory mechanism to roll over catch and landings limits from one year to the next in these FMPs, so this action is required to set these limits for the start of 2020. This action proposes maintaining the same 2019 specifications for the start of the 2020 fishing year (Table 1), consistent with the Council's Scientific and Statistical Committee (SSC) recommendations and the recommendations of the Council and Boards. These catch limits are expected to be in place for the first few months of 2020 and will be revised as soon as possible following the results of the forthcoming operation assessment for all three species. The results of the assessment will be available in September 2019. The Council and Boards plan on recommending revised 2020 and considering 2021 specifications for all three species at a joint October 2019 meeting.

Prior to the start of the 2020 fishing year, we will announce if any adjustments need to be made to account for any previous overages or, in the case of bluefish, any commercial/recreational sector transfers. The initial commercial scup quota allocations for 2020 by quota period are outlined in Table 2.

TABLE 1—PROPOSED INTERIM 2020 SPECIFICATIONS FOR SCUP, BLACK SEA BASS, AND BLUEFISH

	Scup		Black Sea Bass		Bluefish	
	million lb	mt	million lb	mt	million lb	mt
Overfishing Limit (OFL)	41.03	18,612	10.29	4,667	29.97	12,688
ABC	36.43	16,525	8.94	4,055	21.81	9,895

TABLE 1—PROPOSED INTERIM 2020 SPECIFICATIONS FOR SCUP, BLACK SEA BASS, AND BLUEFISH—Continued

	Scup		Black Sea Bass		Bluefish	
	million lb	mt	million lb	mt	million lb	mt
ACL	36.43	16,525	8.94	4,055	21.81	9,895
Commercial ACL	28.42	12,890	4.35	1,974		
ACT	28.42	12,890	4.35	1,974	3.71	1,682
Commercial Quota	23.98	10,879	3.52	1,596	7.71	3,497
Recreational ACL	8.01	3,636	4.59	2,083		
Recreational ACT	8.01	3,636	4.59	2,083	18.11	8,213
Recreational Harvest Limit	7.37	3,342	3.66	1,661	11.62	5,271

TABLE 2—INITIAL COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2020 BY QUOTA PERIOD

Quota period	Percent share	lb	mt
Winter I	45.11	10,820,000	4,908
Summer	38.95	9,340,986	4,237
Winter II	15.94	3,822,816	1,734
Total	100.0	23,983,802	10,879

Note: Metric tons are as converted from lb and may not necessarily total due to rounding.

Proposed 2020–2021 Summer Flounder Specifications

In February 2019, the final peer review and assessment results from the 66th Stock Assessment Workshop/Stock Assessment Review Committee (SAW/SARC 66) became available. This assessment incorporated revised MRIP estimates of recreational catch, which has an important impact on estimated spawning stock biomass for summer flounder. Based on the results of this benchmark assessment, the summer flounder stock is not overfished, and overfishing is not occurring.

The Council's SSC and the Summer Flounder Monitoring Committee (MC) met in late February 2019 to make recommendations to the Council for revised catch and landings limits for 2019 through 2021 based on the assessment information. Due to the need to implement revised 2019 specifications as soon as possible, we published an interim final rule on May 17, 2019 (84 FR 22392), adjusting the 2019 catch limits for the remainder of the 2019 fishing year. This proposed rule would implement the 2020 specifications and announce the projected 2021 specifications (Table 3). The 2020 and 2021 specifications are identical to what is currently in place for 2019.

Table 4 outlines the initial 2020 state-by-state summer flounder allocations. Prior to the start of each fishing year, we will announce any adjustments necessary to address any long-standing overages or potential 2018 overages and to provide the states with their specific quotas.

TABLE 3—SUMMARY OF 2020–2021 SUMMER FLOUNDER FISHERY SPECIFICATIONS

[In millions of pounds]

	million lb	mt
OFL	30.94 (2020)	14,034 (2020)
	31.67 (2021)	14,365 (2021)
ABC	25.03	11,354
Commercial ACL	13.53	6,136
Commercial ACT	13.53	6,136
Commercial Quota	11.53	5,229
Recreational ACL	11.51	5,218
Recreational ACT	11.51	5,218
Recreational Harvest Limit	7.69	3,486

TABLE 4—INITIAL 2020 SUMMER FLOUNDER STATE-BY-STATE ALLOCATIONS

State	FMP percent share	Initial 2020 quotas *	
		lb	kg
ME	0.0476	5,484	2,487
NH	0.0005	53	24
MA	6.8205	786,399	356,705
RI	15.6830	1,808,248	820,207
CT	2.2571	260,241	118,043
NY	7.6470	881,698	399,931
NJ	16.7250	1,928,391	874,704

TABLE 4—INITIAL 2020 SUMMER FLOUNDER STATE-BY-STATE ALLOCATIONS—Continued

State	FMP percent share	Initial 2020 quotas *	
		lb	kg
DE	0.0178	2,051	930
MD	2.0391	235,108	106,643
VA	21.3168	2,457,822	1,114,850
NC	27.4458	3,164,505	1,435,395
Total	100.00	11,530,000	5,229,920

* Initial quotas do not account for any previous overages.

This action makes no changes to the current commercial management measures, including the minimum fish size (14-inch (36-cm) total length), gear requirements, and possession limits. The 2020 recreational management measures will be considered in the late fall of 2019.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, Atlantic Bluefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Mid-Atlantic Fishery Management Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures in conjunction with an EA (summer flounder) and SIR (scup, black sea bass, and bluefish). According to the commercial ownership database, 1,345 affiliate firms landed summer flounder, scup, black sea bass, and/or bluefish during the 2015–2019 period, with 1,335 of those business affiliates categorized as small businesses and 10 categorized as large businesses. Summer flounder, scup, black sea bass, and bluefish represented approximately 74 percent of the average receipts of the small entities and less than 1 percent for large entities considered over this time period.

The ownership data for the for-hire fleet indicate that there were 389 for-hire affiliate firms with summer flounder, scup, black sea bass, and/or bluefish permits generating revenues from recreationally fishing, all of which are categorized as small businesses. Although it is not possible to derive what proportion of the overall revenues came from specific fishing activities, given the popularity of these three species as recreational targets, it is likely that revenues generated from these species are important for some, if not all, of these firms.

For all four species, the proposed measures would maintain the commercial quotas and recreational harvest limits that are in place for the 2019 fishing year, resulting in similar fishing effort and revenues. As a result, this action is not expected to adversely impact revenues for commercial and recreational vessels that fish for summer flounder, scup, black sea bass, and bluefish. Because this rule will not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: July 22, 2019.

Samuel D. Rauch, III,

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

[FR Doc. 2019–15845 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 84, No. 144
Friday, July 26, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 23, 2019.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by August 26, 2019 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Generic Information Collection and Clearance of FNS Fast Track Clearance for the Collection of Routine Customer Feedback.

OMB Control Number: 0584–0611.

Summary of Collection: This is an extension of a previously approved collection. Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers' needs, Food and Nutrition Service (FNS) (hereafter ''the Agency'') seeks to obtain OMB approval for the extension of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

Need and Use of the Information: This collection of information is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with the Agency's programs. This feedback provides insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It also allows feedback to contribute directly to the improvement of program management.

Description of Respondents: Individuals or household; Business or other for-profit; Not-for-profit institutions; State, Local, or Tribal Governments.

Number of Respondents: 30,000.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 30,000.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–15892 Filed 7–25–19; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

ACTION: Notice of collection and comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of USDA Farm Service Agency's (FSA) and Rural Development, henceforth collectively known as Rural Development, or individually as Housing and Community Programs, Business and Cooperative Programs, Utility Programs, to request an extension for a currently approved information collection in support of compliance with applicable acts for planning and performing construction and other development work.

DATES: Comments on this notice must be received by September 24, 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

Rural Development is submitting to OMB for extension.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the 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 respondents, 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 P. Dickson, Rural Development Innovation Center—Regulatory, USDA, 1400 Independence Avenue SW, STOP 1522, South Building, Washington, DC 20250–1522. Telephone: (202) 690–4492. Email *Thomas.dickson@usda.gov.*

Title: RD 1924–A, Planning and Performing Construction and Other Development.

OMB Number: 0575–0042.

Type of Request: Extension of a currently approved information collection.

Abstract: The information collection under OMB Number 0575–0042 enables the Agencies to effectively administer the policies, methods, and responsibilities in the planning and performing of construction and other development work for the related construction programs.

Section 501 of Title V of the Housing Act of 1949, as amended, authorizes the Secretary of Agriculture to extend financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings; farm buildings; and/or related facilities to provide decent, safe, and sanitary living conditions, as well as adequate farm buildings and other structures in rural areas.

Section 506 of the Act requires that all new buildings and repairs shall be constructed in accordance with plans and specifications as required by the Secretary and that such construction be supervised and inspected.

Section 509 of the Act grants the Secretary the power to determine and prescribe the standards of adequate farm housing and other buildings. The Housing and Urban Rural Recovery Act of 1983 amended section 509(a) and section 515 to require residential buildings and related facilities to comply with the standards prescribed by the Secretary of Agriculture, the standard prescribed by the Secretary of Housing and Urban Development, or the standards prescribed in any of the nationally recognized model building codes.

Similar authorizations are contained in sections 303, 304, 306, and 339 of the Consolidated Farm and Rural Development Act, as amended, which authorized loans and grants for essential community services.

In several sections of both acts, loan limitations are established as percentages of development cost, requiring careful monitoring of those costs. Also, the Secretary is authorized to prescribe regulations to ensure that Federal funds are not wasted or dissipated, and that construction will be undertaken in an economic manner and will not be of elaborate or extravagant design or materials.

The Rural Utilities Service (RUS) is the credit Agency for rural water and wastewater development within Rural Development of the United States Department of Agriculture (USDA). The Rural-Business-Cooperative Service (RBS) is the credit Agency for rural business development within Rural Development of USDA. These Agencies adopted use of forms in RD Instruction 1924–A. Information for their usage is included in this report.

Other information collection is required to conform to numerous Pubic Laws applying to all Federal agencies, such as: Civil Rights Acts of 1964 and 1968, Davis-Bacon Act, Historic Preservation Act, Environmental Policy Act, and to conform to Executive Orders governing use of Federal funds. This information is cleared through the appropriate enforcing Agency or other executive Departments.

The Agencies provide forms and/or guidelines to assist in the collection and submission of information; however, most of the information may be collected and submitted in the form and content which is accepted and typically used in normal conduct of planning and performing development work in private industry when a private lender is financing the activity. The information is usually submitted via hand delivery or U.S. Postal Service to the appropriate Agency office. Electronic submittal of information is also possible through email or USDA's Service Center eForms website.

The information is used by the Agencies to determine whether a loan/grant can be approved, to ensure that the Agency has adequate security for the loans financed, to provide for sound construction and development work, and to determine that the requirements of the applicable acts have been met. The information is also used to monitor compliance with the terms and conditions of the Agencies' loan/grant programs and to monitor the prudent use of Federal funds.

If the information were not collected and submitted, the Agencies would not have control over the type and quality of construction and development work planned and performed with Federal funds. The Agencies would not be assured that the security provided for loans is adequate, nor would the Agencies be certain that decent, safe, and sanitary dwelling or other adequate structures were being provided to rural residents as required by the different acts.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .31 hours per response.

Respondents: Individuals or households, farms, business or other for-profit, non-profit institutions, and small businesses or organizations.

Estimated Number of Respondents: 78,286.

Estimated Number of Responses per Respondent: 14.

Estimated Number of Responses: 112,077.

Estimated Total Annual Burden on Respondents: 36,624 hours.

Copies of this information collection can be obtained from Diane M. Berger, Rural Development Innovation Center—Regulatory Team; phone (715) 619–3124; or email *diane.berger@usda.gov.*

Bruce W. Lammers,

Administrator, Rural Housing Service.

[FR Doc. 2019–15860 Filed 7–25–19; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–19–2019]

Foreign-Trade Zone (FTZ) 249—Pensacola, Florida; Authorization of Production Activity; GE Renewables North America, LLC, (Wind Turbine Nacelles, Hubs, and Drivetrains), Pensacola, Florida

On March 25, 2019, GE Renewables North America, LLC submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 249, in Pensacola, Florida.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (84 FR 13005, April 3,

2019). On July 23, 2019, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: July 23, 2019.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2019–15920 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–21–2019]

Foreign-Trade Zone (FTZ) 291—Cameron Parish, Louisiana; Authorization of Production Activity; Cheniere Energy Partners, L.P. (Liquified Natural Gas), Cameron, Louisiana

On March 25, 2019, Cheniere Energy Partners, L.P. submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 291, in Cameron, Louisiana.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (84 FR 14087, April 9, 2019). On July 23, 2019, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: July 23, 2019.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2019–15921 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–819]

Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Colakoglu Dis Ticaret A.S. (COTAS) and Colakoglu Metalurji A.S. (Colakoglu Metalurji) (collectively, Colakoglu), Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. (Icdas), and Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan Demir) and Kaptan Metal Dis Ticaret Ve Nakliyat A.S. (Kaptan Metal) (collectively, Kaptan), producers and/or exporters of steel concrete reinforcing bar (rebar) from the Republic of Turkey (Turkey), received countervailable subsidies during the period of review (POR) January 1, 2016 through December 31, 2016. This review also covered 11 companies not individually examined, which Commerce determines received net countervailable subsidies during the POR. In addition, Commerce is rescinding the review with respect to DufEnergy Trading SA (DufEnergy), Duferco Celik Ticaret Limited (Duferco), Ekinciler Demir ve Celik Sanayi A.S. (Ekinciler), and Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. (Habas).

DATES: Applicable July 26, 2019.

FOR FURTHER INFORMATION CONTACT: Mark Hoadley or Caitlin Monks, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3148 and (202) 482–2670, respectively.

Background

Commerce published the *Preliminary Results* of this administrative review on December 10, 2018.[1] For a history of events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[2] 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.[3] On March 27, 2019, Commerce extended the deadline for the final results of this administrative review until July 18, 2019.[4]

Scope of the *Order* [5]

The merchandise covered by the *Order* is rebar imported in either straight length or coil form regardless of metallurgy, length, diameter, or grade. For a complete description of the scope, *see* attachment to the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in interested parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues raised by interested parties, and to which we responded in the Issues and Decision Memorandum, is provided in the Appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we determine that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[6] For a full description of the methodology underlying all of Commerce's conclusions, *see* the Issues and Decision Memorandum.

Partial Rescission of Review

DufEnergy, Duferco, and Ekinciler each timely filed a no-shipments certification.[7] U.S. Customs and Border

[1] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review in Part; 2016,* 83 FR 63472 (December 10, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2016,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019.

[4] *See* Memorandum, ''Steel Concrete Reinforcing Bar from the Republic of Turkey: Extension of Deadline for Final Results in 2016 Countervailing Duty Administrative Review,'' dated March 27, 2019.

[5] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Countervailing Duty Order,* 79 FR 65926 (November 6, 2014) (*Order*).

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* DufEnergy's Letter, ''*Steel Concrete Reinforcing Bar from Turkey;* No Shipments Letter for DufEnergy Trading SA (formerly known as Duferco Investment Services SA),'' dated January

Continued

Protection (CBP) did not provide to Commerce any information that contradicted these no-shipments certifications. Consequently, in the *Preliminary Results,* Commerce announced its intent to rescind the reviews of DufEnergy, Duferco, and Ekinciler. No interested party submitted comments on Commerce's intent to rescind the reviews of DufEnergy, Duferco, and Ekinciler. Because there is no evidence on the record to indicate that DufEnergy, Duferco, or Ekinciler had entries, exports, or sales of subject merchandise to the United States during the POR, pursuant to 19 CFR 351.213(d)(3), we are rescinding the review with respect to these companies.

Entries of merchandise produced and exported by Habas are not subject to countervailing duties because Commerce's final determination of the investigation with respect to this producer/exporter combination was negative.[8] However, any entries of merchandise produced by any other entity and exported by Habas, or produced by Habas and exported by another entity, are subject to this *Order.*

No interested party submitted comments on Commerce's intent to rescind the review of Habas. Because there is no evidence on the record of entries of merchandise produced by another entity and exported by Habas, or entries of merchandise produced by Habas and exported by another entity, we determine that Habas is not subject to this administrative review. Therefore, pursuant to 19 CFR 351.213(d)(3), we are rescinding the review with respect to Habas.

Final Results of the Review

In accordance with 19 CFR 351.221(b)(5), we determine the following net countervailable subsidy rates exist for the period January 1, 2016 through December 31, 2016:

Company	Subsidy rate *ad valorem* (percent)
Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. and its cross-owned affiliates[9]	2.76
Kaptan Demir Celik Endustrisi ve Ticaret A.S. and Kaptan Metal Dis Ticaret ve Nakliyat A.S. and their cross-owned affiliates[10]	*0.22 (de minimis)
Colakoglu Dis Ticaret A.S. and Colakoglu Metalurji A.S. and their cross-owned affiliates[11]	1.82
Acemar International Limited	2.29
Agir Haddecilik A.S	2.29
As Gaz Sinai ve Tibbi Gazlar A.S	2.29
Asil Celik Sanayi ve Ticaret A.S	2.29
Ege Celik Endustrisi Sanayi ve Ticaret A.S	2.29
Izmir Demir Celik Sanayi A.S	2.29
Kocaer Haddecilik Sanayi Ve Ticar L	2.29
Mettech Metalurji Madencilik Muhendislik Uretim Danismanlik ve Ticaret Limited Sirketi	2.29
MMZ Onur Boru Profil A.S	2.29
Ozkan Demir Celik Sanayi A.S	2.29
Wilmar Europe Trading BV	2.29

* (*de minimis*)

Disclosure

We will disclose to the parties in this proceeding the calculations performed for these final results within five days of the date of publication of this notice in the **Federal Register**.[12]

Assessment and Cash Deposit Requirements

In accordance with 19 CFR 351.212(b)(2), Commerce intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 1, 2016 through December 31, 2016, for the above-listed companies at the *ad valorem* assessment rates listed, except for those companies to which a *de minimis* rate is assigned. Concerning those companies with a *de minimis* rate, Commerce intends to issue assessment instructions to CBP to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 1, 2016 through December 31, 2016, without regard to countervailing duties. Concerning those companies with a *de minimis* rate, Commerce intends to issue assessment instructions to CBP to liquidate shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 1, 2016 through December 31, 2016, without regard to countervailing duties.

Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above, except, where the rate calculated in these final results is *de minimis,* no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all others rate applicable to the company, as appropriate. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their

29, 2018; Duferco's Letter, ''*Steel Concrete Reinforcing Bar from Turkey;* No Shipments Letter for Duferco Celik Ticaret Limited,'' dated January 29, 2018; and Ekinciler's Letter, ''Hot-Rolled Steel Products from Turkey (C–489–819): Countervailing Duty Administrative Review (01/01/16–12/31/16),'' dated January 24, 2018.

[8] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination,* 79 FR 54963 (September 15, 2014) (*Turkey Rebar Final Determination*).

[9] Commerce finds the following companies to be cross-owned with Icdas: Mardas Marmara Deniz Isletmeciligi A.S., Oraysan Insaat Sanayi ve Ticaret A.S., Artmak Denizcilik Ticaret ve Sanayi A.S., and Icdas Elektrik Enerjisi Uretim ve Yatirim A.S.

[10] Commerce finds the following companies to be cross-owned with Kaptan: Martas Marmara Ereglisi Liman Tesisleri A.S., Aset Madencilik A.S., and Kaptan Is Makinalari Hurda Alim Satim Ltd. Sti.

[11] Commerce finds the following company to be cross-owned with Colakoglu: Demirsan Haddecilik San. Ve Tic. A.S.

[12] *See* 19 CFR 351.224(b).

responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(d)(4), and 19 CFR 351.221(b)(5).

Dated: July 18, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2019–15824 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty

AGENCY: Enforcement and Compliance, International Trade Administration Department of Commerce.

DATES: Applicable July 26, 2019.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–3692.

SUPPLEMENTARY INFORMATION: On May 9, 2019, the Department of Commerce (Commerce), pursuant to section 702(h) of the Trade Agreements Act of 1979, as amended (the Act), published the quarterly update to the annual listing of foreign government subsidies on articles of cheese subject to an in-quota rate of duty covering the period October 1, 2018 through December 31, 2018.[1] In the *Fourth Quarter 2018 Update,* we requested that any party that has information on foreign government subsidy programs that benefit articles of cheese subject to an in-quote rate of duty submit such information to Commerce.[2] We received no comments, information, or requests for consultation from any party.

Pursuant to section 702(h) of the Act, we hereby provide Commerce's update of subsidies on articles of cheese that were imported during the period January 1, 2019 through March 31, 2019. The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amounts of each subsidy for which information is currently available.

Commerce will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the information is developed. Commerce encourages any person having information on foreign government subsidy programs which benefit articles of cheese subject to an in-quota rate of duty to submit such information in writing to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the Act.

Dated: July 19, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Subsidy Programs on Cheese Subject to an In-Quota Rate ofDuty

Country	Program(s)	Gross [3] Subsidy ($/lb)	Net [4] Subsidy ($/lb)
28 European Union Member States [5]	European Union Restitution Payments	$0.00	$0.00
Canada	Export Assistance on Certain Types of Cheese	0.46	0.46
Norway	Indirect (Milk) Subsidy	0.00	0.00
	Consumer Subsidy	0.00	0.00
Total		0.00	0.00
Switzerland	Deficiency Payments	0.00	0.00

[FR Doc. 2019–15823 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty,* 84 FR 20326 (May 9, 2019) (*Fourth Quarter 2018 Update*).

[2] *Id.*

[3] Defined in 19 U.S.C. 1677(5).

[4] Defined in 19 U.S.C. 1677(6).

[5] The 28 member states of the European Union are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR017

Marine Mammals and Endangered Species; File No. 22435

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the Northwest Fisheries Science Center, Marine Forensic Laboratory, 2725 Montlake Blvd. East, Seattle, WA 98112 (Responsible Party: Kevin Werner, Ph.D.), has applied in due form for a permit to receive, import, and export marine mammal and protected species parts for scientific research.

DATES: Written, telefaxed, or email comments must be received on or before August 26, 2019.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 22435 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. 22435 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Shasta McClenahan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The applicant proposes to receive, import, and export samples from up to 100 individual animals from each species of all cetaceans, pinnipeds (excluding walrus), sea turtles (in water), coral, and individual species of fish and abalone listed under the ESA including: Black and white abalone, Pacific and Atlantic salmonids, sawfish, sturgeon, sharks, grouper, rockfish, guitarfish, and totoaba. Receipt, import, and export is requested worldwide. Sources of samples may include animal strandings in foreign countries, foreign and domestic subsistence harvests, captive animals, other authorized persons or collections, incidentally bycaught animals, transfers from law enforcement, and marine mammals that died incidental to commercial fishing operations in the U.S. and foreign countries, where such take is legal. Samples would be archived at the Marine Forensics Laboratories in either Charleston or Seattle and would be used for research, supporting law enforcement actions, and outreach and education. No live takes from the wild would be authorized. The requested duration of the permit is 5 years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: July 23, 2019.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–15907 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG909

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys of Lease Areas OCS–A 0486, OCS–A 0487, and OCS–A 0500

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from Orsted Wind Power LLC (Orsted) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to high-resolution geophysical (HRG) survey investigations associated with marine site characterization activities off the coast of Massachusetts and Rhode Island in the areas of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) currently being leased by the Applicant's affiliates Deepwater Wind New England, LLC and Bay State Wind LLC, respectively. These are identified as OCS–A 0486, OCS–A 0487, and OCS–A 0500 (collectively referred to as the Lease Areas). Orsted is also proposing to conduct marine site characterization surveys along one or more export cable route corridors (ECRs) originating from the Lease Areas and landing along the shoreline at locations from New York to Massachusetts, between Raritan Bay (part of the New York Bight) to Falmouth, Massachusetts (see Figure 1). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Orsted to incidentally take, by Level B harassment only, small numbers of marine mammals during the specified activities. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than August 26, 2019.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National

Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Pauline@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Rob Pauline, 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/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

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.

National Environmental Policy Act (NEPA)

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 IHA. NMFS' [EIS or EA] [was or will be] made available at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On March 8, 2019, NMFS received an application from Orsted for the taking of marine mammals incidental to HRG and geotechnical survey investigations in the OCS–A 0486, OCS–A 0487, and OCS–A 0500 Lease Areas, designated and offered by the Bureau of Ocean Energy Management (BOEM) as well as along one or more ECRs between the southern portions of the Lease Areas and shoreline locations from New York to Massachusetts, to support the development of an offshore wind project. Orsted's request is for take, by Level B harassment, of small numbers of 15 species or stocks of marine mammals. The application was considered adequate and complete on May 23, 2019. Neither Orsted nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued two IHAs to both Bay State Wind (81 FR 56589, August 22, 2016; 83 FR 36539, July 30, 2018) and Deepwater Wind (82 FR 32230, July 13, 2017; 83 FR 28808, June 21, 2018) for similar activities. Orsted has complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the issued IHAs.

Description of the Specified Activity

Overview

Orsted proposes to conduct HRG surveys in the Lease Area and ECRs to support the characterization of the existing seabed and subsurface geological conditions. This information is necessary to support the final siting, design, and installation of offshore project facilities, turbines and subsea cables within the project area as well as to collect the data necessary to support the review requirements associated with Section 106 of the National Historic Preservation Act of 1966, as amended. Underwater sound resulting from Orsted's proposed site characterization surveys has the potential to result in incidental take of marine mammals. This take of marine mammals is anticipated to be in the form of harassment and no serious injury or mortality is anticipated, nor is any authorized in this IHA.

Dates and Duration

HRG surveys are anticipated to commence in August, 2019. Orsted is proposing to conduct continuous HRG survey operations 24-hours per day (Lease Area and ECR Corridors) using multiple vessels. Based on the planned 24-hour operations, the survey activities for all survey segments would require 666 vessel days total if one vessel were surveying the entire survey line continuously. However, an estimated 5 vessels may be used simultaneously with a maximum of no more than 9 vessels. Therefore, all of the survey will be completed within one year. See Table 1 for the estimated number of vessel days for each survey segment. This is considered the total number of vessel days required, regardless of the number of vessels used. While actual survey duration would shorten given the use of multiple vessels, total vessel days provides an equivalent estimate of exposure for a given area. The estimated durations to complete survey activities do not include weather downtime. Surveys are anticipated to commence upon issuance of the requested IHA, if appropriate.

TABLE 1—SUMMARY OF PROPOSED HRG SURVEY SEGMENTS

Survey segment	Total line km per day	Total duration (vessel days) *
Lease Area OCS–A 0486	70	79
Lease Area OCS–A 0487	.....	140
Lease Area OCS–A 0500	.....	94
ECR Corridor(s)	.....	353
Total	.....	666

* Estimate is based on total time for one (1) vessel to complete survey activities.

Specified Geographic Region

Orsted's survey activities will occur in the Lease Areas designated and offered by BOEM, located approximately 14 miles (mi) south of Martha's Vineyard, Massachusetts at its closest point, as well as within potential export cable route corridors off the coast of New York, Connecticut, Rhode Island, and Massachusetts shown in Figure 1. Water depth in these areas for the majority of the survey area is 1–55 m. However south of Long Island in the area we are surveying for cable routes, the maximum depth reaches 77 m in some locations. Also there is a very small area in the area north of the eastern end of Long Island that reaches a depth of 123 m.

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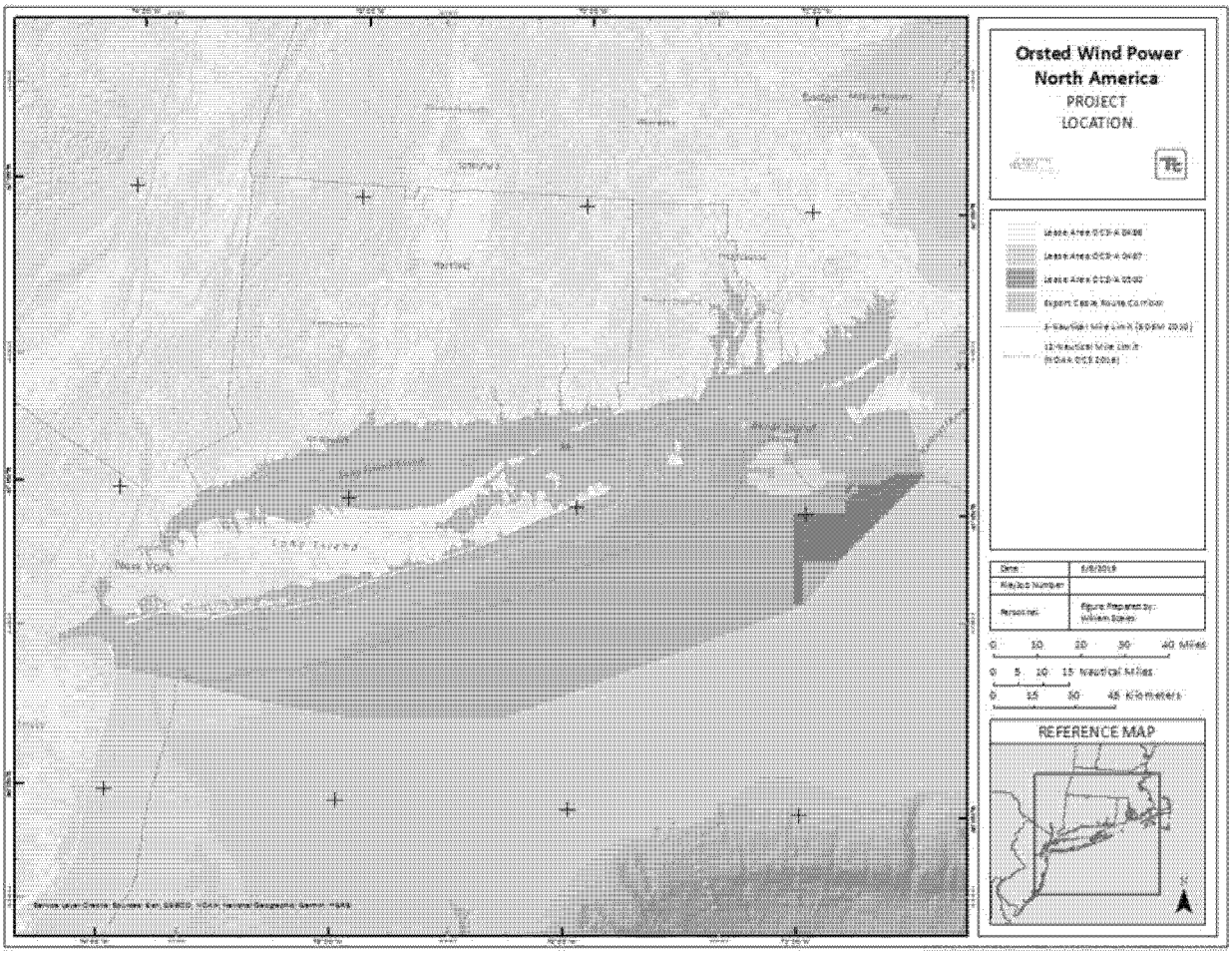

Figure 1. Survey Area Location

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Detailed Description of Specified Activities

Marine site characterization surveys will include the following HRG survey activities:

- Depth sounding (multibeam depth sounder) to determine water depths and general bottom topography (currently estimated to range from approximately 3 to 180 feet (ft), 1 to 55 m, in depth below mean lower low water);
- Magnetic intensity measurements for detecting local variations in regional magnetic field from geological strata and potential ferrous objects on and below the seabed;
- Seafloor imaging (sidescan sonar survey) for seabed sediment classification purposes, to identify natural and man-made acoustic targets resting on the bottom as well as any anomalous features;
- Sub-bottom profiler to map the near surface stratigraphy; and
- Ultra High Resolution Seismic (UHRS) equipment to map deeper subsurface stratigraphy as needed.

Table 2 identifies the representative survey equipment that is being considered in support of the HRG survey activities. The make and model of the HRG equipment will vary depending on availability. The primary operating frequency is oftentimes defined by the HRG equipment manufacturer or HRG contractor. The pulse duration provided represents best engineering estimates of the RMS_{90} values based on anticipated operator and sound source verification (SSV) reports of similar equipment (see Appendix E in Application). Orsted SSV reports also provide relevant information on anticipated settings. For most HRG sources, the midrange frequency is typically deemed appropriate for hydroacoustic assessment purposes. The SSV reports have also reasonably assumed that the HRG equipment were being operated at configurations deemed appropriate for the Survey Area. None of the proposed HRG survey activities will result in the disturbance of bottom habitat in the Survey Area.

TABLE 2—SUMMARY OF PROPOSED HRG SURVEY DATA ACQUISITION EQUIPMENT

Representative HRG survey equipment	Range of operating frequencies (kHz)	Baseline source level [a]	Representative RMS_{90} pulse duration (millisec)	Pulse repetition rate (Hz)	Primary operating frequency (kHz)
USBL & Global Acoustic Positioning System (GAPS) Transceiver					
Sonardyne Ranger 2 transponder [b]	19–34	200 dB_{RMS}	300	1	26
Sonardyne Ranger 2 USBL HPT 5/7000 transceiver [b].	19 to 34	200 dB_{RMS}	300	1	26
Sonardyne Ranger 2 USBL HPT 3000 transceiver [b].	19 to 34	194 dB_{RMS}	300	3	26.5
Sonardyne Scout Pro transponder [b]	35 to 50	188 dB_{RMS}	300	1	42.5
Easytrak Nexus 2 USBL transceiver [b]	18 to 32	192 dB_{RMS}	300	1	26
IxSea GAPS transponder [b]	20 to 32	188 dB_{RMS}	20	10	26
Kongsberg HiPAP 501/502 USBL transceiver [b]	21 to 31	190 dB_{RMS}	300	1	26
Edgetech BATS II transponder [b]	17 to30	204 dB_{RMS}	300	3	23.5
Shallow Sub-Bottom Profiler (Chirp)					
Edgetech 3200 [c]	2 to 16	212 dB_{RMS}	150	5	9
EdgeTech 216 [b]	2 to 16	174 dB_{RMS}	22	2	6
EdgeTech 424 [b]	4 to 24	176 dB_{RMS}	3.4	2	12
EdgeTech 512 [b]	0.5 to 12	177 dB_{RMS}	2.2	2	3
Teledyne Benthos Chirp III—TTV 170 [b]	2 to 7	197 dB_{RMS}	5 to 60	4	3.5
GeoPulse 5430 A Sub-bottom Profiler [b e]	1.5 to 18	214 dB_{RMS}	25	10	4.5
PanGeo LF Chirp [b]	2 to 6.5	195 dB_{RMS}	481.5	0.06	3
PanGeo HF Chirp [b]	4.5 to 12.5	190 dB_{RMS}	481.5	0.06	5
Parametric Sub-Bottom Profiler					
Innomar SES–2000 Medium 100 [c]	85 to 115	247 dB_{RMS}	0.07 to 2	40	85
Innomar SES–2000 Standard & Plus [b]	85 to 115	236 dB_{RMS}	0.07 to 2	60	85
Innomar SES–2000 Medium 70 [b]	60 to 80	241 dB_{RMS}	0.1 to 2.5	40	70
Innomar SES–2000 Quattro [b]	85 to 115	245 dB_{RMS}	0.07 to 1	60	85
PanGeo 2i Parametric [b]	90–115	239 dB_{RMS}	0.33	40	102
Medium Penetration Sub-Bottom Profiler (Sparker)					
GeoMarine Geo-Source 400tip [d]	0.2 to 5	212 dB_{Peak}; 201 dB_{RMS}.	55	2	2
GeoMarine Geo-Source 600tip [d]	0.2 to 5	214 dB_{Peak}; 205 dB_{RMS}.	55	2	2
GeoMarine Geo-Source 800tip [d]	0.2 to 5	215 dB_{Peak}; 206 dB_{RMS}.	55	2	2
Applied Acoustics Dura-Spark 400 System [d]	0.3 to 1.2	225 dB_{Peak}; 214 dB_{RMS}.	55	0.4	1
GeoResources Sparker 800 System [d]	0.05 to 5	215 dB_{Peak}; 206 dB_{RMS}.	55	2.5	1.9

TABLE 2—SUMMARY OF PROPOSED HRG SURVEY DATA ACQUISITION EQUIPMENT—Continued

Representative HRG survey equipment	Range of operating frequencies (kHz)	Baseline source level [a]	Representative RMS_{90} pulse duration (millisec)	Pulse repetition rate (Hz)	Primary operating frequency (kHz)
Medium Penetration Sub-Bottom Profiler (Boomer)					
Applied Acoustics S-Boom 1000J [b]	0.250 to 8	228 dB_{Peak}; 208 dB_{RMS}	0.6	3	0.6
Applied Acoustics S-Boom 700J [b]	0.1 to 5	211 dB_{Peak}; 205 dB_{RMS}	5	3	0.6

Notes:
[a] Baseline source levels were derived from manufacturer-reported source levels (SL) when available either in the manufacturer specification sheet or from the SSV report. When manufacturer specifications were unavailable or unclear, Crocker and Fratantonio (2016) SLs were utilized as the baseline:
[b] source level obtained from manufacturer specifications;
[c] source level obtained from SSV-reported manufacturer SL;
[d] source level obtained from Crocker and Fratantonio (2016);
[e] unclear from manufacturer specifications and SSV whether SL is reported in peak or rms; however, based on SLpk source level reported in SSV, assumption is SLrms is reported in specifications.
The transmit frequencies of sidescan and multibeam sonars for the 2019 marine site characterization surveys operate outside of marine mammal functional hearing frequency range.

The deployment of HRG survey equipment, including the use of intermittent, impulsive sound-producing equipment operating below 200 kilohertz (kHz), has the potential to cause acoustic harassment to marine mammals. Based on the frequency ranges of the equipment to be used in support of the HRG survey activities (Table 2) and the hearing ranges of the marine mammals that have the potential to occur in the Survey Area during survey activities (Table 3), the noise produced by the ultrashort baseline (USBL) and global acoustic positioning system (GAPS) transceiver systems; sub-bottom profilers (parametric and chirp); sparkers; and boomers fall within the established marine mammal hearing ranges and have the potential to result in harassment of marine mammals. All HRG equipment proposed for use is shown in Table 2.

Assuming a maximum survey track line to fully cover the Survey Area, the survey activities will be supported by vessels sufficient in size to accomplish the survey goals in specific survey areas and capable of maintaining both the required course and a survey speed to cover approximately 70.0 kilometers (km) per day at a speed of 4 knots (7.4 km per hour) while acquiring survey lines. While survey tracks could shorten, the maximum survey track scenario has been selected to provide operational flexibility and to cover the possibility of multiple landfall locations and associated cable routes. Survey segments represent a maximum extent, and distances may vary depending on contractor used.

Orsted has proposed to reduce the total duration of survey activities and minimize cost by conducting continuous HRG survey operations 24-hours per day for all survey segments. Total survey effort has been conservatively estimated to require up to a full year to provide survey flexibility on specific locations and vessel numbers to be utilized (likely between 5–9), which will be determined at the time of contractor selection.

Orsted also proposes to complete the proposed survey quickly and efficiently by using multiple vessels of varying size depending on survey segment location. To reduce the total survey duration, simultaneous survey activities will occur across multiple vessels in respective survey segments, where appropriate. Additionally, Orsted may elect to use an autonomous surface vehicle (ASV) to support survey operations. Use of an ASV in combination with a mother vessel allows the project team to double the survey daily production. The ASV will capture data in water depths shallower than 26 ft (8 m), increasing the shallow end reach of the larger vessel. The ASV can be used for nearshore operations and shallow work (20 ft (6 m) and less) in a ''manned'' configuration. The ASV and mother vessel will acquire survey data in tandem and the ASV will be kept within sight of the mother vessel at all times. The ASV will operate autonomously along a parallel track to, and slightly ahead of, the mother vessel at a distance set to prevent crossed signaling of survey equipment (within 2,625 ft (800 m)) During data acquisition surveyors have full control of the data being acquired and have the ability to make changes to settings such as power, gain, range scale etc. in real time.

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 the Specified Activity

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' Stock Assessment Reports (SAR; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

We expect that the species listed in Table 3 will potentially occur in the project area and will potentially be taken as a result of the proposed project. Table 3 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 (2018). 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 is included here as a gross indicator 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 comprise that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic Ocean SARs (*e.g.,* Hayes *et al.,* 2018). All values presented in Table 3 are the most recent available at the time of publication and are available in the 2017 SARs (Hayes *et al.,* 2018) and draft 2018 SARs (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 3—MARINE MAMMAL KNOWN TO OCCUR IN SURVEY AREA WATERS

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 Balaenidae:						
North Atlantic Right whale.	*Eubalaena glacialis*	Western North Atlantic (WNA).	E/D; Y	451 (0; 445; 2017)	0.9	5.56
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae.*	Gulf of Maine	-/-; N	896 (0; 896; 2012)	14.6	9.7
Fin whale	*Balaenoptera physalus*	WNA	E/D; Y	1,618 (0.33; 1,234; 2011).	2.5	2.5
Sei whale	*Balaenoptera borealis*	Nova Scotia	E/D; Y	357 (0.52; 236)	0.5	0.8
Minke whale	*Balaenoptera acutorostrata.*	Canadian East Coast	-/-; N	2,591 (0.81; 1,425)	14	7.7
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus.*	E; Y	2,288 (0.28; 1,815)	North Atlantic	3.6	0.8
Family Delphinidae:						
Long-finned pilot whale.	*Globicephala melas*	WNA	-/-; Y	5,636 (0.63; 3,464)	35	38
Bottlenose dolphin	*Tursiops spp.*	WNA Offshore	-/-; N	77,532 (0.40; 56053; 2016).	561	39.4
Short beaked common dolphin.	*Delphinus delphis*	WNA	-/-; N	70,184 (0.28; 55,690; 2011).	557	406
Atlantic white-sided dolphin.	*Lagenorhynchus acutus*	WNA	-/-; N	48,819 (0.61; 30,403; 2011).	304	30
Atlantic spotted dolphin	*Stenella frontalis*	WNA	-/-: N	44,715 (0.43; 31,610; 2013).	316	0
Risso's dolphin	*Grampus griseus*	WNA	-/-; N	18,250 (0.5; 12,619; 2011).	126	49.7
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy.	-/-; N	79,833 (0.32; 61,415; 2011).	706	256
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Gray seal	*Halichoerus grypus*	-; N	27,131 (0.19; 23,158)	W. North Atlantic	1,389	5,688
Harbor seal	*Phoca vitulina*	-; N	75,834 (0.15; 66,884)	W. North Atlantic	345	333

[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: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region/.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's 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.

As described below, 15 species (with 15 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.

The following subsections provide additional information on the biology, habitat use, abundance, distribution, and the existing threats to the non-ESA-listed and ESA-listed marine mammals that are both common in the waters of the outer continental shelf (OCS) of Southern New England and have the likelihood of occurring, at least seasonally, in the Survey Area. These species include the North Atlantic right, humpback, fin, sei, minke, sperm, and long finned pilot whale, bottlenose, short-beaked common, Atlantic white-sided, Atlantic spotted, and Risso's dolphins, harbor porpoise, and gray and harbor seals (BOEM 2014). Although the potential for interactions with long-finned pilot whales and Atlantic spotted and Risso's dolphins is minimal, small numbers of these species may transit the Survey Area and are included in this analysis.

Cetaceans

North Atlantic Right Whale

The North Atlantic right whale ranges from the calving grounds in the southeastern United States to feeding grounds in New England waters and into Canadian waters (Waring *et al.,* 2017). Right whales have been observed in or near southern New England during all four seasons; however, they are most common in the spring when they are migrating north and in the fall during their southbound migration (Kenney and Vigness-Raposa 2009). Surveys have demonstrated the existence of seven areas where North Atlantic right whales congregate seasonally, including north and east of the proposed survey area in Georges Bank, off Cape Cod, and in Massachusetts Bay (Waring *et al.,* 2017). In addition modest late winter use of a region south of Martha's Vineyard and Nantucket Islands was recently described (Stone *et al.* 2017). A large increase in aerial surveys of the Gulf of St. Lawrence documented at least 36 and 117 unique individuals using the region, respectively, during the summers of 2015 and 2017 (NMFS unpublished data). In the late fall months (*e.g.* October), right whales are generally thought to depart from the feeding grounds in the North Atlantic and move south to their calving grounds off Florida. However, recent research indicates our understanding of their movement patterns remains incomplete (Davis *et al.* 2017). A review of passive acoustic monitoring data from 2004 to 2014 throughout the western North Atlantic Ocean demonstrated nearly continuous year-round right whale presence across their entire habitat range, including in locations previously thought of as migratory corridors, suggesting that not all of the population undergoes a consistent annual migration (Davis *et al.* 2017). The number of North Atlantic right whale vocalizations detected in the proposed survey area were relatively constant throughout the year, with the exception of August through October when detected vocalizations showed an apparent decline (Davis *et al.* 2017). North Atlantic right whales are expected to be present in the proposed survey area during the proposed survey, especially during the summer months, with numbers possibly lower in the fall. The proposed survey area is part of a migratory Biologically Important Area (BIA) for North Atlantic right whales; this important migratory area is comprised of the waters of the continental shelf offshore the East Coast of the United States and extends from Florida through Massachusetts. A map showing designated BIAs is available at: *https://cetsound.noaa.gov/biologically-important-area-map.*

NMFS' regulations at 50 CFR part 224.105 designated nearshore waters of the Mid-Atlantic Bight as Mid-Atlantic U.S. Seasonal Management Areas (SMA) for right whales in 2008. SMAs were developed to reduce the threat of collisions between ships and right whales around their migratory route and calving grounds. A portion of one SMA, overlaps spatially with a section of the proposed survey area. The SMA is active from November 1 through April 30 of each year.

The western North Atlantic population demonstrated overall growth of 2.8 percent per year between 1990 to 2010, despite a decline in 1993, and no growth between 1997 and 2000 (Pace *et al.* 2017). However, since 2010 the population has been in decline, with a 99.99 percent probability of a decline of just under 1 percent per year (Pace *et al.* 2017). Between 1990 and 2015, calving rates varied substantially, with low calving rates coinciding with all three periods of decline or no growth (Pace *et al.* 2017). In 2018, no new North Atlantic right whale calves were documented in their calving grounds; this represented the first time since annual NOAA aerial surveys began in 1989 that no new right whale calves were observed. However, in 2019 at least seven right whale calves have been identified (Savio 2019). Data indicates that the number of adult females fell from 200 in 2010 to 186 in 2015 while males fell from 283 to 272 in the same time frame (Pace *et al.,* 2017). In addition, elevated North Atlantic right whale mortalities have occurred since June 7, 2017. A total of 26 confirmed dead stranded whales (18 in Canada; 8 in the United States), have been documented to date. This event has been declared an Unusual Mortality Event (UME), with human interactions (*i.e.,* fishery-related entanglements and vessel strikes) identified as the most likely cause. More information is available online at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2018-north-atlantic-right-whale-unusual-mortality-event.*

Humpback Whale

Humpback whales are found worldwide in all oceans. Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. NMFS recently evaluated the status of the species, and on September 8, 2016, NMFS divided the species into 14 distinct population segments (DPS), removed the current species-level listing, and in its place listed four DPSs as endangered and one DPS as threatened (81 FR 62259; September 8, 2016). The remaining nine DPSs were not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whale that is expected to occur in the survey area. The best estimate of population abundance for the West Indies DPS is 12,312 individuals, as described in the NMFS Status Review of the Humpback Whale under the Endangered Species Act (Bettridge *et al.,* 2015).

In New England waters, feeding is the principal activity of humpback whales, and their distribution in this region has been largely correlated to abundance of prey species, although behavior and bathymetry are factors influencing foraging strategy (Payne *et al.* 1986, 1990). Humpback whales are frequently piscivorous when in New England waters, feeding on herring (*Clupea harengus*), sand lance (*Ammodytes* spp.), and other small fishes, as well as euphausiids in the northern Gulf of Maine (Paquet *et al.* 1997). During winter, the majority of humpback whales from North Atlantic feeding areas (including the Gulf of Maine) mate and calve in the West Indies, where spatial and genetic mixing among feeding groups occurs, though significant numbers of animals are found in mid- and high-latitude regions

at this time and some individuals have been sighted repeatedly within the same winter season, indicating that not all humpback whales migrate south every winter (Waring *et al.,* 2017). Other sightings of note include 46 sightings of humpbacks in the New York- New Jersey Harbor Estuary documented between 2011 and 2016 (Brown *et al.* 2017). Multiple humpbacks were observed feeding off Long Island during July of 2016 (*https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2016/july/26_humpback_whales_visit_new_york.html,* accessed 31 December, 2018) and there were sightings during November–December 2016 near New York City (*https://www.greateratlantic.fisheries.noaa.gov/mediacenter/2016/december/09_humans_and_humpbacks_of_new_york_2.html,* accessed 31 December 2018).

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida. The event has been declared a UME. Partial or full necropsy examinations have been conducted on approximately half of the 93 known cases. A portion of the whales have shown evidence of pre-mortem vessel strike; however, this finding is not consistent across all of the whales examined so more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. More detailed information is available at*: https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2018-humpback-whale-unusual-mortality-event-along-atlantic-coast#causes-of-the-humpback-whale-ume* (accessed June 3, 2019). Three previous UMEs involving humpback whales have occurred since 2000, in 2003, 2005, and 2006.

Fin Whale

Fin whales are common in waters of the U. S. Atlantic Exclusive Economic Zone (EEZ), principally from Cape Hatteras northward (Waring *et al.,* 2017). Fin whales are present north of 35-degree latitude in every season and are broadly distributed throughout the western North Atlantic for most of the year, though densities vary seasonally (Waring *et al.,* 2017). The main threats to fin whales are fishery interactions and vessel collisions (Waring *et al.,* 2017). New England waters represent a major feeding ground for fin whales. The proposed survey area would overlap spatially and temporally with a feeding BIA for fin whales. The important fin whale feeding area occurs from March through October and stretches from an area south of Montauk Point to south of Martha's Vineyard.

Sei Whale

The Nova Scotia stock of sei whales can be found in deeper waters of the continental shelf edge waters of the northeastern United States and northeastward to south of Newfoundland. NOAA Fisheries considers sei whales occurring from the U.S. East Coast to Cape Breton, Nova Scotia, and east to 42° W as the Nova Scotia stock of sei whales (Waring *et al.* 2016; Hayes *et al.* 2018). In the Northwest Atlantic, it is speculated that the whales migrate from south of Cape Cod along the eastern Canadian coast in June and July, and return on a southward migration again in September and October (Waring *et al.* 2014; 2017). Spring is the period of greatest abundance in U.S. waters, with sightings concentrated along the eastern margin of Georges Bank and into the Northeast Channel area, and along the southwestern edge of Georges Bank in the area of Hydrographer Canyon (Waring *et al.,* 2015).

Minke Whale

Minke whales can be found in temperate, tropical, and high-latitude waters. The Canadian East Coast stock can be found in the area from the western half of the Davis Strait (45° W) to the Gulf of Mexico (Waring *et al.,* 2017). This species generally occupies waters less than 100 m deep on the continental shelf. There appears to be a strong seasonal component to minke whale distribution in which spring to fall are times of relatively widespread and common occurrence, and when the whales are most abundant in New England waters, while during winter the species appears to be largely absent (Waring *et al.,* 2017).

Since January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. Partial or full necropsy examinations have been conducted on more than 60 percent of the 59 known cases. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease. These findings are not consistent across all of the whales examined, so more research is needed. As part of the UME investigation process, NOAA is assembling an independent team of scientists to coordinate with the Working Group on Marine Mammal Unusual Mortality Events to review the data collected, sample stranded whales, and determine the next steps for the investigation. More information is available at: *www.fisheries.noaa.gov/national/marine-life-distress/2017-2018-minke-whale-unusual-mortality-event-along-atlantic-coast* (accessed June 3, 2019).

Sperm Whale

The distribution of the sperm whale in the U.S. EEZ occurs on the continental shelf edge, over the continental slope, and into mid-ocean regions (Waring *et al.* 2014). The basic social unit of the sperm whale appears to be the mixed school of adult females plus their calves and some juveniles of both sexes, normally numbering 20–40 animals in all. Sperm whales are somewhat migratory; however, their migrations are not as specific as seen in most of the baleen whale species. In the North Atlantic, there appears to be a general shift northward during the summer, but there is no clear migration in some temperate areas (Rice 1989). In summer, the distribution of sperm whales includes the area east and north of Georges Bank and into the Northeast Channel region, as well as the continental shelf (inshore of the 100-m isobath) south of New England. In the fall, sperm whale occurrence south of New England on the continental shelf is at its highest level, and there remains a continental shelf edge occurrence in the mid-Atlantic bight. In winter, sperm whales are concentrated east and northeast of Cape Hatteras. Their distribution is typically associated with waters over the continental shelf break and the continental slope and into deeper waters (Whitehead *et al.* 1991). Sperm whale concentrations near drop-offs and areas with strong currents and steep topography are correlated with high productivity. These whales occur almost exclusively found at the shelf break, regardless of season.

Long-Finned Pilot Whale

Long-finned pilot whales are found from North Carolina and north to Iceland, Greenland and the Barents Sea (Waring *et al.,* 2016). They are generally found along the edge of the continental shelf (a depth of 330 to 3,300 feet (100 to 1,000 meters)), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid

and mackerel populations (Reeves *et al.* 2002). They frequently travel into the central and northern Georges Bank, Great South Channel, and Gulf of Maine areas during the late spring and remain through early fall (May and October) (Payne and Heinemann 1993).

Atlantic White-Sided Dolphin

White-sided dolphins are found in temperate and sub-polar waters of the North Atlantic, primarily in continental shelf waters to the 100-m depth contour from central West Greenland to North Carolina (Waring *et al.,* 2017). The Gulf of Maine stock is most common in continental shelf waters from Hudson Canyon to Georges Bank, and in the Gulf of Maine and lower Bay of Fundy. Sighting data indicate seasonal shifts in distribution (Northridge *et al.,* 1997). During January to May, low numbers of white-sided dolphins are found from Georges Bank to Jeffreys Ledge (off New Hampshire), with even lower numbers south of Georges Bank, as documented by a few strandings collected on beaches of Virginia to South Carolina. From June through September, large numbers of white-sided dolphins are found from Georges Bank to the lower Bay of Fundy. From October to December, white-sided dolphins occur at intermediate densities from southern Georges Bank to southern Gulf of Maine (Payne and Heinemann 1990). Sightings south of Georges Bank, particularly around Hudson Canyon, occur year round but at low densities.

Atlantic Spotted Dolphin

Atlantic spotted dolphins are found in tropical and warm temperate waters ranging from southern New England, south to Gulf of Mexico and the Caribbean to Venezuela (Waring *et al.,* 2014). This stock regularly occurs in continental shelf waters south of Cape Hatteras and in continental shelf edge and continental slope waters north of this region (Waring *et al.,* 2014). There are two forms of this species, with the larger ecotype inhabiting the continental shelf and is usually found inside or near the 200 m isobaths (Waring *et al.,* 2014). The smaller ecotype has less spots and occurs in the Atlantic Ocean, but is not known to occur in the Gulf of Mexico. Atlantic spotted dolphins are not listed under the ESA and the stock is not considered depleted or strategic under the MMPA.

Common Dolphin

The short-beaked common dolphin is found world-wide in temperate to subtropical seas. In the North Atlantic, short-beaked common dolphins are commonly found over the continental shelf between the 100-m and 2,000-m isobaths and over prominent underwater topography and east to the mid-Atlantic Ridge (Waring *et al.,* 2016). This species is found between Cape Hatteras and Georges Bank from mid-January to May, although they migrate onto the northeast edge of Georges Bank in the fall where large aggregations occur (Kenney and Vigness-Raposa 2009), where large aggregations occur on Georges Bank in fall (Waring *et al.* 2007). Only the western North Atlantic stock may be present in the Survey Area.

Bottlenose Dolphin

There are two distinct bottlenose dolphin ecotypes in the western North Atlantic: The coastal and offshore forms (Waring *et al.,* 2015). The migratory coastal morphotype resides in waters typically less than 65.6 ft (20 m) deep, along the inner continental shelf (within 7.5 km (4.6 miles) of shore), around islands, and is continuously distributed south of Long Island, New York into the Gulf of Mexico. This migratory coastal population is subdivided into 7 stocks based largely upon spatial distribution (Waring *et al.* 2015). Of these 7 coastal stocks, the Western North Atlantic migratory coastal stock is common in the coastal continental shelf waters off the coast of New Jersey (Waring *et al.* 2017). Generally, the offshore migratory morphotype is found exclusively seaward of 34 km (21 miles) and in waters deeper than 34 m (111.5 feet). This morphotype is most expected in waters north of Long Island, New York (Waring *et al.* 2017; Hayes *et al.* 2017; 2018). The offshore form is distributed primarily along the outer continental shelf and continental slope in the Northwest Atlantic Ocean from Georges Bank to the Florida Keys and is the only type that may be present in the survey area as the survey area is north of the northern extent of the range of the Western North Atlantic Northern Migratory Coastal Stock.

Risso's Dolphins

Risso's dolphins are distributed worldwide in tropical and temperate seas (Jefferson *et al.* 2008, 2014), and in the Northwest Atlantic occur from Florida to eastern Newfoundland (Leatherwood *et al.* 1976; Baird and Stacey 1991). Off the northeastern U.S. coast, Risso's dolphins are distributed along the continental shelf edge from Cape Hatteras northward to Georges Bank during spring, summer, and autumn (CETAP 1982; Payne *et al.* 1984) (Figure 1). In winter, the range is in the mid-Atlantic Bight and extends outward into oceanic waters (Payne *et al.* 1984).

Harbor Porpoise

In the Survey Area, only the Gulf of Maine/Bay of Fundy stock may be present. This stock is found in U.S. and Canadian Atlantic waters and is concentrated in the northern Gulf of Maine and southern Bay of Fundy region, generally in waters less than 150 m deep (Waring *et al.,* 2017). During fall (October–December) and spring (April–June) harbor porpoises are widely dispersed from New Jersey to Maine. During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada They are seen from the coastline to deep waters (>1800 m; Westgate *et al.* 1998), although the majority of the population is found over the continental shelf (Waring *et al.,* 2017).

Harbor Seal

Harbor seals are year-round inhabitants of the coastal waters of eastern Canada and Maine (Katona *et al.* 1993), and occur seasonally along the coasts from southern New England to New Jersey from September through late May. While harbor seals occur year-round north of Cape Cod, they only occur during winter migration, typically September through May, south of Cape Cod (Southern New England to New Jersey) (Waring *et al.* 2015; Kenney and Vigness-Raposa 2009).

Gray Seal

There are three major populations of gray seals found in the world; eastern Canada (western North Atlantic stock), northwestern Europe and the Baltic Sea. Gray seals in the survey area belong to the western North Atlantic stock. The range for this stock is thought to be from New Jersey to Labrador. Current population trends show that gray seal abundance is likely increasing in the U.S. Atlantic EEZ (Waring *et al.,* 2017). Although the rate of increase is unknown, surveys conducted since their arrival in the 1980s indicate a steady increase in abundance in both Maine and Massachusetts (Waring *et al.,* 2017). It is believed that recolonization by Canadian gray seals is the source of the U.S. population (Waring *et al.,* 2017).

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared a UME. Additionally, seals showing clinical signs of stranding have occurred as far

south as Virginia, although not in elevated numbers. Therefore the UME investigation now encompasses all seal strandings from Maine to Virginia. Between July 1, 2018 and June 26, 2019, a total of 2,593 seal strandings have been recorded as part of this designated Northeast Pinniped UME. Based on tests conducted so far, the main pathogen found in the seals is phocine distemper virus. Additional testing to identify other factors that may be involved in this UME are underway.

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 Hertz (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;
- 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. Fifteen marine mammal species (thirteen cetacean and two pinniped (both 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, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), seven are classified as mid-frequency cetaceans (*i.e.,* all delphinid species and the sperm whale), and one is classified as high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of the Specified Activity 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.

Background on Sound

Sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water, and is generally characterized by several variables. Frequency describes the sound's pitch and is measured in Hz or kHz, while sound level describes the sound's intensity and is measured in dB. Sound level increases or decreases exponentially with each dB of change. The logarithmic nature of the scale means that each 10-dB increase is a 10-fold increase in acoustic power (and a 20-dB increase is then a 100-fold increase in power). A 10-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder, however. Sound levels are compared to a reference sound pressure (micro-Pascal) to identify the medium. For air and water, these reference pressures are ''re: 20 micro pascals (µPa)'' and ''re: 1 µPa,'' respectively. Root mean square (RMS) is the quadratic mean sound pressure over the duration of an impulse. RMS is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1975). RMS 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. 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 rather than by peak pressures.

Acoustic Impacts

HRG survey equipment use during the geophysical surveys may temporarily impact marine mammals in the area due to elevated in-water sound levels. Marine mammals are continually exposed to many sources of sound. Naturally occurring sounds such as lightning, rain, sub-sea earthquakes, and biological sounds (*e.g.,* snapping shrimp, whale songs) are widespread throughout the world's oceans. Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to: (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels of sound depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.,* 1995). Type

and significance of marine mammal reactions to sound are likely dependent on a variety of factors including, but not limited to, (1) the behavioral state of the animal (*e.g.,* feeding, traveling, etc.); (2) frequency of the sound; (3) distance between the animal and the source; and (4) the level of the sound relative to ambient conditions (Southall *et al.,* 2007).

When sound travels (propagates) from its source, its loudness decreases as the distance traveled by the sound increases. Thus, the loudness of a sound at its source is higher than the loudness of that same sound a kilometer away. Acousticians often refer to the loudness of a sound at its source (typically referenced to one meter from the source) as the source level and the loudness of sound elsewhere as the received level (*i.e.,* typically the receiver). For example, a humpback whale 3 km from a device that has a source level of 230 dB may only be exposed to sound that is 160 dB loud, depending on how the sound travels through water (*e.g.,* spherical spreading (6 dB reduction with doubling of distance) was used in this example). As a result, it is important to understand the difference between source levels and received levels when discussing the loudness of sound in the ocean or its impacts on the marine environment.

As sound travels from a source, its propagation in water is influenced by various physical characteristics, including water temperature, depth, salinity, and surface and bottom properties that cause refraction, reflection, absorption, and scattering of sound waves. Oceans are not homogeneous and the contribution of each of these individual factors is extremely complex and interrelated. The physical characteristics that determine the sound's speed through the water will change with depth, season, geographic location, and with time of day (as a result, in actual active sonar operations, crews will measure oceanic conditions, such as sea water temperature and depth, to calibrate models that determine the path the sonar signal will take as it travels through the ocean and how strong the sound signal will be at a given range along a particular transmission path). As sound travels through the ocean, the intensity associated with the wavefront diminishes, or attenuates. This decrease in intensity is referred to as propagation loss, also commonly called transmission loss.

Hearing Impairment

Marine mammals may experience temporary or permanent hearing impairment when exposed to loud sounds. Hearing impairment is classified by temporary threshold shift (TTS) and permanent threshold shift (PTS). There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is considered auditory injury (Southall *et al.,* 2007) and occurs in a specific frequency range and amount. Irreparable damage to the inner or outer cochlear hair cells may cause PTS; however, other mechanisms are also involved, such as exceeding the elastic limits of certain tissues and membranes in the middle and inner ears and resultant changes in the chemical composition of the inner ear fluids (Southall *et al.,* 2007). Given the higher level of sound, longer durations of exposure necessary to cause PTS as compared with TTS, and the small zone within which sound levels would exceed criteria for onset of PTS, it is unlikely that PTS would occur during the proposed HRG surveys.

Temporary Threshold Shift

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can occur to varying degrees (*i.e.,* a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends.

Marine mammal hearing plays a critical role in communication with conspecifics and in 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 takes place during a time when the animals is traveling through the open ocean, 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 a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale, harbor porpoise, and Yangtze finless porpoise) and three 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 (*e.g.,* Finneran *et al.,* 2002 and 2010; Nachtigall *et al.,* 2004; Kastak *et al.,* 2005; Lucke *et al.,* 2009; Mooney *et al.,* 2009; Popov *et al.,* 2011; Finneran and Schlundt, 2010). In general, harbor seals (Kastak *et al.,* 2005; Kastelein *et al.,* 2012a) and harbor porpoises (Lucke *et al.,* 2009; Kastelein *et al.,* 2012b) have a lower TTS onset than other measured pinniped or cetacean species. However, even for these animals, which are better able to hear higher frequencies and may be more sensitive to higher frequencies, exposures on the order of approximately 170 dB_{RMS} or higher for brief transient signals are likely required for even temporary (recoverable) changes in hearing sensitivity that would likely not be categorized as physiologically damaging (Lucke *et al.,* 2009). 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 (of note, the source operating characteristics of some of Orsted's proposed HRG survey equipment—*i.e.,* the equipment positioning systems—are unlikely to be audible to mysticetes). For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see NMFS (2018), Southall *et al.* (2007), Finneran and Jenkins (2012), and Finneran (2015).

Scientific literature highlights the inherent complexity of predicting TTS onset in marine mammals, as well as the importance of considering exposure duration when assessing potential impacts (Mooney *et al.,* 2009a, 2009b; Kastak *et al.,* 2007). Generally, with sound exposures of equal energy,

quieter sounds (lower sound pressure level (SPL)) of longer duration were found to induce TTS onset more than louder sounds (higher SPL) of shorter duration (more similar to sub-bottom profilers). For intermittent sounds, less threshold shift will occur than from a continuous exposure with the same energy (some recovery will occur between intermittent exposures) (Kryter *et al.,* 1966; Ward, 1997). For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the sound ends; intermittent exposures recover faster in comparison with continuous exposures of the same duration (Finneran *et al.,* 2010). NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system.

Marine mammals in the Survey Area during the HRG survey are unlikely to incur TTS hearing impairment due to the characteristics of the sound sources, which include low source levels (208 to 221 dB re 1 µPa-m) 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. 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 HRG 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. 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.

Masking

Masking is the obscuring of sounds of interest to an animal by other sounds, typically at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other sound is important in communication and detection of both predators and prey (Tyack, 2000). Background ambient sound may interfere with or mask the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Even in the absence of anthropogenic sound, the marine environment is often loud. Natural ambient sound includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal sound resulting from molecular agitation (Richardson *et al.,* 1995).

Background sound may also include anthropogenic sound, and masking of natural sounds can result when human activities produce high levels of background sound. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. Ambient sound is highly variable on continental shelves (Thompson, 1965; Myrberg, 1978; Desharnais *et al.,* 1999). This results in a high degree of variability in the range at which marine mammals can detect anthropogenic sounds.

Although masking is a phenomenon which may occur naturally, the introduction of loud anthropogenic sounds into the marine environment at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. For example, if a baleen whale is exposed to continuous low-frequency sound from an industrial source, this would reduce the size of the area around that whale within which it can hear the calls of another whale. The components of background noise that are similar in frequency to the signal in question primarily determine the degree of masking of that signal. In general, little is known about the degree to which marine mammals rely upon detection of sounds from conspecifics, predators, prey, or other natural sources. In the absence of specific information about the importance of detecting these natural sounds, it is not possible to predict the impact of masking on marine mammals (Richardson *et al.,* 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous. Masking is typically of greater concern for those marine mammals that utilize low-frequency communications, such as baleen whales, and from sources of lower frequency, because of how far low-frequency sounds propagate.

Marine mammal species, including ESA-listed species, that may be exposed to survey noise are widely dispersed. As such, only a very small percentage of the population is likely to be within the radius of masking at any given time. Richardson *et al.* (1995) concludes broadly that, although further data are needed, localized or temporary increases in masking probably cause few problems for marine mammals, with the possible exception of populations highly concentrated in an ensonified area. While some number of marine mammals may be subject to occasional masking as a result of survey activity, temporary shifts in calling behavior to reduce the effects of masking, on the scale of no more than a few minutes, are not likely to result in failure of an animal to feed successfully, breed successfully, or complete its life history.

Furthermore, marine mammal communications would not likely be masked appreciably by sound from most HRG survey equipment given the narrow beam widths, directionality of the signal, relatively small ensonified area, and the brief period when an individual mammal is likely to be exposed to sound from the HRG survey equipment.

Marine mammal communications would not likely be masked appreciably by the sub-profiler or pingers' signals given the directionality of the signal and the brief period when an individual mammal is likely to be within its beam, as well as the higher frequencies.

Non-Auditory Physical Effects (Stress)

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is

sufficient to trigger a stress response (Moberg, 2000; Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: Behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses.

In the case of many stressors, an animal's first and sometimes most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical ''fight or flight'' response which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effect on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine systems; the system that has received the most study has been the hypothalamus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuro-endocrine 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 (Moberg, 1987; Rivier, 1995), altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha, 2000), and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic 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 a risk to the animal's welfare. 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 biotic function, which impairs those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and its fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (Seyle, 1950) or ''allostatic loading'' (McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long-term (days or weeks) stress response exposure to stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiments; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Information has also been collected on the physiological responses of marine mammals to exposure to anthropogenic sounds (Fair and Becker, 2000; 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. In a conceptual model developed by the Population Consequences of Acoustic Disturbance (PCAD) working group, serum hormones were identified as possible indicators of behavioral effects that are translated into altered rates of reproduction and mortality.

Studies of other marine animals and terrestrial animals would also lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to high frequency, mid-frequency and low-frequency sounds. For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (for example, elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b), for example, identified noise-induced physiological transient stress responses in hearing-specialist fish (*i.e.,* goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and to communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), we also assume that stress responses are likely to persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS.

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 HRG surveys would create conditions of long-term, continuous noise and chronic acoustic exposure leading to long-term physiological stress responses in marine mammals.

Behavioral Disturbance

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways) (Southall *et al.,* 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007, DeRuiter *et al.,* 2013). Individuals (of different age, gender, reproductive status, etc.) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone. Studies by DeRuiter *et al.* (2012) indicate that variability of responses to acoustic stimuli depends not only on the species receiving the sound and the sound source, but also on the social, behavioral, or environmental contexts of exposure.

Ellison *et al.* (2012) outlined an approach to assessing the effects of sound on marine mammals that incorporates contextual-based factors. The authors recommend considering not just the received level of sound, but also the activity the animal is engaged in at the time the sound is received, the nature and novelty of the sound (*i.e.,* is this a new sound from the animal's perspective), and the distance between the sound source and the animal. They submit that this ''exposure context,'' as described, greatly influences the type of behavioral response exhibited by the animal. This sort of contextual information is challenging to predict with accuracy for ongoing activities that occur over large spatial and temporal expanses. However, distance is one contextual factor for which data exist to quantitatively inform a take estimate. Other factors are often considered qualitatively in the analysis of the likely consequences of sound exposure, where supporting information is available.

Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable response: Increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stranding, potentially resulting in death (Southall *et al.,* 2007). A review of marine mammal responses to anthropogenic sound was first conducted by Richardson (1995). More recent reviews (Nowacek *et al.,*2007; DeRuiter *et al.,* 2012 and 2013; Ellison *et al.,* 2012) address studies conducted since 1995 and focused on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated. Southall *et al.* (2016) states that results demonstrate that some individuals of different species display clear yet varied responses, some of which have negative implications, while others appear to tolerate high levels, and that responses may not be fully predicable with simple acoustic exposure metrics (*e.g.,* received sound level). Rather, the authors state that differences among species and individuals along with contextual aspects of exposure (*e.g.,* behavioral state) appear to affect response probability.

Changes in dive behavior can vary widely. They 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. Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. Variations in dive behavior may also expose an animal to potentially harmful conditions (*e.g.,* increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving 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.

Avoidance is the displacement of an individual from an area as a result of the presence of a sound. Richardson *et al.* (1995) noted that avoidance reactions are the most obvious manifestations of disturbance in marine mammals. Avoidance is qualitatively different from the flight response, but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, etc.). Oftentimes avoidance is temporary, and animals return to the area once the noise has ceased. However, longer term displacement is possible and can lead to changes in abundance or distribution patterns of the species in the affected region if they do not become acclimated to the presence of the sound (Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006). Acute avoidance responses have been observed in captive porpoises and pinnipeds exposed to a number of different sound sources (Kastelein *et al.,* 2001; Finneran *et al.,* 2003; Kastelein *et al.,* 2006a; Kastelein *et al.,* 2006b).

Southall *et al.* (2007) reviewed the available literature on marine mammal hearing and behavioral and physiological responses to human-made sound with the goal of proposing exposure criteria for certain effects. This peer-reviewed compilation of literature is very valuable, though Southall *et al.* (2007) note that not all data are equal, some have poor statistical power, insufficient controls, and/or limited information on received levels, background noise, and other potentially important contextual variables—such data were reviewed and sometimes used for qualitative illustration but were not included in the quantitative analysis for the criteria recommendations. All of the studies considered, however, contain an estimate of the received sound level when the animal exhibited the indicated response.

For purposes of analyzing responses of marine mammals to anthropogenic sound and developing criteria, NMFS (2018) differentiates between pulse (impulsive) sounds (single and multiple) and non-pulse sounds. For purposes of evaluating the potential for take of marine mammals resulting from underwater noise due to the conduct of the proposed HRG surveys (operation of USBL positioning system and the sub-bottom profilers), the criteria for Level A harassment (PTS onset) from

impulsive noise was used as prescribed in NMFS (2018) and the threshold level for Level B harassment (160 dB_{RMS} re 1 µPa) was used to evaluate takes from behavioral harassment.

Studies that address responses of low-frequency cetaceans to sounds include data gathered in the field and related to several types of sound sources, including: Vessel noise, drilling and machinery playback, low-frequency M-sequences (sine wave with multiple phase reversals) playback, tactical low-frequency active sonar playback, drill ships, and non-pulse playbacks. These studies generally indicate no (or very limited) responses to received levels in the 90 to 120 dB re: 1µPa range and an increasing likelihood of avoidance and other behavioral effects in the 120 to 160 dB range. As mentioned earlier, though, contextual variables play a very important role in the reported responses and the severity of effects do not increase linearly with received levels. Also, few of the laboratory or field datasets had common conditions, behavioral contexts, or sound sources, so it is not surprising that responses differ.

The studies that address responses of mid-frequency cetaceans to sounds include data gathered both in the field and the laboratory and related to several different sound sources, including: Pingers, drilling playbacks, ship and ice-breaking noise, vessel noise, Acoustic harassment devices (AHDs), Acoustic Deterrent Devices (ADDs), mid-frequency active sonar, and non-pulse bands and tones. Southall *et al.* (2007) were unable to come to a clear conclusion regarding the results of these studies. In some cases animals in the field showed significant responses to received levels between 90 and 120 dB, while in other cases these responses were not seen in the 120 to 150 dB range. The disparity in results was likely due to contextual variation and the differences between the results in the field and laboratory data (animals typically responded at lower levels in the field). The studies that address the responses of mid-frequency cetaceans to impulse sounds include data gathered both in the field and the laboratory and related to several different sound sources, including: Small explosives, airgun arrays, pulse sequences, and natural and artificial pulses. The data show no clear indication of increasing probability and severity of response with increasing received level. Behavioral responses seem to vary depending on species and stimuli.

The studies that address responses of high-frequency cetaceans to sounds include data gathered both in the field and the laboratory and related to several different sound sources, including: Pingers, AHDs, and various laboratory non-pulse sounds. All of these data were collected from harbor porpoises. Southall *et al.* (2007) concluded that the existing data indicate that harbor porpoises are likely sensitive to a wide range of anthropogenic sounds at low received levels (around 90 to 120 dB), at least for initial exposures. All recorded exposures above 140 dB induced profound and sustained avoidance behavior in wild harbor porpoises (Southall *et al.,* 2007). Rapid habituation was noted in some but not all studies.

The studies that address the responses of pinnipeds in water to sounds include data gathered both in the field and the laboratory and related to several different sound sources, including: AHDs, various non-pulse sounds used in underwater data communication, underwater drilling, and construction noise. Few studies exist with enough information to include them in the analysis. The limited data suggest that exposures to non-pulse sounds between 90 and 140 dB generally do not result in strong behavioral responses of pinnipeds in water, but no data exist at higher received levels (Southall *et al.,* 2007). The studies that address the responses of pinnipeds in water to impulse sounds include data gathered in the field and related to several different sources, including: Small explosives, impact pile driving, and airgun arrays. Quantitative data on reactions of pinnipeds to impulse sounds is limited, but a general finding is that exposures in the 150 to 180 dB range generally have limited potential to induce avoidance behavior (Southall *et al.,* 2007).

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 and Farmer, 2000; Tyack, 2000; 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. Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations. 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. 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; Matthews *et al.,* 2016) 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; Di Iorio and Clark, 2009; Holt *et al.,* 2009).

Marine mammals are likely to avoid the HRG survey activity, especially harbor porpoises, while the harbor seals might be attracted to them out of curiosity. However, because the sub-bottom profilers and other HRG survey equipment operate from a moving vessel, and the predicted maximum distance to the 160 dB_{RMS} re 1µPa isopleth (Level B harassment criteria) is 178 m, the area and time that this equipment would be affecting a given location is very small. Further, once an area has been surveyed, it is not likely that it will be surveyed again, therefore reducing the likelihood of repeated HRG-related impacts within the survey area.

A number of cetacean mass stranding events have been linked to use of military active sonar. We considered the potential for HRG equipment to result in standings or indirect injury or mortality based on the 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 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.

Tolerance

Numerous studies have shown that underwater sounds from industrial activities are often readily detectable by marine mammals in the water at distances of many kilometers. However, other studies have shown that marine mammals at distances more than a few kilometers away often show no apparent response to industrial activities of various types (Miller *et al.,* 2005). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound from sources such as airgun pulses or vessels under some conditions, at other times, mammals of all three types have shown no overt reactions (*e.g.,* Malme *et al.,* 1986; Richardson *et al.,* 1995; Madsen and Mohl, 2000; Croll *et al.,* 2001; Jacobs and Terhune, 2002; Madsen *et al.,* 2002; Miller *et al.,* 2005). In general, pinnipeds seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995) found that vessel sound does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995) went on to explain that seals on haulouts sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992) observed ringed seals (*Pusa hispida*) hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.16–0.31 mi (0.25–0.5 km). Due to the relatively high vessel traffic in the Survey Area it is possible that marine mammals are habituated to noise from project vessels in the area.

Vessel Strike

Ship strikes of marine mammals can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or a vessel's propeller could injure an animal just below the surface. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (*e.g.,* bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Jensen and Silber, 2003; Vanderlaan and Taggart, 2007). In assessing records with known vessel speeds, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 24.1 km/h (14.9 mph; 13 knots). Given the slow vessel speeds and predictable course necessary for data acquisition, ship strike is unlikely to occur during the geophysical and geotechnical surveys. Most marine mammals would be able to easily avoid vessels and are likely already habituated to the presence of numerous vessels in the area. Further, Orsted shall implement measures (*e.g.,* vessel speed restrictions and separation distances; see *Proposed Mitigation Measures*) set forth in the BOEM Lease to reduce the risk of a vessel strike to marine mammal species in the Survey Area. Finally, survey vessels will travel at slow speeds (approximately 4 knots) during the survey, which reduces the risk of injury in the unlikely the event a survey vessel strikes a marine mammal.

Effects on Marine Mammal Habitat

Bottom disturbance associated with the HRG activities may include grab sampling to validate the seabed classification obtained from the multibeam echosounder/sidescan sonar data. This will typically be accomplished using a Mini-Harmon Grab with 0.1 m^2 sample area or the

slightly larger Harmon Grab with a 0.2 m^2 sample area. This limited and highly localized impact to habitat in relation to the comparatively vast area of surrounding open ocean, would not be expected to result in any effects to prey availability. The HRG survey equipment itself will not disturb the seafloor.

There are no feeding areas, rookeries, or mating grounds known to be biologically important to marine mammals within the proposed project area with the exception of a feeding BIA for fin whales and migratory BIA for North Atlantic right whales which were described previously. There is also no designated critical habitat for any ESA-listed marine mammals. NMFS' regulations at 50 CFR part 224 designated the nearshore waters of the Mid-Atlantic Bight as the Mid-Atlantic U.S. Seasonal Management Area (SMA) for right whales in 2008. Mandatory vessel speed restrictions are in place in that SMA from November 1 through April 30 to reduce the threat of collisions between ships and right whales around their migratory route and calving grounds.

We are not aware of any available literature on impacts to marine mammal prey species from HRG survey equipment. However, because the HRG survey equipment introduces noise to the marine environment, there is the potential for avoidance of the area around the HRG survey activities by marine mammal prey species. Any avoidance of the area on the part of marine mammal prey species would be expected to be short term and temporary. Because of the temporary nature of the disturbance, the availability of similar habitat and resources (*e.g.,*prey species) in the surrounding area, and the lack of important or unique marine mammal habitat, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. Impacts on marine mammal habitat from the proposed activities will be temporary, insignificant, and discountable.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, 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, 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 be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to sound from HRG equipment. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown—discussed in detail below in Proposed Mitigation section), Level A harassment is neither anticipated nor proposed to be authorized.

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 be behaviorally harassed (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.,* 2011). Based on what the available science indicates 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 harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 µPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 µPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources. Orsted's proposed activities include the use of intermittent impulsive (HRG Equipment) sources, and therefore the 160 dB re 1 µPa (rms) threshold is applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (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).

These thresholds are provided in Table 4 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.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1*: $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2*: $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3*: $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4*: $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5*: $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6*: $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7*: $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8*: $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9*: $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10*: $L_{E,OW,24h}$: 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.

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.

When NMFS' Acoustic 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 of the new thresholds, NMFS developed an optional User Spreadsheet that includes tools to help predict takes. 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 will result in some degree of overestimate of Level A 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 mobile sources such as the HRG survey equipment proposed for use in Orsted's activity, 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.

Orsted conducted field verification tests on different types of HRG equipment within the proposed Lease Areas during previous site characterization survey activities. NMFS is proposing to authorize take in these same three Lease Areas listed below.

- *OCS–A 0486 & OCS–A 0487:* Marine Acoustics, Inc. (MAI), under contract to Oceaneering International completed an underwater noise monitoring program for the field verification for equipment to be used to survey the Skipjack Windfarm Project (MAI 2018a; 2018b).
- *OCS–A 0500 Lease Area:* The Gardline Group (Gardline), under contract to Alpine Ocean Seismic Survey, Inc., completed an underwater noise monitoring program for the field verification within the Lease Area prior to the commencement of the HRG survey which took place between August 14 and October 6, 2016 (Gardline 2016a, 2016b, 2017). Additional field verifications were completed by the RPS Group, under contract to Terrasond prior to commencement of the 2018 HRG field survey campaign (RPS 2018).

Field Verification results are shown in Table 5. The purpose of the field verification programs was to determine distances to the regulatory thresholds for injury/mortality and behavior disturbance of marine mammals that were established during the permitting process.

As part of their application, Orsted collected field verified source levels and calculated the differential between the averaged measured field verified source levels versus manufacturers' reported source levels for each tested piece of HRG equipment. The results of the field verification studies were used to derive the variability in source levels based on the extrapolated values resulting from regression analysis. These values were used to further calibrate calculations for a specific suite of HRG equipment of similar type. Orsted stated that the calculated differential accounts for both the site specific environmental conditions and directional beam width patterns and can be applied to similar HRG equipment within one of the specified equipment categories (*e.g.,* USBL & GAPS Transceivers, Shallow Sub-Bottom Profilers (SBP), Parametric SBP, Medium Penetration SBP (Sparker), and Medium Penetration SBP (Boomer)). For example, the manufacturer of the Geosource 800J medium penetration SBP reported a source level of 206 dB RMS. The field verification study measured a source level of 189 dB RMS (Gardline 2016a, 2017). Therefore, the differential between the manufacturer and field verified SL is −17 dB RMS. Orsted proposed to apply this differential (−17 dB) to other HRG equipment in the medium penetration SBP (sparker) category with an output of approximately 800 joules. Orsted employed this methodology for all non-field verified equipment within a specific equipment category. These new differential-based proxy SLs were inserted into the User Spreadsheet and used to calculate the Level A and Level B harassment isopleths for the various hearing groups. Table 5 shows the field verified equipment SSV results as well as applicable non-verified equipment broken out by equipment category.

TABLE 5—SUMMARY OF FIELD VERIFIED HRG EQUIPMENT SSV RESULTS AND APPLICABLE HRG DEVICES GROUPED BY CATEGORY TYPE

Representative HRG survey equipment	Operating frequencies	Baseline source level (dB re 1 μPa)	Source level measured during Ørsted FV surveys (dB re 1 μPa)	2019 HRG survey data acquisition equipment
USBL & GAPS Transponder and Transceiver [a]				
Sonardyne Ranger 2	19 to 34 kHz	200 dB_{RMS}	166 dB_{RMS}	Sonardyne Ranger 2 USBL HPT 5/7000; Sonardyne Ranger 2 USBL HPT 3000; Sonardyne Scout Pro; Easytrak Nexus 2 USBL; IxSea GAPS System; Kongsberg HiPAP 501/502 USBL; Edgetech BATS II.
Shallow Sub-Bottom Profilers (Chirp) [a c]				
GeoPulse 5430 A Sub-bottom Profiler.	1.5 to 18 kHz	214 dB_{RMS}	173 dB_{RMS}	Edgetech 3200; Teledyne Benthos Chirp III—TTV 170.
EdgeTech 512	0.5 to 12 kHz	177 dB_{RMS}	166 dB_{RMS}	PanGeo LF Chirp; PanGeo HF Chirp; EdgeTech 216; EdgeTech 424.
Parametric Sub-Bottom Profiler [d]				
Innomar SES–2000 Medium 100.	85 to 115	247 dB_{RMS}	187 dB_{RMS}	Innomar SES–2000 Standard & Plus; Innomar SES–2000 Medium 70; Innomar SES–2000 Quattro; PanGeo 2i Parametric.
Medium Penetration Sub-Bottom Profiler (Sparker) [a]				
Geo-Resources Geo-Source 600 J.	0.05 to 5 kHz	214 dB_{Peak}; 205 dB_{RMS}	206 dB_{Peak}; 183 dB_{RMS}	GeoMarine Geo-Source 400tip; Applied Acoustics Dura-Spark 400 System.
Geo-Resources Geo-Source 800 J.	0.05 to 5 kHz	215 dB_{Peak}; 206 dB_{RMS}	212 dB_{Peak}; 189 dB_{RMS}	GeoMarine Geo-Source 800.
Medium Penetration Sub-Bottom Profiler (Boomer) [b c]				
Applied Acoustics S-Boom Triple Plate Boomer (700J).	0.1 to 5	211 dB_{Peak}; 205 dB_{RMS}	195 dB_{Peak}; 173 dB_{RMS}	Not used for any other equipment.
Applied Acoustics S-Boom Triple Plate Boomer (1000J).	0.250 to 8 kHz	228 dB_{Peak}; 208 dB_{RMS}	215 dB_{Peak}; 198 dB_{RMS}	Not used for any other equipment.

Sources: [a] Gardline 2016a, 2017; [b] RPS 2018; [c] MAI 2018a; [d] Subacoustech 2018

After careful consideration, NMFS concluded that the use of differentials to derive proxy SLs is not appropriate or acceptable. NMFS determined that when field verified measurements are compared to the source levels measured in a controlled experimental setting (*i.e.,* Crocker and Fratantonio, 2016), there are significant discrepancies in isopleth distances for the same equipment that cannot be explained solely by absorption and scattering of acoustic energy. There are a number of variables, including potential differences in propagation rate, operating frequency, beam width, and pulse width that make us question whether SL differential values can be universally applied across different pieces of equipment, even if they fall within the same equipment category. Therefore, NMFS did not employ Orsted's proposed use of differentials to determine Level A and Level B harassment isopleths or proposed take estimates.

As noted above, much of the HRG equipment proposed for use during Orsted's survey has not been field-verified. NMFS employed an alternate approach in which data reported by Crocker and Fratantonio (2016) was used to establish injury and behavioral harassment zones. If Crocker and Fratantonio (2016) did not provide data on a specific piece of equipment within a given equipment category, the SLs reported in the study for measured equipment are used to represent all the other equipment within that category, regardless of whether any of the devices has been field verified. If SSV data from Crocker and Fratantonio (2016) is not available across an entire equipment category, NMFS instead adopted the field verified results from equipment that had been tested. Here, the largest field verified SL was used to represent the entire equipment category. These values were applied to the User Spreadsheet to calculate distances for each of the proposed HRG equipment categories that might result in harassment of marine mammals. Inputs to the User Spreadsheet are shown in Table 6. The source levels used in Table 6 are from field verified values shown in Table 5. However, source levels for the EdgeTech 512 (177 dB RMS) and Applied Acoustics S-Boom Triple Plate Boomer (1,000j) (203 dB RMS) were derived from Crocker and Fratantonio (2016). Table 7 depicts isopleths that could result in injury to a specific hearing group.

TABLE 6—INPUTS TO THE USER SPREADSHEET

Spreadsheet tab used	USBL	Shallow penetration SBP-chirp	Shallow penetration SBP-chirp	Parametric SBP	Medium penetration SBP—sparker	Medium penetration SBP—boomer
	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	F: Mobile source: impulsive, intermittent	F: Mobile source: impulsive, intermittent
HRG Equipment	Sonardyne Ranger 2	GeoPulse 5430 A Sub-bottom Profiler.	EdgeTech 512	Innomar SES 2000 Medium 100.	GeoMarine Geo-Source 800 J.	Applied Acoustics S-Boom Triple Plate Boomer (1,000j).

TABLE 6—INPUTS TO THE USER SPREADSHEET—Continued

Spreadsheet tab used	USBL	Shallow penetration SBP-chirp	Shallow penetration SBP-chirp	Parametric SBP	Medium penetration SBP—sparker	Medium penetration SBP—boomer
	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	D: Mobile source: Non-impulsive, intermittent	F: Mobile source: impulsive, intermittent	F: Mobile source: impulsive, intermittent
Source Level (dB RMS SPL)	166	173	177*	187	212 Pk; 189 RMS	209 Pk; 203 RMS.*
Weighting Factor Adjustment (kHz)	26	4.5	3	42	2	0.6.
Source Velocity (m/s)	2.045	2.045	2.045	2.045	2.045	2.045.
Pulse Duration (seconds)	0.3	0.025	0.0022	0.001	0.055	0.0006.
1/Repetition rate ∧ (seconds)	1	0.1	0.50	0.025	0.5	0.333.
Source Level (PK SPL)					212	215.
Propagation (xLogR)	20	20	20	20	20	20.

*Crocker and Fratantonio (2016).

TABLE 7—MAXIMUM DISTANCES TO LEVEL A HARASSMENT ISOPLETHS BASED ON DATA FROM FIELD VERIFICATION STUDIES AND CROCKER AND FRATANTONIO (2016) (WHERE AVAILABLE)

Representative HRG survey equipment	Marine mammal group	PTS onset	Lateral distance (m)
USBL/GAPS Positioning Systems			
Sonardyne Ranger 2	LF cetaceans	199 dB SEL_{cum}	.....
	MF cetaceans	198 dB SEL_{cum}	.....
	HF cetaceans	173 dB SEL_{cum}	<1
	Phocid pinnipeds	201 dB SEL_{cum}	.....
Shallow Sub-Bottom Profiler (Chirp)			
Edgetech 512	LF cetaceans	199 dB SEL_{cum}	.....
	MF cetaceans	198 dB SEL_{cum}	.....
	HF cetaceans	173 dB SEL_{cum}	.....
	Phocid pinnipeds	201 dB SEL_{cum}	.....
GeoPulse 5430 A Sub-bottom Profiler	LF cetaceans	199 dB SEL_{cum}	.....
	MF cetaceans	198 dB SEL_{cum}	.....
	HF cetaceans	173 dB SEL_{cum}	.....
	Phocid pinnipeds	201 dB SEL_{cum}	.....
Parametric Sub-bottom Profiler			
Innomar SES–2000 Medium 100	LF cetaceans	199 dB SEL_{cum}	.....
	MF cetaceans	198 dB SEL_{cum}	.....
	HF cetaceans	173 dB SEL_{cum}	<2
	Phocid pinnipeds	201 dB SEL_{cum}	.....
Medium Penetration Sub-Bottom Profiler (Sparker)			
GeoMarine Geo-Source 800tip	LF cetaceans	219 dBpeak, 183 dB SEL_{cum}	—, < 1
	MF cetaceans	230 dBpeak, 185 dB SEL_{cum}	.....
	HF cetaceans	202 dBpeak, 155 dB SEL_{cum}	<4, <1
	Phocid pinnipeds	218 dBpeak, 185 dB SEL_{cum}	—, <1
Medium Penetration Sub-Bottom Profiler (Boomer)			
Applied Acoustics S-Boom Triple Plate Boomer (1000j)	LF cetaceans	219 dBpeak, 183 dB SEL_{cum}	—, <1
	MF cetaceans	230 dBpeak, 185 dB SEL_{cum}	.....
	HF cetaceans	202 dBpeak, 155 dB SEL_{cum}	<3, —
	Phocid pinnipeds	218 dBpeak, 185 dB SEL_{cum}	.....

In the absence of Crocker and Fratantonio (2016) data, as noted above, NMFS determined that field verified SLs could be used to delineate Level A harassment isopleths which can be used to represent all of the HRG equipment within that specific category. While there is some uncertainty given that the SLs associated with assorted HRG equipment are variable within a given category, all of the predicted distances based on the field-verified source level are small enough to support a prediction that Level A harassment is unlikely to occur. While it is possible that Level A harassment isopleths of non-verified equipment would be larger than those shown in Table 7, it is unlikely that such zones would be substantially greater in size such that take by Level A harassment would be expected. Therefore, NMFS is not proposing to authorize any take from Level A harassment.

The methodology described above was also applied to calculate Level B harassment isopleths as shown in Table 8. Note that the spherical spreading propagation model (20logR) was used to derive behavioral harassment isopleths for equipment measured by Crocker and Fratantonio (2016) data. However, the practical spreading model (15logR) was used to conservatively assess distances to Level B harassment thresholds for equipment not tested by Crocker and

Fratantonio (2016). Table 8 shows calculated Level B harassment isopleths for specific equipment tested by Crocker and Fratantonio (2016) which is applied to all devices within a given category. In cases where Crocker and Fratantonio (2016) collected measurement on more than one device, the largest calculated isopleth is used to represent the entire category. Table 8 also shows field-verified SLs and associated Level B harassment isopleths for equipment categories that lack relevant Crocker & Fratantonio (2016) measurements. Additionally, Table 8 also references the specific field verification studies that were used to develop the isopleths. For these categories, the largest calculated isopleth in each category was also used to represent all equipment within that category.

Further information depicting how Level B harassment isopleths were derived for each equipment category is described below:

USBL and GAPS: There are no relevant information sources or measurement data within the Crocker and Fratantonio (2016) report. However, SSV tests were conducted on the Sonardyne Ranger 2 (Gardline 2016a, 2017) and the IxSea GAPS System (MAI 2018b). Of the two devices, the IxSea GAPS System had the larger Level B harassment isopleth calculated at a distance of 6 m. It is assumed that all equipment within this category will have the same Level B harassment isopleth.

Parametric SBP: There are no relevant data contained in Crocker and Fratantonio (2016) report for parametric SBPs. However, results from an SSV study showed a Level B harassment isopleth of 63 m for the Innomar-2000 SES Medium 100 system (Subacoustech 2018). Therefore, 63 m will serve as the Level B harassment isopleth for all parametric SBP devices.

SBP (Chirp): Crocker and Fratantonio (2016) tested two chirpers, the Edge Tech (ET) models 424 and 512. The largest calculated isopleth is 7 m associated with the Edgetech 512. This distance will be applied to all other HRD equipment within this category.

SBP (sparkers): The Applied Acoustics Dura-Spark 400 was the only sparker tested by Crocker and Fratantonio (2016). The Level B harassment isopleth calculated for this devise is 141 m and represents all equipment within this category.

SBP (Boomers): The Crocker and Fratantonio report (2016) included data on the Applied Acoustics S-Boom Triple Plate Boomer (1,000J) and the Applied Acoustics S-Boom Boomer (700J). The results showed respective Level B harassment isopleths of 141 m and 178 m. Therefore, the Level B harassment isopleth for both boomers will be established at a distance of 178 m.

TABLE 8—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS

HRG survey equipment	Lateral distance to Level B (m)	Measured SSV level at closest point of approach single pulse $SPL_{rms, 90\%}$ (dB re 1μPa^2)
USBL & GAPS Transceiver		
Sonardyne Ranger 2[a]	2	126 to 132 @40 m
Sonardyne Scout Pro	.....	N/A
Easytrak Nexus 2 USBL	.....	N/A
IxSea GAPS System[e]	6	144 @35 m
Kongsberg HiPAP 501/502 USBL	.....	N/A
Edgetech BATS II	.....	N/A
Shallow Sub-Bottom Profiler (Chirp)		
Edgetech 3200[f]	5	153 @30 m
EdgeTech 216[e]	2	142 @35 m
EdgeTech 424	6	Crocker and Fratantonio (2016): SL = 176
EdgeTech 512[c]	2.4	141 dB @40 m 130 dB @200 m
	7	Crocker and Fratantonio (2016): SL = 177
Teledyne Benthos Chirp III—TTV 170	.....	N/A
GeoPulse 5430 A Sub-Bottom Profiler[a]	4	145 @20 m
PanGeo LF Chirp (Corer)	.....	N/A
PanGeo HF Chirp (Corer)	.....	N/A
Parametric Sub-Bottom Profiler		
Innomar SES–2000 Medium 100 Parametric Sub-Bottom Profiler[b]	63	129 to 133 @100 m
Innomar SES–2000 Medium 70 Parametric Sub-Bottom Profiler	.....	N/A
Innomar SES–2000 Standard & Plus Parametric Sub-Bottom Profiler	.....	N/A
Innomar SES–2000 Quattro	.....	N/A
PanGeo 2i Parametric (Corer)	.....	N/A
Medium Penetration Sub-Bottom Profiler (Sparker)		
GeoMarine Geo-Source 400tip	.....	N/A
GeoMarine Geo-Source 600tip[a]	34	155@20 m
GeoMarine Geo-Source 800tip[a]	86	144@200 m
Applied Acoustics Dura-Spark 400 System[g]	141	Crocker and Fratantonio (2016); SL = 203
GeoResources Sparker 800 System	.....	N/A
Medium Penetration Sub-Bottom Profiler (Boomer)		
Applied Acoustics S-Boom Boomer 1000 J operation[d g]	20	146 @144
	141	Crocker and Fratantonio (2016); SL = 203

TABLE 8—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS—Continued

HRG survey equipment	Lateral distance to Level B (m)	Measured SSV level at closest point of approach single pulse $SPL_{rms, 90\%}$ (dB re 1μPa²)
Applied Acoustics S-Boom Boomer/700 J operation [d g]	14 178	142 @38 m Crocker and Fratantonio (2016); SL = 205

Sources:
[a] Gardline 2016a, 2017.
[b] Subacoustech 2018.
[c] MAI 2018a.
[d] NCE, 2018.
[e] MAI 2018b.
[f] Subacoustech 2017.
[g] Crocker and Fratantonio, 2016.

For the purposes of estimated take and implementing proposed mitigation measure, it is assumed that all HRG equipment will operate concurrently. Therefore, NMFS conservatively utilized the largest isopleth of 178 m, derived from the Applied Acoustics S-Boom Boomer medium SBP, to establish the Level B harassment zone for all HRG categories and devices.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in harassment, radial distances to predicted isopleths corresponding to harassment thresholds are calculated, as described above. Those distances are then used to calculate the area(s) around the HRG survey equipment predicted to be ensonified to sound levels that exceed harassment thresholds. The area estimated to be ensonified to relevant thresholds by a single vessel in a single day of the survey is then calculated, based on areas predicted to be ensonified around the HRG survey equipment and the estimated trackline distance traveled per day by the survey vessel. The daily area is multiplied by the marine mammal density of a given species. This value is then multiplied by the number of proposed vessel days (666).

HRG survey equipment has the potential to cause harassment as defined by the MMPA (160 dB_{RMS} re 1 μPa). As noted previously, all noise producing survey equipment/sources are assumed to be operated concurrently by each survey vessel on every vessel day. The greatest distance to the Level B harassment threshold of 160 $dB_{RMS90\%}$ re 1 μPa level B for impulsive sources is 178 m associated with the Applied Acoustics S-Boom Boomer (700J) (Crocker & Fratantonio, 2016). Therefore, this distance is conservatively used to estimate take by Level B harassment.

The estimated distance of the daily vessel trackline was determined using the estimated average speed of the vessel and the 24-hour operational period within each of the corresponding survey segments. Estimates of incidental take by HRG survey equipment are calculated using the 178 m Level B harassment isopleth, estimated daily vessel track of approximately 70 km, and the daily ensonified area of 25.022 km² for 24-hour operations as shown in Table 9, multiplied by 666 days.

TABLE 9—SURVEY SEGMENT DISTANCES AND LEVEL B HARASSMENT ISOPLETH AND ZONE

Survey segment	Number of active survey vessel days	Estimated distances per day (km)	Level harassment isopeth (m)	Calculated ZOI per day (km²)
Lease Area OCS–A 0486	79	70.000	178	25.022
Lease Area OCS–A 0487	140	.....	.....	.....
Lease Area OCS–A 0500	94	.....	.....	.....
ECR Corridor(s)	353	.....	.....	.....

The data used as the basis for estimating species density for the Lease Area are derived from data provided by Duke Universities' Marine Geospatial Ecology Lab and the Marine-life Data and Analysis Team. This data set is a compilation of the best available marine mammal data (1994–2018) and was prepared in a collaboration between Duke University, Northeast Regional Planning Body, University of Carolina, the Virginia Aquarium and Marine Science Center, and NOAA (Roberts *et al.* 2016a; Curtice *et al.* 2018). Recently, these data have been updated with new modeling results and have included density estimates for pinnipeds (Roberts *et al.* 2016b; 2017; 2018). Because the seasonality of, and habitat use by, gray seals roughly overlaps with harbor seals, the same abundance estimate is applicable. Pinniped density data (as presented in Roberts *et al.* 2016b; 2017; 2018) were used to estimate pinniped densities for the Lease Area Survey segment and ECR Corridor Survey segment(s). Density data from Roberts *et al.* (2016b; 2017; 2018) were mapped within the boundary of the Survey Area for each segment using geographic information systems. For all Survey Area locations, the maximum densities as reported by Roberts *et al.* (2016b; 2017; 2018), were averaged over the survey duration (for spring, summer, fall and winter) for the entire HRG survey area based on the proposed HRG survey schedule as depicted in Table 7. The Level B ensonified area and the projected duration of each respective survey segment was used to produce the estimated take calculations provided in Table 10.

TABLE 10—MARINE MAMMAL DENSITY AND ESTIMATED LEVEL B HARASSMENT TAKE NUMBERS AT 178 M ISOPLETH

Species	Lease area OCS–A 0500		Lease area OCS–A 0486		Lease area OCS–A 0487		ECR corridor(s)		Adjusted totals	
	Average seasonal density [a] (No./100 km^2)	Calculated take (No.)	Average seasonal density [a] (No./100 km^2)	Calculated take (No.)	Average seasonal density [a] (No./100 km^2)	Calculated take (No.)	Average seasonal density [a] (No./100 km^2)	Calculated take (No.)	Take authorization (No.)	Percent of population
North Atlantic right whale	0.502	11.798	0.383	7.570	0.379	13.262	0.759	67.029	[c] 10	2.2
Humpback whale	0.290	6.814	0.271	5.354	0.277	9.717	0.402	35.537	58	6.4
Fin whale	0.350	8.221	0.210	4.157	0.283	9.929	0.339	29.905	52	3.2
Sei whale	0.014	0.327	0.005	0.106	0.009	0.306	0.011	0.946	2	0.5
Sperm whale	0.018	0.416	0.014	0.272	0.017	0.581	0.047	4.118	5	0.2
Minke whale	0.122	2.866	0.075	1.487	0.094	3.275	0.126	11.146	19	0.7
Long-finned pilot whale	1.895	44.571	0.504	9.969	1.012	35.449	1.637	144.590	235	4.2
Bottlenose dolphin	1.992	46.844	1.492	57.800	1.478	43.874	25.002	2,208.314	2,357	3.0
Short beaked common dolphin	22.499	529.176	7.943	157.012	14.546	509.559	19.198	1,695.655	2,892	4.1
Atlantic white-sided dolphin	7.349	172.857	2.006	39.656	3.366	117.896	7.634	674.282	1,005	2.1
Spotted dolphin	0.105	2.477	2.924	0.313	1.252	1.119	0.109	9.611	[d] 50	0.1
Risso's dolphin	0.037	0.859	0.016	0.120	0.032	0.498	0.037	3.291	[d] 30	0.2
Harbor porpoise	5.389	126.757	5.868	115.997	4.546	159.253	20.098	1,775.180	2,177	<0.1
Harbor seal [b]	7.633	179.522	6.757	133.558	3.966	138.918	45.934	4,057.192	4,509	5.9
Gray Seal [b]	7.633	179.522	6.757	133.558	3.966	138.918	45.934	4,057.192	4,509	16.6

Notes:
[a] Cetacean density values from Duke University (Roberts *et al.* 2016, 2017, 2018).
[b] Pinniped density values from Duke University (Roberts *et al.* 2016, 2017, 2018) reported as ''seals'' and not species-specific.
[c] Exclusion zone exceeds Level B isopleth; take adjusted to 10 given duration of survey.
[d] The number of authorized takes (Level B harassment only) for these species has been increased from the estimated take to mean group size. Source for Atlantic spotted dolphin group size estimate is: Jefferson *et al.* (2008). Source for Risso's dolphin group size estimate is: Baird and Stacey (1991).

For the North Atlantic right whale, NMFS proposes to establish a 500-m exclusion zone which substantially exceeds the distance to the level B harassment isopleth (178 m). However, Orsted will be operating 24 hours per day for a total of 666 vessel days. Even with the implementation of mitigation measures (including night-vision goggles and thermal clip-ons) it is reasonable to assume that night time operations for an extended period could result in a limited number of right whales being exposed to underwater sound at Level B harassment levels. Given the fact that take has been conservatively calculated based on the largest source, which will not be operating at all times, and is thereby likely over-estimated to some degree, the fact that Orsted will implement a shutdown zone at 2.5 times the predicted Level B threshold distance for that largest source (and more than that for the smaller sources), and the fact that night vision goggles with thermal clips will be used for nighttime operations, NMFS predicts that 10 right whales may be taken by Level B harassment.

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) 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 (latter not applicable for this action). 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. 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) and 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.

With NMFS' input during the application process, Orsted is requesting the following mitigation measures during site characterization surveys utilizing HRG survey equipment. The mitigation measures outlined in this section are based on protocols and procedures that have been successfully implemented and previously approved by NMFS (DONG Energy, 2016, ESS, 2013; Dominion, 2013 and 2014).

Orsted will develop an environmental training program that will be provided to all vessel crew prior to the start of survey and during any changes in crew such that all survey personnel are fully aware and understand the mitigation, monitoring and reporting requirements. Prior to implementation, the training program will be provided to NOAA Fisheries for review and approval. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey event.

Marine Mammal Monitoring Zone, Harassment Zone and Exclusion Zone

Protected species observers (PSOs) will observe the following monitoring and exclusion zones for the presence of marine mammals:

- 500-m exclusion zone for North Atlantic right whales;
- 100-m exclusion zone for large whales (except North Atlantic right whales); and
- 180-m Level B harassment zone for all marine mammals except for North Atlantic right whales. This represents the largest Level B harassment isopleth applicable to all hearing groups.

If a marine mammal is detected approaching or entering the exclusion zones during the HRG survey, the vessel

operator would adhere to the shutdown procedures described below to minimize noise impacts on the animals.

At all times, the vessel operator will maintain a separation distance of 500 m from any sighted North Atlantic right whale as stipulated in the *Vessel Strike Avoidance* procedures described below. These stated requirements will be included in the site-specific training to be provided to the survey team.

Pre-Clearance of the Exclusion Zones

Orsted will implement a 30-minute clearance period of the exclusion zones prior to the initiation of ramp-up. During this period the exclusion zones will be monitored by the PSOs, using the appropriate visual technology for a 30-minute period. Ramp up may not be initiated if any marine mammal(s) is within its respective exclusion zone. If a marine mammal is observed within an exclusion zone during the pre-clearance period, ramp-up may not begin until the animal(s) has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other species).

Ramp-Up

A ramp-up procedure will be used for HRG survey equipment capable of adjusting energy levels at the start or re-start of HRG survey activities. A ramp-up procedure will be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the Survey Area by allowing them to vacate the area prior to the commencement of survey equipment use. The ramp-up procedure will not be initiated during periods of inclement conditions or if the exclusion zones cannot be adequately monitored by the PSOs, using the appropriate visual technology for a 30-minute period.

A ramp-up would begin with the powering up of the smallest acoustic HRG equipment at its lowest practical power output appropriate for the survey. When technically feasible the power would then be gradually turned up and other acoustic sources would be added.

Ramp-up activities will be delayed if a marine mammal(s) enters its respective exclusion zone. Ramp-up will continue if the animal has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other species).

Shutdown Procedures

An immediate shut-down of the HRG survey equipment will be required if a marine mammal is sighted at or within its respective exclusion zone. The vessel operator must comply immediately with any call for shut-down by the Lead PSO. Any disagreement between the Lead PSO and vessel operator should be discussed only after shut-down has occurred. Subsequent restart of the survey equipment can be initiated if the animal has been observed exiting its respective exclusion zone with 30 minutes of the shut-down or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and 30 minutes for all other species).

If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the 180 m Level B harassment zone, shutdown must occur.

If the acoustic source is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it may be activated again without ramp-up, if PSOs have maintained constant observation and no detections of any marine mammal have occurred within the respective exclusion zones. If the acoustic source is shut down for a period longer than 30 minutes and PSOs have maintained constant observation then ramp-up procedures will be initiated as described in previous section.

The shutdown requirement is waived for small delphinids of the following genera: *Delphinus, Lagenodelphis, Lagenorhynchus, Lissodelphis, Stenella, Steno, and Tursiops.* If a delphinid (individual belonging to the indicated genera of the Family Delphinidae), is visually detected within the exclusion zone, no shutdown is required unless the visual PSO confirms the individual to be of a genus other than those listed, in which case a shutdown is required.

Vessel Strike Avoidance

Orsted will ensure that vessel operators and crew maintain a vigilant watch for cetaceans and pinnipeds and slow down or stop their vessels to avoid striking these species. Survey vessel crew members responsible for navigation duties will receive site-specific training on marine mammal and sea turtle sighting/reporting and vessel strike avoidance measures. Vessel strike avoidance measures will include the following, except under extraordinary circumstances when complying with these requirements would put the safety of the vessel or crew at risk:

- All vessel operators will comply with 10 knot (<18.5 km per hour [km/h]) speed restrictions in any Dynamic Management Area (DMA) when in effect and in Mid-Atlantic Seasonal Management Areas (SMA) from November 1 through April 30;
- All vessel operators will reduce vessel speed to 10 knots or less when mother/calf pairs, pods, or larger assemblages of non-delphinoid cetaceans are observed near an underway vessel;
- All survey vessels will maintain a separation distance of 1,640 ft (500 m) or greater from any sighted North Atlantic right whale;
- If underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots (<18.5 km/h) or less until the 1,640-ft (500-m) minimum separation distance has been established. If a North Atlantic right whale is sighted in a vessel's path, or within 330 ft (100 m) to an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the North Atlantic right whale has moved outside of the vessel's path and beyond 330 ft (100 m). If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 330 ft (100 m);
- All vessels will maintain a separation distance of 330 ft (100 m) or greater from any sighted non-delphinoid (*i.e.,* mysticetes and sperm whales) cetaceans. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the non-delphinoid cetacean has moved outside of the vessel's path and beyond 330 ft (100 m). If a survey vessel is stationary, the vessel will not engage engines until the non-delphinoid cetacean has moved out of the vessel's path and beyond 330 ft (100 m);
- All vessels will maintain a separation distance of 164 ft (50 m) or greater from any sighted delphinid cetacean. Any vessel underway remain parallel to a sighted delphinid cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Any vessel underway reduces vessel speed to 10 knots or less when pods (including mother/calf pairs) or large assemblages of delphinid cetaceans are observed. Vessels may not adjust course and speed until the delphinid cetaceans have moved beyond 164 ft (50 m) and/or the abeam of the underway vessel;
- All vessels underway will not divert to approach any delphinid

cetacean or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted delphinid cetacean or pinniped; and

• All vessels will maintain a separation distance of 164 ft (50 m) or greater from any sighted pinniped.

Seasonal Operating Requirements

Between watch shifts members of the monitoring team will consult NOAA Fisheries North Atlantic right whale reporting systems for the presence of North Atlantic right whales throughout survey operations. Survey vessels may transit the SMA located off the coast of Rhode Island (Block Island Sound SMA) and at the entrance to New York Harbor (New York Bight SMA). The seasonal mandatory speed restriction period for this SMA is November 1 through April 30.

Throughout all survey operations, Orsted will monitor NOAA Fisheries North Atlantic right whale reporting systems for the establishment of a DMA. If NOAA Fisheries should establish a DMA in the Lease Area under survey, the vessels will abide by speed restrictions in the DMA per the lease condition.

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 of effecting the least practicable impact on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) 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.

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

Visual monitoring of the established monitoring and exclusion zone(s) for the HRG surveys will be performed by qualified, NMFS-approved PSOs, the resumes of whom will be provided to NMFS for review and approval prior to the start of survey activities. During these observations, the following guidelines shall be followed:

Other than brief alerts to bridge personnel of maritime hazards and the collection of ancillary wildlife data, no additional duties may be assigned to the PSO during his/her visual observation watch. For all HRG survey segments, an observer team comprising a minimum of four NOAA Fisheries-approved PSOs, operating in shifts, will be stationed aboard respective survey vessels. Should the ASV be utilized, at least one PSO will be stationed aboard the mother vessel to monitor the ASV exclusively. PSOs will work in shifts such that no one monitor will work more than 4 consecutive hours without a 2-hour break or longer than 12 hours during any 24-hour period. Any time that an ASV is in operation, PSOs will work in pairs. During daylight hours without ASV operations, a single PSO will be required. PSOs will rotate in shifts of 1 on and 3 off during daylight hours when an ASV is not operating and work in pairs during all nighttime operations.

The PSOs will begin observation of the monitoring and exclusion zones during all HRG survey operations. Observations of the zones will continue throughout the survey activity and/or while equipment operating below 200 kHz are in use. The PSOs will be responsible for visually monitoring and identifying marine mammals approaching or entering the established zones during survey activities. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate and enforce the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

PSOs will be equipped with binoculars and will have the ability to estimate distances to marine mammals located in proximity to their respective exclusion zones and monitoring zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the siting and monitoring of marine species. Camera equipment capable of recording sightings and verifing species identification will be utilized. During night operations, night-vision equipment (night-vision goggles with thermal clip-ons) and infrared technology will be used. Position data will be recorded using hand-held or vessel global positioning system (GPS) units for each sighting.

Observations will take place from the highest available vantage point on all the survey vessels. General 360-degree scanning will occur during the monitoring periods, and target scanning by the PSOs will occur when alerted of a marine mammal presence.

For monitoring around the ASV, a dual thermal/HD camera will be installed on the mother vessel, facing forward, angled in a direction so as to provide a field of view ahead of the vessel and around the ASV. One PSO will be assigned to monitor the ASV exclusively at all times during both day and night when in use. The ASV will be kept in sight of the mother vessel at all times (within 800 m). This dedicated PSO will have a clear, unobstructed view of the ASV's exclusion and monitoring zones. While conducting survey operations, PSOs will adjust their positions appropriately to ensure adequate coverage of the entire exclusion and monitoring zones around the respective sound sources. PSOs will also be able to monitor the real time output of the camera on hand-held iPads. Images from the cameras can be

captured for review and to assist in verifying species identification. A monitor will also be installed on the bridge displaying the real-time picture from the thermal/HD camera installed on the front of the ASV itself, providing a further forward field of view of the craft. In addition, night-vision goggles with thermal clip-ons, as mentioned above, and a hand-held spotlight will be provided such that PSOs can focus observations in any direction, around the mother vessel and/or the ASV. The ASV camera is only utilized at night as part of the reduced visibility program, during which one PSO monitors the ASV camera and the forward-facing camera mounted on mothership. The second PSO would use the hand held devices to cover the areas around the mothership that the forward-facing camera could not cover.

Observers will maintain 360° coverage surrounding the mothership vessel and the ASV when in operation, which will travel ahead and slightly offset to the mothership on the survey line. PSOs will adjust their positions appropriately to ensure adequate coverage of the entire exclusion zone around the mothership and the ASV.

As part of the monitoring program, PSOs will record all sightings beyond the established monitoring and exclusion zones, as far as they can see. Data on all PSO observations will be recorded based on standard PSO collection requirements.

Proposed Reporting Measures

Orsted will provide the following reports as necessary during survey activities:

Notification of Injured or Dead Marine Mammals

In the unanticipated event that the specified HRG and geotechnical activities lead to an unauthorized injury of a marine mammal (Level A harassment) or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), Orsted would immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the NOAA Greater Atlantic Regional Fisheries Office (GARFO) Stranding Coordinator. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the event. NMFS would work with Orsted to minimize reoccurrence of such an event in the future. Orsted would not resume activities until notified by NMFS.

In the event that Orsted discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition), Orsted would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources and the GARFO Stranding Coordinator. The report would include the same information identified in the paragraph above. Activities would be allowed to continue while NMFS reviews the circumstances of the incident. NMFS would work with the Applicant to determine if modifications in the activities are appropriate.

In the event that Orsted discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Orsted would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the GARFO Stranding Coordinator, within 24 hours of the discovery. Orsted would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS. Orsted can continue its operations in such a case.

Within 90 days after completion of the marine site characterization survey activities, a draft technical report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, estimates the number of marine mammals that may have been taken during survey activities, and provides an interpretation of the results and effectiveness of all monitoring tasks. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

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).

To avoid repetition, this introductory discussion of our analyses applies to all the species listed in Table 8, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

As discussed in the ''Potential Effects of the Specified Activity on Marine Mammals and Their Habitat'' section, PTS, TTS, masking, non-auditory physical effects, and vessel strike are not expected to occur. Marine mammal habitat may experience limited physical

impacts in the form of grab samples taken from the sea floor. This highly localized habitat impact is negligible in relation to the comparatively vast area of surrounding open ocean, and would not be expected to result in any effects to prey availability. The HRG survey equipment itself will not result in physical habitat disturbance. Avoidance of the area around the HRG survey activities by marine mammal prey species is possible. However, any avoidance by prey species would be expected to be short term and temporary. Marine mammal feeding behavior is not likely to be significantly impacted. Prey species are mobile, and are broadly distributed throughout the Survey Area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the availability of similar habitat and resources in the surrounding area the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

ESA-Listed Marine Mammal Species

ESA-listed species for which takes are proposed are right, fin, sei, and sperm whales, and these effects are anticipated to be limited to lower level behavioral effects. NMFS does not anticipate that serious injury or mortality would occur to ESA-listed species, even in the absence of proposed mitigation and the proposed authorization does not authorize any serious injury or mortality. As discussed in the *Potential Effects* section, non-auditory physical effects and vessel strike are not expected to occur. We expect that most potential takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity were occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). The proposed survey is not anticipated to affect the fitness or reproductive success of individual animals. Since impacts to individual survivorship and fecundity are unlikely, the proposed survey is not expected to result in population-level effects for any ESA-listed species or alter current population trends of any ESA-listed species.

There is no designated critical habitat for any ESA-listed marine mammals within the Survey Area.

Biologically Important Areas (BIA)

The proposed Survey Area includes a fin whale feeding BIA effective between March and October. The fin whale feeding area is sufficiently large (2,933 km^2), and the acoustic footprint of the proposed survey is sufficiently small (<20 km^2 ensonified per day to the Level B harassment threshold assuming simultaneous operation of two survey ships) that whale feeding habitat would not be reduced appreciably. Any fin whales temporarily displaced from the proposed survey area would be expected to have sufficient remaining feeding habitat available to them, and would not be prevented from feeding in other areas within the biologically important feeding habitat. In addition, any displacement of fin whales from the BIA would be expected to be temporary in nature. Therefore, we do not expect fin whale feeding to be negatively impacted by the proposed survey.

The proposed survey area includes a biologically important migratory area for North Atlantic right whales (effective March–April and November–December) that extends from Massachusetts to Florida (LaBrecque, *et al.,* 2015). Off the south coast of Massachusetts and Rhode Island, this biologically important migratory area extends from the coast to beyond the shelf break. The fact that the spatial acoustic footprint of the proposed survey is very small relative to the spatial extent of the available migratory habitat means that right whale migration is not expected to be impacted by the proposed survey. Required vessel strike avoidance measures will also decrease risk of ship strike during migration. Additionally, only very limited take by Level B harassment of North Atlantic right whales has been proposed as HRG survey operations are required to shut down at 500 m to minimize the potential for behavioral harassment of this species.

Unusual Mortality Events (UME)

A UME is defined under the MMPA as ''a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.'' Four UMEs are ongoing and under investigation relevant to HRG survey area. These involve humpback whales, North Atlantic right whales, minke whales, and pinnipeds. Specific information for each ongoing UME is provided below. There is currently no direct connection between the four UMEs, as there is no evident cause of stranding or death that is common across the species involved in the different UMEs. Additionally, strandings across these species are not clustering in space or time.

As noted previously, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016 Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease. Elevated North Atlantic right whale mortalities began in June 2017, primarily in Canada. Overall, preliminary findings support human interactions, specifically vessel strikes or rope entanglements, as the cause of death for the majority of the right whales. Elevated numbers of harbor seal and gray seal mortalities were first observed in July, 2018 and have occurred across Maine, New Hampshire and Massachusetts. Based on tests conducted so far, the main pathogen found in the seals is phocine distemper virus although additional testing to identify other factors that may be involved in this UME are underway.

Direct physical interactions (ship strikes and entanglements) appear to be responsible for many of the UME humpback and right whale mortalities recorded. The proposed HRG survey will require ship strike avoidance measures which would minimize the risk of ship strikes while fishing gear and in-water lines will not be employed as part of the survey. Furthermore, the proposed activities are not expected to promote the transmission of infectious disease among marine mammals. The survey is not expected to result in the deaths of any marine mammals or combine with the effects of the ongoing UMEs to result in any additional impacts not analyzed here.

The required mitigation measures are expected to reduce the number and/or severity of takes by giving animals the opportunity to move away from the sound source before HRG survey equipment reaches full energy and preventing animals from being exposed to sound levels that have the potential to cause injury (Level A harassment) and more severe Level B harassment during HRG survey activities, even in the biologically important areas described above.

Accordingly, Orsted did not request, and NMFS is not proposing to authorize, take of marine mammals by

serious injury, or mortality. NMFS expects that most takes would primarily be in the form of short-term Level B behavioral harassment in the form of brief startling reaction and/or temporary vacating of the area, or decreased foraging (if such activity were occurring)—reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). Since the source is mobile, a specified area would be ensonified by sound levels that could result in take for only a short period. Additionally, required mitigation measures would reduce exposure to sound that could result in harassment.

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 or serious injury is anticipated or authorized;
- No Level A harassment (PTS) is anticipated;
- Foraging success is not likely to be significantly impacted as effects on species that serve as prey species for marine mammals from the survey are expected to be minimal;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- Take is anticipated to be primarily Level B behavioral harassment consisting of brief startling reactions and/or temporary avoidance of the Survey Area;
- While the Survey Area is within areas noted as biologically important for north Atlantic right whale migration, the activities would occur in such a comparatively small area such that any avoidance of the survey area due to activities would not affect migration. In addition, mitigation measures to shut down at 500 m to minimize potential for Level B behavioral harassment would limit any take of the species. Similarly, due to the small footprint of the survey activities in relation to the size of a biologically important area for fin whales foraging, the survey activities would not affect foraging behavior of this species; and
- The proposed mitigation measures, including visual monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

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 Orsted's proposed HRG survey activities will have a negligible impact on the 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)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken 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.

The numbers of marine mammals that we propose for authorization to be taken, for all species and stocks, would be considered small relative to the relevant stocks or populations (less than 17 percent for all authorized species).

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.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

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 IHAs, NMFS consults internally, in this case with the Greater Atlantic Regional Field Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

Within the project area, fin, Sei, humpback, North Atlantic right, and sperm whale are listed as endangered under the ESA. Under section 7 of the ESA, BOEM consulted with NMFS on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. NOAA's GARFO issued a Biological Opinion concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of fin whale or North Atlantic right whale. NMFS is also consulting internally on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity and the existing Biological Opinion may be amended to include an incidental take exemption for these marine mammal species, as appropriate.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Orsted for HRG survey activities effective one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the IHA itself is available for review in conjunction with this notice at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed survey. We also request at this time comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal.

On a case-by-case basis, NMFS may issue a one-year IHA renewal with an additional 15 days for public comments when (1) another year of identical or nearly identical activities as described in the Specified Activities section of this notice is planned or (2) the activities as described in the Specified Activities section of this notice would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section of this notice, provided all of the following conditions are met:

• A request for renewal is received no later than 60 days prior to expiration of the current IHA.

• The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take because only a subset of the initially analyzed activities remain to be completed under the Renewal).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

• Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: July 19, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

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BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV006

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scientific & Statistical Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, August 21, 2019, beginning at 9 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hotel Providence, 139 Matthewson Street, Providence, RI; phone: (401) 490–8000.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scientific and Statistical Committee will develop acceptable biological catch (ABC) and overfishing level (OFL) recommendations for the fishery management plan (FMP) for Monkfish for fishing years 2020–22, Deep-sea Red Crab fishing years 2020–22, and the Skate Complex. They also will develop ABC and OFL recommendations for Georges Bank yellowtail flounder, which is managed under the Northeast Multispecies FMP for fishing years 2020–21. Additionally, the SSC may discuss internal organizational issues. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. 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, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: July 23, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–15901 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV005

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Surfclam and Ocean Quahog Advisory Panel (AP) will hold a public meeting.

DATES: The meeting will be held on Tuesday, September 17, 2019, from 9 a.m. until 12 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place at the Embassy Suites Philadelphia-Airport, 9000 Bartram Ave., Philadelphia, PA 19153; telephone: (215) 365–4500.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's (Councils) Surfclam and Ocean Quahog AP will meet to review and provide comments on the Fishery Management Action Team's recommendations to address potential actions from the Catch Share Program review conducted by Northern Economic, Inc. The input from the AP on this topic will be presented to the Council's Executive Committee at the October 2019 Council meeting, when the Council discusses its 2020 Implementation Plan.

In addition, at this meeting, the AP will also review and provide input on the public hearing comments from the Excessive Shares Amendment. The Council will collect public comments on the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment during 4 public hearings to be held during a 45-day Public comment period from August 1 to September 14, 2019 (84 FR 31032). The input from the AP on this topic will be presented to the Council at its December 2019 Council meeting, when the Council discusses the final action/approval of the Excessive Shares Amendment. An

agenda and background documents will be posted at the Council's website (*www.mafmc.org) prior to the meeting.*

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: July 23, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–15900 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV003

Fisheries of the Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 65 data webinar III for HMS Atlantic blacktip shark.

SUMMARY: The SEDAR 65 assessment process of HMS Atlantic blacktip shark will consist of a Data Workshop, a series of data and assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 65 data webinar III will be held September 10, 2019, from 1 p.m. to 3 p.m., Eastern Time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) A Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the data webinar III are as follows:

Panelists will review the data sets being considered for the assessment and discuss initial modeling efforts.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: July 23, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–15897 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Pacific Coast Groundfish Rationalization Sociocultural Study

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before September 24, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, Government Information Specialist, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or via the internet at *PRAcomments@doc.gov*). All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Suzanne Russell, Human Dimensions Team, Northwest Fisheries Science Center, 2725 Montlake Blvd. East, Seattle, WA 98112, (206) 860–3274, *Suzanne.russell@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection (revision). The revision consists of minor changes to the information collection tool.

Historically, changes in fisheries management regulations result in

impacts to both individuals and fishing communities tied to fisheries. An understanding of social impacts, achieved through the collection of data from individuals whom fish and live in fishing communities is a requirement under several federal laws. The National Environmental Protection Act (NEPA) and the Magnuson Stevens Fishery Conservation Act (as amended 2007) describe such requirements. The collection of this data not only informs legal requirements for existing management actions, but also provides information for future and ongoing management actions requiring equivalent information.

Literature indicates fisheries' rationalization programs have an impact on those individuals participating in the affected fishery. The Pacific Fisheries Management Council implemented a rationalization program for the Pacific Coast Groundfish limited entry trawl fishery in January 2011. This research aims to continue to study the individuals in the affected fishery over the long term. Data collection will transition to a five-year cycle, beginning in FY 2020. Prior data collection related to program design elements. A baseline data collection occurred in 2010, followed by a second post-implementation collection in 2012, and a post quota-share trading collection in 2015/2016. The data collected has contributed to the five-year review of the program and highlighted several areas for continued research. Efforts have also identified the need for long-term data collection as species recover and external factors affect fishermen in this fishery as they continue to be faced with issues of underutilization, high costs of participation, and other challenges. This issue has been able to highlight several issues such as 'graying of the fleet' in smaller communities, changing women's roles in commercial fishing, and fishermen's adaptations under the new regulations. Continued research will identify and clarify continued and long-term social impacts. These efforts are critical and are a puzzle piece, that combined with the ongoing mandatory Economic Data Collection (EDC) and biological data collection, provides the Pacific Fisheries Management Council extensive information on concerns and impacts to fishing communities.

Information from future and past data collections provide a time series data set of sociocultural information, indicating changes in the fishing communities. Data can inform multiple regulatory efforts as needed. Future data collection efforts will inform the 10-year review of the program. Primarily, this data collection will meet legal requirements to study and understand fishing communities and the individuals whom live in those communities.

This study is managed by the Human Dimensions Team, Ecosystem Science Program, Conservation Biology Division, Northwest Fisheries Science Center, National Marine Fisheries Service, Seattle, WA.

II. Method of Collection

In-person paper surveys and interviews are the primary data collection tools. Electronic surveys, verbal communications and collaborations with key informants, with the potential for small focus groups all supplement the primary tools for the greatest breadth of data collection possible.

III. Data

OMB Control Number: 0648–0606.

Form Number(s): None.

Type of Review: Revision and extension of a currently approved collection.

Affected Public: Individuals or households; Business or other for-profit organizations.

Estimated Number of Respondents: 350.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 800.

Estimated Total Annual Cost to Public: 0.

IV. Request for Comments

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 shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection 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 on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Departmental Lead PRA Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–15882 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV004

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Surfclam and Ocean Quahog Committee (Committee) will hold a public meeting.

DATES: The meeting will be held on Tuesday, September 17, 2019, from 1:30 p.m. until 5 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place at the Embassy Suites Philadelphia-Airport, 9000 Bartram Ave., Philadelphia, PA 19153; telephone: (215) 365–4500.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Mid-Atlantic Fishery Management Council's Surfclam and Ocean Quahog Committee will meet to review and provide comments on the Fishery Management Action Team's recommendations to address potential actions from the Catch Share Program review conducted by Northern Economic, Inc. The input from the Committee on this topic will be presented to the Council's Executive Committee at the October 2019 Council meeting, when the Council discusses its 2020 Implementation Plan.

In addition, at this meeting, the Committee will also review and provide input on the public hearing comments from the Excessive Shares Amendment. The Council will collect public comments on the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment during 4 public hearings to be held during a 45-day Public comment period from August 1 to September 14, 2019 (84 FR 31032). The input from the Committee on this topic will be presented to the Council at its December 2019 Council meeting, when the Council discusses the final action/approval of the Excessive Shares

Amendment. An agenda and background documents will be posted at the Council's website (*www.mafmc.org) prior to the meeting.*

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: July 23, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–15899 Filed 7–25–19; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete service(s) from the Procurement List that were previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* August 25, 2019.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following services are proposed for deletion from the Procurement List:

Services

Service Type: Recycling, End of Life Electronics
Mandatory for: U.S. Mint: 633 3rd Street NW, Washington, DC
Mandatory Source of Supply: ServiceSource, Inc., Oakton, VA
Contracting Activity: DEPARTMENT OF THE TREASURY

Service Type: Janitorial/Custodial
Mandatory for: Department of Energy: Yucca Mountain Site Characterization Office 1551 Hillshire Drive, Las Vegas, NV
Mandatory Source of Supply: Opportunity Village Association for Retarded Citizens, Las Vegas, NV
Contracting Activity: Department of Energy, Headquarters Procurement Services

Service Type: Custodial Services
Mandatory for: VA Medical Center, 50 Irving Street NW, Washington, DC
Mandatory Source of Supply: Didlake, Inc., Manassas, VA
Contracting Activity: VETERANS AFFAIRS, DEPARTMENT OF, NAC

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–15896 Filed 7–25–19; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Addition to and deletions from the Procurement List.

SUMMARY: This action adds service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) and service(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* August 25, 2019.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Addition

On 6/07/2019 the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the service to the Government.

2. The action will result in authorizing small entities to provide the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service is added to the Procurement List:

Service

Service Type: Custodial and Related Services
Mandatory for: GSA PBS Region 3, Clarksburg U.S. Post Office Building, Clarksburg, WV
Mandatory Source of Supply: Job Squad, Inc., Bridgeport, WV
Contracting Activity: PUBLIC BUILDINGS SERVICE, PBS R3

Deletions

On 6/21/2019, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSNs—Product Names:
8345–00–242–0266—Flag, 3 Star, Outdoor, 58″ x 81″
8345–00–242–0267—Flag, 3 Star, Outdoor, 43″ x 62″
8345–00–242–0268—Flag, 3 Star, Outdoor, 22″ x 32″
8345–00–242–0269—Flag, 3 Star, Outdoor, 12″ x 15″
8345–00–242–0270—Flag, 2 Star, Outdoor, 58″ x 81″
8345–00–242–0271—Flag, 2 Star, Outdoor, 43″ x 62″
8345–01–033–9300—Flag, 2 Star, Outdoor, 52″ x 66″
8345–01–085–6033—Flag, Commandant, 52″ X 66″
8345–01–085–6034—Flag, Vice Commandant, 52″ x 66″
8345–01–087–4592—Flag, Commandant, Outdoor 43″ x 62″
8345–00–265–7522—Pennant
8345–01–087–4593—Flag, Commandant, Outdoor, 22″ x 32″
8345–01–087–4596—Flag, Vice Commandant, Outdoor 22″ x 32″
8345–01–087–4597—Flag, Vice Commandant, Automobile, 12″ x 15″
8345–01–168–1144—Flag, 1 Star, 52″ x 66″
8345–01–168–1145—Flag, 1 Star, Outdoor, 22″ x 32″
8345–01–168–1147—Flag, 1 Star, 43″ x 62″
8345–01–248–4071—Flag, 3 Star, 52″ x 66″
8345–01–298–7403—Flag, Standard Coast Guard, 52″ x 66″
8345–00–242–0272—Flag, 2 Star, Outdoor, 22x32
8345–01–087–4594—Flag, Commandant, Automobile, 12x15
8345–01–087–4595—Flag, Vice Commandant, Outdoor, 43x62
8345–01–168–1146—Flag, 1 Star, Automobile
Mandatory Source of Supply: Goodwill Industries of South Florida, Inc., Miami, FL
Contracting Activity: SFLC PROCUREMENT BRANCH 3, BALTIMORE, MD

Services

Service Type: Data Entry
Mandatory for: USDA, Food Safety & Inspection Services: 100 North Sixth Street, Minneapolis, MN
Contracting Activity: General Services Administration, FPDS Agency Coordinator

Service Type: Document Destruction
Mandatory for: US Department of the Interior, Interior Business Center, Acquisition Services Directorate, Division III, Sierra Vista, AZ
Mandatory Source of Supply: Beacon Group, Inc., Tucson, AZ
Contracting Activity: Departmental Offices, IBC ACQ SERVICES DIVISION (00063)

Service Type: Janitorial/Custodial
Mandatory for: U.S. Army Reserve, Fridley USARC, Covington, VA
Mandatory Source of Supply: Goodwill Industries of the Valleys, Inc., Roanoke, VA
Contracting Activity: DEPT OF THE ARMY, W6QM MICC–FT DIX (RC–E)

Service Type: Janitorial/Custodial
Mandatory for: U.S. Army Reserve AFRC: 3938 Old French Road, Erie, PA
Mandatory Source of Supply: Dr. Gertrude A. Barber Center, Inc., Erie, PA
Contracting Activity: DEPT OF THE ARMY, W6QM MICC CTR–FT DIX (RC)

Service Type: Janitorial/Custodial
Mandatory for:
Camp Lincoln Museum
Combined Support Maintenance Shop
U.S. Property and Fiscal Office, Building 1
U.S. Property and Fiscal Office Warehouse: Building 2 Springfield, IL
Mandatory Source of Supply: United Cerebral Palsy of the Land of Lincoln, Springfield, IL
Contracting Activity: DEPT OF THE ARMY, W7M6 USPFO ACTIVITY IL ARNG

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–15893 Filed 7–25–19; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection Number 3038–0067, Protection of Consumer Information Under the Fair Credit Reporting Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. This notice solicits comments on the collections of information mandated by the Commission's regulations (Protection of Consumer Information under the Fair Credit Reporting Act).

DATES: Comments must be submitted on or before September 24, 2019.

ADDRESSES: You may submit comments, identified by ''Part 162—Protection of Consumer Information under the Fair Credit Reporting Act,'' and OMB Control No. 3038–0067 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: Jacob Chachkin, Special Counsel, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, (202) 418–5496, email: *jchachkin@cftc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act[1] (''PRA''), Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 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: Part 162—Protection of Consumer Information under the Fair Credit Reporting Act (OMB Control No. 3038–0067). This is a request for an extension of a currently approved information collection.

Abstract: On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[2] Title X of the Dodd-Frank Act, which is titled the Consumer Financial Protection Act of 2010 (''CFP Act''), amends a number of federal consumer protection laws enacted prior to the Dodd-Frank Act including, in relevant part, the Fair Credit Reporting Act

[1] 44 U.S.C. 3501 *et seq.*

[2] Public Law 111–203, 124 Stat. 1376 (2010).

(''FCRA'') [3] and the Fair and Accurate Credit Transactions Act of 2003 (''FACT Act'').[4] Specifically, Section 1088 of the CFP Act sets out certain amendments to the FCRA and the FACT Act directing the Commission to promulgate regulations that are intended to provide privacy protections to certain consumer information held by an entity that is subject to the jurisdiction of the Commission.

Section 1088 amends section 214(b) of the FACT Act—which added section 624 to the FCRA in 2003—and directs the Commission to implement the provisions of section 624 of the FCRA with respect to persons that are subject to the Commission's enforcement jurisdiction. Section 624 of the FCRA gives a consumer the right to block affiliates of an entity subject to the Commission's jurisdiction from using certain information obtained from such entity to make solicitations to that consumer (hereinafter referred to as the ''affiliate marketing rules'').[5] Under the affiliate marketing rules, the entities covered by the regulations are expected to prepare and provide clear, conspicuous and concise opt-out notices to any consumers with whom such entities have a pre-existing business relationship. A covered entity only has to provide an opt-out notice to the extent that an affiliate of the covered entity plans to make a solicitation to any of the covered entity's consumers. The purpose of the opt-out notice is to provide consumers with the ability to prohibit marketing solicitations from affiliate businesses that do not have a pre-existing business relationship with the consumers, but that do have access to such consumers' nonpublic, personal information. A covered entity is required to send opt-out notices at the maximum of once every five years.

Section 1088 of the CFP Act also amends section 628 of the FCRA and mandates that the Commission implement regulations requiring persons subject to the Commission's jurisdiction who possess or maintain consumer report information in connection with their business activities to properly dispose of that information (hereinafter referred to as the ''disposal rules'').[6] Under the disposal rules, the entities covered by the regulations are expected to develop and implement a written disposal plan with respect to any consumer information within such entities' possession. The regulations provide that a covered entity develop a written disposal plan that is tailored to the size and complexity of such entity's business. The purpose of the written disposal plan is to establish a formal plan for the disposal of nonpublic, consumer information, which otherwise could be illegally confiscated and used by unauthorized third parties. Under the rules, a covered entity is required to develop a written disposal plan only once, but may subsequently amend such plan from time to time.

In addition, Section 1088 of the CFP Act amended the FCRA by adding the CFTC and the Securities and Exchange Commission (''SEC,'' together with the CFTC, the ''Commissions'') to the list of federal agencies required to jointly prescribe and enforce identity theft red flags rules and guidelines and card issuer rules. Thus, the Dodd-Frank Act provides for the transfer of rulemaking responsibility and enforcement authority to the CFTC and SEC with respect to the entities under their respective jurisdiction. Accordingly, the Commissions have issued final rules and guidelines (hereinafter referred to as the ''identity theft rules'') [7] to implement new statutory provisions enacted by the CFP Act that amend section 615(e) of the FCRA and direct the Commissions to prescribe rules requiring entities that are subject to the Commissions' jurisdiction to address identity theft. Under the identity theft rules, entities covered by the regulation are required to develop and implement reasonable policies and procedures to identify, detect, and respond to relevant red flags for identity theft that are appropriate to the size and complexity of such entity's business and, in the case of entities that issue credit or debit cards, to assess the validity of, and communicate with cardholders regarding, address changes.[8] They are also required to provide for the continued administration of identity theft policies and procedures.

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.[9]

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 information collection request 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 to reflect its estimate of the current number of CFTC registrants subject to the requirements of part 162 regulations. In addition, this burden estimate reflects the total burden hours from the affiliate marketing rules (subpart A), the disposal rules (subpart B), and the identity theft rules (subpart C)—the first two categories of which were inadvertently omitted from previous renewals. Thus the current renewal aims to correct past omissions by including burden calculations from all three categories under part 162.

[3] 15 U.S.C. 1681–1681x.

[4] Public Law 108–159, 117 Stat. 1952, 1980 (2003).

[5] The affiliate marketing rules are found in part 162, subpart A (Business Affiliate Marketing Rules) of the CFTC's regulations. 17 CFR part 162, subpart A.

[6] The disposal rules are found in part 162, subpart B (Disposal Rules) of the CFTC's regulations. 17 CFR part 162, subpart B.

[7] The CFTC's identity theft rules are found in part 162, subpart C (Identity Theft Red Flags) of the CFTC's regulations. 17 CFR part 162, subpart C.

[8] The CFTC understands that CFTC-regulated entities generally do not issue credit or debit cards, but instead may partner with other entities, such as banks, that issue cards on their behalf. These other entities, which are not regulated by the CFTC, are already subject to substantially similar change of address obligations pursuant to other federal regulators' identity theft red flags rules. Therefore, the CFTC does not expect that any CFTC-regulated entities will be subject to the related information collection requirements under the CFTC's identity theft rules.

[9] 17 CFR 145.9.

Accordingly, the respondent burden for this collection is estimated to be as follows:

Estimated Number of Respondents: 4,488.

Estimated Average Burden Hours per Respondent: 13.25.[10]

Estimated Total Annual Burden Hours: 59,459.

Frequency of Collection: As applicable.

There are no capital costs or operating and maintenance costs associated with this collection.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: July 23, 2019.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2019–15933 Filed 7–25–19; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2019–HQ–0015]

Submission for OMB Review; Comment Request

AGENCY: Army & Air Force Exchange Service (Exchange), DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by August 26, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov*. Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Exchange Accounts Receivable Files; CRC 7429395—''Military Star Card Paper Application'' and Exchange Form 6450–005—''Exchange Credit Program Account Update''; OMB Number 0702–0137.

Type of Request: Extension.

Number of Respondents: 916,574.

Responses per Respondent: 1.

Annual Responses: 916,574.

Average Burden per Response: 3 minutes.

Annual Burden Hours: 45,829.

Needs and Uses: The information collection requirement is necessary to process, monitor, and post audit accounts receivables to the Army and Air Force Exchange Service; to administer the Federal Claims Collection Act and to answer inquiries pertaining thereto as well as collection of indebtedness and determination of customer's eligibility to cash checks at Exchange facilities.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

Dated: July 23, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–15939 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2019–OS–0052]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by August 26, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Technical Assistance for Public Participation (TAPP) Application; DD Form 2749; OMB Control Number 0704–0392.

Type of Request: Revision.

Number of Respondents: 25.

Responses per Respondent: 2.

Annual Responses: 50.

Average Burden per Response: 4 hours.

Annual Burden Hours: 200.

Needs and Uses: The information collection requirement is necessary to identify products or services requested by community members of restoration advisory boards or technical review committees to aid in their participation in the Department of Defense's environmental restoration program, and to meet Congressional reporting requirements.

Affected Public: Individuals or households.

Frequency: As required.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

[10] This number reflects the average aggregate burden hours, per respondent, in response to: (a) Disclosure (1 hr.) and recordkeeping requirements (3.5 hrs) under the affiliate marketing rules, (b) recordkeeping requirements under the disposal rules (5.9 hrs), and (c) recordkeeping requirements under the identity theft rules (2.85 hrs).

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

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

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: July 23, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–15927 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–12]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19–12 with attached Policy Justification and Sensitivity of Technology.

Dated: July 22, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

MAR 1 2 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-12 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Australia for defense articles and services estimated to cost $240.5 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 19–12

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Australia

(ii) *Total Estimated Value:*

Major Defense Equipment *	$219.6 million
Other	$ 20.9 million
TOTAL	$240.5 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of Australia has requested to buy defense articles and services from the U.S. Government in support of the National Advanced Surface to Air Missile System (NASAMS).

Major Defense Equipment (MDE):

One hundred eight (108) AIM–120C–7 Advanced Medium-Range Air-to-Air Missiles (AMRAAM)

Six (6) AIM–120C–7 AMRAAM Air Vehicles Instrumented

Six (6) Spare AIM–120C–7 AMRAAM Guidance Sections

Non-MDE:

Also included are containers, weapon system support equipment, support and test equipment, site survey, transportation, repair and return warranties, spare and repair parts, publications and technical data, maintenance, personnel training, and training equipment, U.S. Government and contractor representative engineering, logistics, and technical support services, and other related elements of logistics support.

(iv) *Military Department:* Air Force (AT–D–YAI)

(v) *Prior Related Cases, if any:* AT–D–YLD

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* **March 12, 2019.**

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Australia—AIM–120C–7 Advanced Medium-Range Air-to-Air Missiles

The Government of Australia has requested to buy up to 108 AIM–120C–7 Advanced Medium-Range Air-to-Air Missiles (AMRAAM); six (6) AIM–120C–7 AMRAAM Air Vehicles Instrumented; and six (6) spare AIM–120C–7 AMRAAM guidance sections. Also included are containers, weapon system support equipment, support and test equipment, site survey, transportation, repair and return warranties, spare and repair parts, publications and technical data, maintenance, personnel training, and training equipment, U.S. Government and contractor representative engineering, logistics, and technical support services, and other related elements of logistics support. These items are in support of Australia's purchase of the National Advanced Surface to Air Missile System (NASAMS). The estimated total program cost is $240.5 million.

This sale will support the foreign policy and national security of the United States by helping to improve the security of a major ally that is an important force for political stability and economic progress in the Western Pacific. It is vital to the U.S. national interest to assist our ally in developing and maintaining a strong and ready self-defense capability.

This proposed sale is in support of the Australian Defence Force (ADF) Project LAND 19 Phase 7B for acquisition of a ground based air and missile defense capability. Australia will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment will not alter the basic military balance in the region.

The prime contractor will be Raytheon Missile Systems, Tucson, Arizona. There are no known offset arrangements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Australia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19–12

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. AIM–120C Advance Medium Range Air-to-Air (AMRAAM) is a radar guided missile featuring digital technology and micro-miniature solid-state electronics. AMRAAM capabilities include look-down/shoot-down, multiple launches against multiple targets, resistance to electronic counter measures, and interception of high flying and low flying and maneuvering targets. AIM–120 Captive Air Training Missiles are non-functioning, inert missile rounds used for armament load training, and which also simulates the correct weight and balance of live missiles during captive carry on training sorties. The AIM–120C–7, as employed in the National Advanced Surface-to-Air System (NASAMS), protects national assets from imminent hostile air threats. The AMRAAM All Up Round is classified CONFIDENTIAL, major components and subsystems range from UNCLASSIFIED to CONFIDENTIAL, and technology data and other documentation are classified up to SECRET.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. A determination has been made that Australia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Australia.

[FR Doc. 2019–15855 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2019–OS–0050]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by August 26, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD

Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Collection of Required Data Elements to Verify Eligibility; OMB Control Number 0704–0545.

Type of Request: Revision.

Number of Respondents: 1,000,000.

Responses per Respondent: 1.

Annual Responses: 1,000,000.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 83,333.

Needs and Uses: The information collection requirement is necessary for the Government to verify whether or not an individual was impacted by the OPM cybersecurity incident involving background investigation records and to send a letter confirming status as ''impacted'' or ''not impacted'' by this incident. Once the minimally required information has been input into the OPM secure portal, it will be compared to an electronic master file and verification will be accomplished electronically. After the Government has validated the individual's status, the DoD Defense Manpower Data Center (DMDC) will generate and mail a response letter. This letter will either confirm eligibility and contain a PIN for impacted individuals, or confirm that the individual was not impacted by this cybersecurity incident.

Affected Public: Individuals or households.

Frequency: As required.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: July 23, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–15944 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2019–OS–0048]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by August 26, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DoD Safe Helpline/Victim-Related Inquiries; DD Form 2985, DD Form 2985–1; OMB Control Number 0704–0565.

Type of Request: Revision.

Number of Respondents: 150.

Responses per Respondent: 1.

Annual Responses: 150.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 75.

Needs and Uses: This information collection requirement is necessary to facilitate a timely response and appropriate resolution to inquiries from DoD sexual assault victims/survivors, support personnel and others. Collection of this information is used to support victims and survivors of sexual assault in their recovery and to maintain a database of inquiries that documents the nature and status of inquiries in order to provide adequate follow-up services and inform sexual assault prevention and response program and policy improvements while promoting victim recovery.

Affected Public: Individuals or households.

Frequency: As required.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: July 22, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–15876 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 19–0B]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(5)(C) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal

19–0B with attached Policy Justification.

Dated: July 22, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

MAR 1 2 2019

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(5)(C) of the Arms Export Control Act (AECA), as amended, we are forwarding Transmittal No. 19-0B. This report relates to enhancements or upgrades from the level of sensitivity of technology or capability described in the Section 36(b)(1) AECA certification 17-36 of August 18, 2017.

Sincerely,

Charles W. Hooper
Lieutenant General, USA
Director

Enclosures:
1. Transmittal

BILLING CODE 5001–06–C

Transmittal No. 19–0B

REPORT OF ENHANCEMENT OR UPGRADE OF SENSITIVITY OF TECHNOLOGY OR CAPABILITY (SEC. 36(B)(5)(C), AECA)

(i) *Purchaser*: Government of Romania

(ii) *Sec. 36(b)(1), AECA Transmittal No.*: 17–36

Date: August 18, 2017

Military Department: Army

(iii) *Description:* On August 18, 2017, Congress was notified by Congressional certification transmittal number 17-36 of the possible sale under Section 36(b)(1) of the Arms Export Control Act of 54 High Mobility Artillery Rocket Systems (HIMARS) Launchers, 81 Guided Multiple Launch Rocket Systems (GMLRS) M31A1-Unitary, 81 GMLRS M30A1-Alternative Warhead, 54 Army Tactical Missile Systems (ATACMS) M57 Unitary, 24 Advanced Field Artillery Tactical Data Systems (AFATDS), 15 High Mobility Multipurpose Wheeled Vehicles (HMMWV), Utility-Armored, M1151A1 and 15 HMMWVs, Armor Ready 2-Man, M1151A1. Included: 54 each M1084A1P2 HIMARS Resupply Vehicles (RSVs), 54 M1095 MTV Cargo Trailer with RSV kit, and 10 each M1089A1P2 FMTV Wreckers 30 Low Cost Reduced Range (LCRR) practice rockets. Also includes repair parts, training and U.S. Government support. The estimated total cost was $1.25 billion. Major Defense Equipment (MDE) constituted $900 million of this total.

This transmittal notifies the addition of:

1. Forty-eight (48) Advanced Field Artillery Tactical Data Systems (AFATDS) (MDE);

2. Forty-five (45) M1152A1 HMMWVs—Armor Ready 2-Man (MDE);

3. Fifty-four (54) M1084A1P2 HIMARS Resupply Vehicles (MDE);

4. Support and communications equipment, spare and repair parts, test sets, batteries, laptop computers, publications and technical data, facility design, personnel training and equipment, systems integration support, Quality Assurance Teams and a Technical Assistance Fielding Team, United States Government and contractor engineering and logistics personnel services. (non-MDE)

The additional MDE items are valued at $24.42 million, resulting in a new MDE value of $924.42 million, and additional non-MDE items are valued at $225.574 million, resulting in a total program increase of $250 million. The total case value will increase to $1.5 billion.

(iv) *Significance*: This proposed sale of defense articles and services supports Romania's ongoing effort to modernize its armed forces and increase the Army's capacity to counter threats posed by potential attacks. This will contribute to the Romanian's Armed Forces effort to update their capabilities and enhance interoperability with the U.S. and other allies.

(v) *Justification*: This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a NATO ally in developing and maintaining a strong and ready self-defense capability. This proposed sale will enhance U.S. national security objectives in the region.

(vi) *Sensitivity of Technology*: The statement contained in the original AECA 36(b)(1) transmittal applies to the MDE items reported here.

(vii) *Date Report Delivered to Congress*: March 12, 2019

[FR Doc. 2019–15844 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2019–HQ–0011]

Submission for OMB Review; Comment Request

AGENCY: The Office of the Secretary of the Navy, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received August 26, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Risk Management Information (RMI) system; OPNAV 3750/16 Safety Investigation Report Enclosure (Promise of Confidentiality) Advice to Witness, OPNAV 5102/10 Advice to Witness, OPNAV 5102/11 Advice to Witness (Promise of Confidentiality); OMB Control Number 0703–0065.

Type of Request: Extension.

Number of Respondents: 25.

Responses per Respondent: 1.

Annual Responses: 25.

Average Burden per Response: 1.5 hours.

Annual Burden Hours: 37.5.

Needs and Uses: The information collection requirement is necessary to collect information on injuries/fatalities, occupational illnesses required of Federal governmental agencies by the Occupational Safety and Health Administration (OSHA), and pertinent information for property damage occurring during DON operations. The data maintained in this system will be used for analytical purposes to improve the DON's accident prevention policies, procedures, standards and operations, as well as to ensure internal data quality assurance. The collection will also help to ensure that all individuals receive required safety, fire, security, force protection, and emergency management training courses necessary to perform assigned duties and comply with Federal, DoD, and DON related regulations.

Affected Public: Individuals and Households, Federal Government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: July 23, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–15948 Filed 7–25–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0087]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Native Hawaiian Career and Technical Education Grant Application (NHCTEP) (1894–0001)

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), 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 August 26, 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–0087. 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 *ICDocket;Mgr@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 Braden Goetz, 202–245–7405.

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: Native Hawaiian Career and Technical Education Grant Application (NHCTEP) (1894–0001).

OMB Control Number: 1830–0564.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 10.

Total Estimated Number of Annual Burden Hours: 1,133.

Abstract: This collection solicits applications for grants made under the Native Hawaiian Career and Technical Education Program, establishes the selection criteria used to assess the quality of applications, requires grantees to support an independent evaluation of their projects, and, for any applicant that is not proposing to provide career and technical education directly to Native Hawaiian students, requires a written agreement between the applicant and the educational entity that will provide career and technical education directly to students.

Dated: July 23, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–15915 Filed 7–25–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0066]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation

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 a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before August 26, 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–0066. 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 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Freddie Cross, 202–453–7224.

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: Higher Education Act (HEA) Title II Report Cards on State Teacher Credentialing and Preparation.

OMB Control Number: 1840–0744.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector.

Total Estimated Number of Annual Responses: 1,794.

Total Estimated Number of Annual Burden Hours: 267,588.

Abstract: This request is to approve a revision of the state report card and re-approval institution and program report cards required by the Higher Education Act of 1965, as amended in 2008 by the Higher Education Opportunity Act (HEOA). States must report annually on criteria and assessments required for initial teacher credentials using a State Report Card (SRC), and institutions of higher education (IHEs) with teacher preparation programs (TPP), and TPPs outside of IHEs, must report on key program elements on an Institution and Program Report Card (IPRC). IHEs and TPPs outside of IHEs report annually to their states on program elements, including program numbers, type, enrollment figures, demographics, completion rates, goals and assurances

to the state. States, in turn, must report on TPP elements to the Secretary of Education in addition to information on assessment pass rates, state standards, initial credential types and requirements, numbers of credentials issued, TPP classification as at-risk or low-performing. The information from states, institutions, and programs is published annually in The Secretary's Report to Congress on Teacher Quality.

Dated: July 23, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–15890 Filed 7–25–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0086]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Recruitment and Field Test Update

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 August 26, 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–0086. 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 9086, 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: High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Recruitment and Field Test Update.

OMB Control Number: 1850–0944.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 53,503.

Total Estimated Number of Annual Burden Hours: 35,635.

Abstract: The High School and Beyond 2020 study (HS&B:20) will be the sixth in a series of longitudinal studies at the high school level conducted by the National Center for Education Statistics (NCES), within the Institute of Education Sciences (IES) of the U.S. Department of Education. HS&B:20 will follow a nationally representative sample of ninth grade students from the start of high school in the fall of 2020 to the spring of 2024 when most will be in twelfth grade. A field test will be conducted one year prior to the full-scale study. The study sample will be freshened in 2024 to create a nationally representative sample of twelfth-grader students. A high school transcript collection and additional follow-up data collections beyond high school are also planned. The NCES secondary longitudinal studies examine issues such as students' readiness for high school; the risk factors associated with dropping out of high school; high school completion; the transition into postsecondary education and access/choice of institution; the shift from school to work; and the pipeline into science, technology, engineering, and mathematics (STEM). They inform education policy by tracking long-term trends and elucidating relationships among student, family, and school characteristics and experiences. HS&B:20 will follow the Middle Grades Longitudinal Study of 2017/18 (MGLS:2017) which followed the Early Childhood Longitudinal Study, Kindergarten Class of 2010–11 (ECLS–K:2011), thereby allowing for the study of all transitions from elementary school through high school and into higher education and/or the workforce. HS&B:20 will include surveys of students, parents, students' math teachers, counselors, and administrators, plus a student assessment in mathematics and reading and a brief hearing and vision test. The HS&B:20 Base-Year Full-Scale study (BYFS) will begin in the fall of 2020. The request to conduct the HS&B:20 Base-Year Field Test (BYFT) and the BYFS sampling and state, school district, school, and parent recruitment activities, both scheduled to begin in the fall of 2019, was approved in June 2019 (OMB# 1850–0944 v.1–2). These activities include collecting student rosters and selecting the BYFS sample. This request is to: (1) Add instruction to the BYFT student roster template; (2) add response options to BYFT school administrator questionnaire; (3) revise existing and add new BYFT recruitment materials; and (4) finalize the BYFS student session length. Approval for the base-year full scale study data collection will be requested in a separate submission in early 2020.

Dated: July 23, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–15911 Filed 7–25–19; 8:45 am]

BILLING CODE 4000–01–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: EC19–114–000.

Applicants: Big Sky Wind, LLC, Pattern Renewables 2 LP.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Big Sky Wind, LLC, et al.

Filed Date: 7/18/19.

Accession Number: 20190718–5095.

Comments Due: 5 p.m. ET 8/8/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–153–000.

Applicants: Hickory Run Energy, LLC.

Description: Hickory Run Energy, LLC Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 7/19/19.

Accession Number: 20190719–5052.

Comments Due: 5 p.m. ET 8/9/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–1198–001.

Applicants: Ameren Illinois Company.

Description: Compliance Filing to Order on Formal Challenge of Ameren Illinois Company.

Filed Date: 7/19/19.

Accession Number: 20190719–5099.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–151–001.

Applicants: MATL LLP.

Description: Post-Open Solicitation Compliance Filing, et al. of MATL LLP.

Filed Date: 7/19/19.

Accession Number: 20190719–5071.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–1928–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 3290R2 Sholes Wind GIA—Extension of Time for Commission Action to be effective 4/25/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5046.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–1962–001.

Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 1166R33 Oklahoma Municipal Power Authority NITSA and NOA Amended Filing to be effective 7/1/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5089.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2285–001.

Applicants: Alabama Power Company.

Description: Tariff Amendment: Amendment to SWE (PowerSouth Territorial) NITSA Amendment Filing (45 Byrd WayDP) to be effective 6/1/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5059.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2422–000.

Applicants: San Diego Gas & Electric Company, Sempra Gas & Power Marketing, LLC.

Description: Joint Application for Approval of Affiliate Transaction of San Diego Gas & Electric Company, et al.

Filed Date: 7/18/19.

Accession Number: 20190718–5154.

Comments Due: 5 p.m. ET 8/8/19.

Docket Numbers: ER19–2423–000.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: MAIT submits 10 Engineering and Construction Services Agreements to be effective 9/17/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5051.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2424–000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Pembroke Energy Project LGIA Filing to be effective 7/8/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5055.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2425–000.

Applicants: Mitsui & Co. Energy Marketing and Services (USA), Inc.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 9/17/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5079.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2426–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: CCSF Work Performance Agreement for Warnerville Rehabilitation (TO SA 284) to be effective 7/20/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5093.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2427–000.

Applicants: Nine Mile Point Nuclear Station, LLC.

Description: Baseline eTariff Filing: 2nd Amended Operating Agreement to be effective 7/20/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5096.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2428–000.

Applicants: Grazing Yak Solar, LLC.

Description: Baseline eTariff Filing: Golden West Power Partners, LLC and Grazing Yak Solar, LLC SFA to be effective 9/18/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5103.

Comments Due: 5 p.m. ET 8/9/19.

Docket Numbers: ER19–2429–000.

Applicants: Brookfield Smoky Mountain Hydropower LP.

Description: Compliance filing: Baseline Tariff Submission and Request for Administrative Cancellation to be effective 6/1/2019.

Filed Date: 7/19/19.

Accession Number: 20190719–5105.

Comments Due: 5 p.m. ET 8/9/19.

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: July 19, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–15865 Filed 7–25–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at The Southwest Power Pool, Inc. Regional State Committee, Members' Committee, and Board of Directors' Meetings

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool, Inc. (SPP) Regional State Committee (RSC), Members' Committee, and Board of Directors, as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

The meetings will be held at the Hilton Des Moines Downtown, 435 Park St., Des Moines, IA 50309. The phone number is (515) 241–1456. All meetings are Central Time.

SPP RSC
July 29, 2019 (8:00 a.m.–4:30 p.m. CDT)

SPP Members/Board of Directors
July 30, 2019 (8:00 a.m.–2:00 p.m. CDT)

The discussions may address matters at issue in the following proceedings:

Docket No. AD18–8, *Reform of Affected System Coordination in the Generator Interconnection Process*
Docket No. EL16–91, *Southwest Power Pool, Inc.*
Docket No. EL17–21, *Kansas Electric Co.* v. *Southwest Power Pool, Inc.*
Docket No. EL17–89, *American Electric Power Service Corporation* v. *Midcontinent Independent System Operator, Inc., et al.*
Docket No. EL17–92, *East Texas Electric Cooperative, Inc.*
Docket No. EL18–9, *Xcel Energy Services, Inc.* v. *Southwest Power Pool, Inc.*
Docket No. EL18–19, *Southwest Power Pool, Inc.*
Docket No. EL18–26, *EDF Renewable Energy, Inc.* v. *Midcontinent Independent System Operator, Inc., Southwest Power Pool, Inc., and PJM Interconnection, L.L.C.*
Docket No. EL18–35, *Southwest Power Pool, Inc.*
Docket No. EL18–58, *Oklahoma Municipal Power Authority* v. *Oklahoma Gas and Electric Co.*
Docket No. EL18–194, *Nebraska Public Power District* v. *Tri-State Generation and Transmission Association, Inc. and Southwest Power Pool, Inc.*
Docket No. EL19–11, *American Wind Energy Association and the Wind Coalition* v. *Southwest Power Pool, Inc.*
Docket No. EL19–60, *City of Prescott, Arkansas* v. *Southwestern Electric Power Company and Midcontinent Independent System Operator, Inc.*
Docket No. EL19–62, *City Utilities of Springfield, Missouri* v. *Southwest Power Pool, Inc.*
Docket No. EL19–75, *EDF Renewables, Inc., et al.* v. *Southwest Power Pool, Inc.*
Docket No. EL19–77, *Oklahoma Gas and Electric Co.* v. *Southwest Power Pool, Inc.*
Docket No. EL19–80, *Kansas Corporation Commission*
Docket No. EL19–83, *City of Lubbock* v. *Public Service Company of Colorado, et al.*
Docket No. ER09–548, *Kansas Corporation Commission*
Docket No. ER15–2028, *Southwest Power Pool, Inc.*
Docket No. ER15–2115, *Southwest Power Pool, Inc.*
Docket No. ER15–2594, *GridLiance High Plains LLC*
Docket No. ER16–204, *Southwest Power Pool, Inc.*
Docket No. ER16–505, *GridLiance High Plains LLC*
Docket No. ER16–1341, *Southwest Power Pool, Inc.*
Docket No. ER17–953, *GridLiance High Plains LLC*
Docket No. ER18–99, *Southwest Power Pool, Inc.*
Docket No. ER18–194, *Southwest Power Pool, Inc.*
Docket No. ER18–195, *Southwest Power Pool, Inc.*
Docket No. ER18–939, *Southwest Power Pool, Inc.*
Docket No. ER18–1267, *GridLiance High Plains LLC*
Docket No. ER18–1702, *Southwest Power Pool, Inc.*
Docket No. ER18–2318, *Southwest Power Pool, Inc.*
Docket No. ER18–2358, *Southwest Power Pool, Inc.*
Docket No. ER18–2404, *Southwest Power Pool, Inc.*
Docket No. ER19–356, *Southwest Power Pool, Inc.*
Docket No. ER19–456, *Southwest Power Pool, Inc.*
Docket No. ER19–460, *Southwest Power Pool, Inc.*
Docket No. ER19–477, *Southwest Power Pool, Inc.*
Docket No. ER19–1357, *Gridliance High Plains LLC*
Docket No. ER19–1396, *American Electric Power Service Corporation*
Docket No. ER19–1485, *Southwest Power Pool, Inc.*
Docket No. ER19–1579, *Southwest Power Pool, Inc.*
Docket No. ER19–1637, *Southwest Power Pool, Inc.*
Docket No. ER19–1672, *Southwest Power Pool, Inc.*
Docket No. ER19–1680, *Southwest Power Pool, Inc.*
Docket No. ER19–1683, *Wildhorse Wind Energy*
Docket No. ER19–1696, *Southwest Power Pool, Inc.*
Docket No. ER19–1746, *Southwest Power Pool, Inc.*
Docket No. ER19–1763, *Southwest Power Pool, Inc.*
Docket No. ER19–1777, *Midwest Energy, Inc.*
Docket No. ER19–1780, *Southwest Power Pool, Inc.*
Docket No. ER19–1859, *Southwest Power Pool, Inc.*
Docket No. ER19–1861, *Southwest Power Pool, Inc.*
Docket No. ER19–1888, *Southwest Power Pool, Inc.*
Docket No. ER19–1895, *Southwest Power Pool, Inc.*
Docket No. ER19–1896, *Southwest Power Pool, Inc.*
Docket No. ER19–1898, *Southwest Power Pool, Inc.*
Docket No. ER19–1901, *Southwest Power Pool, Inc.*
Docket No. ER19–1907, *Southwest Power Pool, Inc.*
Docket No. ER19–1908, *Southwest Power Pool, Inc.*
Docket No. ER19–1912, *Southwest Power Pool, Inc.*
Docket No. ER19–1928, *Southwest Power Pool, Inc.*
Docket No. ER19–1933, *Southwest Power Pool, Inc.*
Docket No. ER19–1954, *Southwest Power Pool, Inc.*
Docket No. ER19–1962, *Southwest Power Pool, Inc.*
Docket No. ER19–1964, *Southwest Power Pool, Inc.*
Docket No. ER19–1975, *Southwest Power Pool, Inc.*
Docket No. ER19–1976, *Southwest Power Pool, Inc.*
Docket No. ER19–1980, *Southwest Power Pool, Inc.*
Docket No. ER19–1989, *Southwest Power Pool, Inc.*
Docket No. ER19–1990, *Grand River Dam Authority*
Docket No. ER19–1996, *Oklahoma Gas and Electric Co.*
Docket No. ER19–2032, *Southwest Power Pool, Inc.*
Docket No. ER19–2059, *Southwest Power Pool, Inc.*
Docket No. ER19–2061, *Southwest Power Pool, Inc.*
Docket No. ER19–2066, *Southwest Power Pool, Inc.*
Docket No. ER19–2067, *Southwest Power Pool, Inc.*
Docket No. ER19–2071, *Southwest Power Pool, Inc.*

Docket No. ER19–2080, *Southwest Power Pool, Inc.*
Docket No. ER19–2082, *Southwest Power Pool, Inc.*
Docket No. ER19–2090, *Southwest Power Pool, Inc.*
Docket No. ER19–2093, *Southwestern Public Service Company*
Docket No. ER19–2098, *Southwest Power Pool, Inc.*
Docket No. ER19–2115, *Southwest Power Pool, Inc.*
Docket No. ER19–2120, *Southwest Power Pool, Inc.*
Docket No. ER19–2121, *Southwest Power Pool, Inc.*
Docket No. ER19–2122, *Southwest Power Pool, Inc.*
Docket No. ER19–2124, *Southwest Power Pool, Inc.*
Docket No. ER19–2126, *Southwest Power Pool, Inc.*
Docket No. ER19–2131, *Southwest Power Pool, Inc.*
Docket No. ER19–2166, *Southwest Power Pool, Inc.*
Docket No. ER19–2168, *Southwest Power Pool, Inc.*
Docket No. ER19–2169, *Southwest Power Pool, Inc.*
Docket No. ER19–2192, *Southwest Power Pool, Inc.*
Docket No. ER19–2194, *Southwest Power Pool, Inc.*
Docket No. ER19–2195, *Southwest Power Pool, Inc.*
Docket No. ER19–2196, *Southwest Power Pool, Inc.*
Docket No. ER19–2200, *Southwest Power Pool, Inc.*
Docket No. ER19–2201, *Southwest Power Pool, Inc.*
Docket No. ER19–2202, *Kansas City Power & Light Company*
Docket No. ER19–2203, *Southwest Power Pool, Inc.*
Docket No. ER19–2204, *Southwest Power Pool, Inc.*
Docket No. ER19–2206, *Southwest Power Pool, Inc.*
Docket No. ER19–2222, *Southwest Power Pool, Inc.*
Docket No. ER19–2234, *Southwest Power Pool, Inc.*
Docket No. ER19–2236, *Southwest Power Pool, Inc.*
Docket No. ER19–2242, *Southwest Power Pool, Inc.*
Docket No. ER19–2243, *Southwest Power Pool, Inc.*
Docket No. ER19–2244, *Southwest Power Pool, Inc.*
Docket No. ER19–2254, *Southwest Power Pool, Inc.*
Docket No. ER19–2257, *Southwest Power Pool, Inc.*
Docket No. ER19–2273, *Southwest Power Pool, Inc.*
Docket No. ER19–2278, *Southwest Power Pool, Inc.*
Docket No. ER19–2293, *Southwest Power Pool, Inc.*
Docket No. ER19–2299, *Southwest Power Pool, Inc.*
Docket No. ER19–2324, *Southwest Power Pool, Inc.*
Docket No. ER19–2362, *Southwest Power Pool, Inc.*
Docket No. RM17–8, *Reform of Generator Interconnection Procedures and Agreements*

This meeting is open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Dated: July 19, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–15863 Filed 7–25–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–471–000]

Bluewater Gas Storage, LLC; Notice of Schedule for Environmental Review of the Bluewater Compression Project

On May 23, 2019, Bluewater Gas Storage, LLC filed an application in Docket No. CP19–471–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Bluewater Compression Project (Project), and would restore the original design capacity of 500,000 million standard cubic feet of firm deliverability to Vector Pipeline L.P.

On June 7, 2019, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA—December 2, 2019
90-day Federal Authorization Decision Deadline—March 1, 2020

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Project would involve construction and operation of a new compressor station in Ray Township, Macomb County, Michigan. Bluewater would also construct two 105-foot-long sections of new 20-inch-diameter pipeline to connect the proposed compressor station to the existing pipeline. One temporary access road would be utilized from 32 Mile Road to the proposed site, and one permanent access road would be constructed from Omo Road to the proposed site.

Background

On July 5, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Bluewater Compression Project and Request for Comments on Environmental Issues* (NOI). The NOI was sent to affected landowners; federal, state, and local government agencies; elected officials; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission has received comments from the Township of Ray and one landowner. Before the NOI was issued, we received comments from a United States Senator, a Michigan senator, the Township of Lenox, and 18 members of the public. The primary issues raised by the commentors were the purpose and need of the Project, property values, air, noise, and safety. All substantive comments will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the eLibrary link, select General Search from the eLibrary menu, enter the selected date range and Docket Number excluding the last three digits (*i.e.,* CP19–471), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866)

208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: July 19, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–15864 Filed 7–25–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9045–9]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 07/15/2019 Through 07/19/2019

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20190167, Final, BLM, NV, Deep South Expansion Project, Review Period Ends: 08/26/2019, Contact: Kevin Hurrell 775–635–4035

EIS No. 20190168, Final, BLM, UT, Bears Ears National Monument Indian Creek and Shash Jaa Units Proposed Monument Management Plans and Associated Final Environmental Impact Statement, Review Period Ends: 08/26/2019, Contact: Lance Porter 435–259–2100

EIS No. 20190169, Final, BLM, UT, Sevier Playa Potash Project, Review Period Ends: 08/26/2019, Contact: Clara Stevens 435–743–3119

EIS No. 20190170, Draft, BR, CA, San Luis Low Point Improvement Project Draft Environmental Impact Statement/Environmental Impact Report, Comment Period Ends: 09/09/2019, Contact: Nicole S. Johnson 916–978–5085

EIS No. 20190171, Final, USFS, MT, Castle Mountains Restoration Project, Review Period Ends: 08/26/2019, Contact: John Casselli 406–791–7723

Amended Notice

EIS No. 20170004, Draft, USFWS,NPS, WA, North Cascades Ecosystem Draft Grizzly Bear Restoration Plan/Environmental Impact Statement, Comment Period Ends: 10/24/2019, Contact: Karen Taylor-Goodrich 360–854–7205 Revision to FR Notice Published 03/17/2017; the National Park Service and the U.S. Fish and Wildlife Service have reopened the comment period to end on 10/24/2019.

Dated: July 22, 2019.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2019–15866 Filed 7–25–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10400 and CMS–10595]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by September 24, 2019.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10400 Establishment of Exchanges and Qualified Health Plans

CMS–10595 QHP Issuers Data Collection for Notices for Plan or Display Errors Special Enrollment Periods

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a

60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Establishment of Exchanges and Qualified Health Plans; *Use:* As directed by the Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers (77 FR 18310) final rule, each Exchange assumed responsibilities related to the certification and offering of QHPs. Under 45 CFR 156.280(e)(5)(ii), each QHP issuer that offers non-excepted abortion services must submit to the State Insurance Commissioner a segregation plan describing how the QHP issuer establishes and maintains separate payment accounts for any QHP covering non-excepted abortion services, and pursuant to § 156.280(e)(5)(iii), each QHP issuer must annually attest to compliance with PPACA section 1303 and applicable regulations. This segregation plan is used to verify that the QHP issuer's financial and other systems fully conform to the segregation requirements required by the PPACA.

The Centers for Medicare and Medicaid Services (CMS) is renewing this information collection request (ICR) in connection with the segregation plan requirement under 45 CFR 156.280(e)(5)(ii). The burden estimate for this ICR included in this renewal package reflects the time and effort for QHP issuers to submit a segregation plan that demonstrates how the QHP issuer segregates QHP funds in accordance with applicable provisions of generally accepted accounting requirements, circulars on funds management of the Office of Management and Budget and guidance on accounting of the Government Accountability Office. CMS is also renewing the ICR in connection with the annual attestation requirement under 45 CFR 156.280(e)(5)(iii). The burden estimate for this ICR reflects the time and effort associated with QHP issuers submitting an annual attestation to the State Insurance Commissioner attesting to compliance with section 1303 of the PPACA. *Form Number:* CMS–10400 (OMB control number: 0938–1156); *Frequency:* Annually; *Affected Public:* Private Sector (business or other for-profits, not-for-profit institutions); *Number of Respondents:* 210; *Number of Responses:* 210; *Total Annual Hours:* 580. (For questions regarding this collection contact Michele Oshman at 410–786–4396).

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* QHP Issuers Data Collection for Notices for Plan or Display Errors Special Enrollment Periods; *Use:* The Patient Protection and Affordable Care Act (Pub. L. 111–148) and Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), collectively referred to as the PPACA, established new competitive private health insurance markets called Marketplaces, or Exchanges, which gave millions of Americans and small businesses access to qualified health plans (QHPs), including stand-alone dental plans (SADPs)— private health and dental insurance plans that have been certified as meeting certain standards.

In the final rule, the Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2017 (CMS–9937–F), we finalized 45 CFR 156.1256, which requires QHP issuers, in the case of a material plan or benefit display error included in 45 CFR 155.420(d)(12), to notify their enrollees of the error and the enrollees' eligibility for a special enrollment period (SEP) within 30 calendar days after the issuer is informed by an Federally-facilitated Exchange (FFE) that the error is corrected, if directed to do so by the FFE. This requirement provides notification to QHP enrollees of errors that may have impacted their QHP selection and enrollment and any associated monthly or annual costs, as well as the availability of an SEP under § 155.420(d)(12) for the enrollee to select a different QHP, if desired. The Centers for Medicare and Medicaid Services (CMS) is renewing this information collection request (ICR) in connection with standards regarding Plan or Display Errors SEPs. *Form Number:* CMS–10595 (OMB control number: 0938–1301); *Frequency:* Yearly; *Affected Public:* Private Sector (business or other for-profits, not-for-profit institutions); *Number of Respondents:* 505; *Total Annual Responses:* 3,400; *Total Annual Hours:* 1,700. (For questions regarding this collection contact Deborah Hunter at 202–309–1098).

Dated: July 23, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–15917 Filed 7–25–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Native Employment Works (NEW) Program Plan Guidance and Report Requirements, (OMB No.: 970–0174)

AGENCY: Division of Tribal TANF Management, Office of Family Assistance, Administration for Children and Families; HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a three-year extension of the form OFA–0086, NEW Plan Guidance and NEW Program Report (OMB #0970–0174, expiration 7/31/2019). There are changes requested to these forms.

DATES: *Comments due within 30 days of publication.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*, Attn: Desk Officer for the Administration for Children and Families.

Copies of the proposed collection may be obtained by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The NEW program plan guidance documents specify the information needed to complete a NEW program plan and explains the process

for plan submission every third year and to complete the annual program report. The program plan is the application for NEW program funding and documents how the grantee will carry out its NEW program. The program report provides HHS, Congress, and grantees information to document and assess the activities and accomplishments of the NEW program. ACF proposes to extend data collection with revisions, including the deletion of guidance for NEW programs included in Public Law 102–477 programs.

Respondents: Indian tribes and tribal coalitions that run NEW programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
NEW program plan guidance for non-477 Tribes	[1] 14	1	29	406
NEW program report	[2] 42	1	15	630

[1] We estimate that 42 of the 78 NEW grantees will not include their NEW programs in Public Law 102–477 projects. 42 grantees divided by 3 (because grantees submit the NEW plan once every 3 years) = 14.

[2] We estimate that 42 of the 78 NEW grantees will not include their NEW programs in Public Law 102–477 projects and therefore will submit the NEW program report to HHS.

Estimated Total Annual Burden Hours: 1036 [3]

Authority: 42 U.S.C. 612.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–15909 Filed 7–25–19; 8:45 am]

BILLING CODE 4184–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0007]

Generic Drug User Fee Rates for Fiscal Year 2020

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Federal Food, Drug, and Cosmetic Act (FD&C Act or statute), as amended by the Generic Drug User Fee Amendments of 2017 (GDUFA II), authorizes the Food and Drug Administration (FDA, Agency, or we) to assess and collect fees for abbreviated new drug applications (ANDAs), drug master files (DMFs), generic drug active pharmaceutical ingredient (API) facilities, finished dosage form (FDF) facilities, contract manufacturing organization (CMO) facilities, and generic drug applicant program user fees. In this document, FDA is announcing fiscal year (FY) 2020 rates for GDUFA II fees.

FOR FURTHER INFORMATION CONTACT: Melissa Hurley, Office of Financial Management, Food and Drug Administration, 4041 Powder Mill Rd., Rm. 61075, Beltsville, MD 20705–4304, 240–402–4585.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 744A and 744B of the FD&C Act (21 U.S.C. 379j-41 and 379j-42) establish fees associated with human generic drug products. Fees are assessed on: (1) Certain types of applications for human generic drug products; (2) certain facilities where APIs and FDFs are produced; (3) certain DMFs associated with human generic drug products; and (4) generic drug applicants who have approved ANDAs (the program fee) (see section 744B(a)(2) to (5) of the FD&C Act).

GDUFA II stipulates that user fees should total $493,600,000 annually adjusted each year for inflation. For FY 2020, the generic drug fee rates are: ANDA ($176,237), DMF ($57,795), domestic API facility ($44,400), foreign API facility ($59,400), domestic FDF facility ($195,662), foreign FDF facility ($210,662), domestic CMO facility ($65,221), foreign CMO facility ($80,221), large size operation generic drug applicant program ($1,661,684), medium size operation generic drug applicant program ($664,674), and small business generic drug applicant program ($166,168). These fees are effective on October 1, 2019, and will remain in effect through September 30, 2020.

II. Fee Revenue Amount for FY 2020

GDUFA II directs FDA to use the yearly revenue amount determined under the statute as a starting point to set the fee rates for each fee type. For more information about GDUFA II, please refer to the FDA website (*https://www.fda.gov/gdufa*). The ANDA, DMF, API facility, FDF facility, CMO facility, and generic drug applicant program fee (GDUFA program fee) calculations for FY 2020 are described in this document.

The base revenue amount for FY 2020 is $501,721,201. This is the amount calculated for the prior fiscal year, FY 2019, pursuant to the statute (see section 744B(b)(1) of the FD&C Act). GDUFA II specifies that the $501,721,201 is to be adjusted for inflation increases for FY 2020 using two separate adjustments—one for personnel compensation and benefits (PC&B) and one for non-PC&B costs (see sections 744B(c)(1)(B) and (C) of the FD&C Act).

The component of the inflation adjustment for PC&B costs shall be one plus the average annual percent change in the cost of all PC&B paid per full-time equivalent position (FTE) at FDA for the first 3 of the 4 preceding fiscal years, multiplied by the proportion of PC&B costs to total FDA costs of human generic drug activities for the first 3 of the preceding 4 fiscal years (see section 744B(c)(1)(B) of the FD&C Act).

Table 1 summarizes the actual cost and total FTEs for the specified fiscal years, and provides the percent change from the previous fiscal year and the average percent change over the first 3 of the 4 fiscal years preceding FY 2020. The 3-year average is 3.1175 percent.

[3] Two additional programs joined the Public Law 102–477 since the publication of FR1, hence the burden is different.

TABLE 1—FDA PERSONNEL COMPENSATION AND BENEFITS (PC&B) EACH YEAR AND PERCENT CHANGE

Fiscal year	2016	2017	2018	3-Year average
Total PC&B	$2,414,728,159	$2,581,551,000	$2,690,678,00	.....
Total FTEs	16,381	17,022	17,023	.....
PC&B per FTE	$147,408	$151,660	$158,061	.....
Percent Change from Previous Year	2.2474	2.8845	4.2206	3.1175

The statute specifies that this 3.1175 percent should be multiplied by the proportion of PC&B expended for human generic drug activities for the first 3 of the preceding 4 fiscal years. Table 2 shows the amount of PC&B and the total amount obligated for human generic drug activities from FY 2016 through FY 2018.

TABLE 2—PC&B AS A PERCENT OF FEE REVENUES SPENT ON THE PROCESS OF HUMAN GENERIC DRUG APPLICATIONS OVER THE LAST 3 YEARS

Fiscal year	2016	2017	2018	3-Year average
PC&B	$242,963,571	$271,748,229	$332,617,643	.....
Non-PC&B	$250,987,599	$262,058,852	$276,911,265	.....
Total Costs	$493,951,170	$533,807,081	$609,528,908	.....
PC&B Percent	49.1878	50.9076	54.5696	51.5550
Non-PC&B Percent	50.8122	49.0924	45.4304	48.4450

The payroll adjustment is 3.1175 percent multiplied by 51.5550 percent (or 1.6072 percent).

The statute specifies that the portion of the inflation adjustment for non-PC&B costs for FY 2020 is the average annual percent change that occurred in the Consumer Price Index (CPI) for urban consumers (Washington-Baltimore, DC-MD-VA-WV; not seasonally adjusted; all items; annual index) for the first 3 of the preceding 4 years of available data multiplied by the proportion of all costs other than PC&B costs to total costs of human generic drug activities (see section 744B(c)(1)(C) of the FD&C Act). As a result of a geographical revision made by the Bureau of Labor and Statistics in January 2018,[1] the ''Washington-Baltimore, DC-MD-VA-WV'' index was discontinued and replaced with two separate indices (*i.e.,* ''Washington-Arlington-Alexandria, DC-VA-MD-WV'' and ''Baltimore-Columbia-Towson, MD''). In order to continue applying a CPI that best reflects the geographic region in which FDA is headquartered and provides the most current data available, the Washington-Arlington-Alexandria index will be used in calculating the relevant adjustment factors for FY 2020 and subsequent years. Table 3 provides the summary data for the percent change in the specified CPI. The data are published by the Bureau of Labor Statistics and can be found on its website at: *https://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUURS35ASA0,CUUSS35ASA0.*

TABLE 3—ANNUAL AND 3-YEAR AVERAGE PERCENT CHANGE IN CPI FOR WASHINGTON-ARLINGTON-ALEXANDRIA AREA

Year	2016	2017	2018	3-Year average
Annual CPI	253.422	256.221	261.445	.....
Annual Percent Change	1.1003	1.1045	2.0389	1.4146

To calculate the inflation adjustment for non-pay costs, we multiply the 3-year average percent change in the CPI (1.4146 percent) by the proportion of all costs other than PC&B to total costs of human generic drug activities obligated. Because 51.5550 percent was obligated for PC&B as shown in table 2, 48.4450 percent is the portion of costs other than PC&B. The non-pay adjustment is 1.4146 percent times 48.4450 percent, or 0.6853 percent.

To complete the inflation adjustment for FY 2020, we add the PC&B component (1.6072 percent) to the non-PC&B component (0.6853 percent) for a total inflation adjustment of 2.2925 percent (rounded), making 1.022925. We then multiply the base revenue amount for FY 2020 ($501,721,201) by 1.022925, yielding an inflation-adjusted amount of $513,223,000 (rounded to the nearest thousand dollars).

III. ANDA Filing Fee

Under GDUFA II, the FY 2020 ANDA filing fee is owed by each applicant that submits an ANDA on or after October 1, 2019. This fee is due on the submission date of the ANDA. Section 744B(b)(2)(B) of the FD&C Act specifies that the ANDA fee will make up 33 percent of the $513,223,000, which is $169,363,590.

To calculate the ANDA fee, FDA estimated the number of full application equivalents (FAEs) that will be submitted in FY 2020. The submissions are broken down into three categories: New originals (submissions that have not been received by FDA previously); submissions that have been refused to receive (RTR) for reasons other than failure to pay fees; and applications that are resubmitted after having been RTR

[1] The Bureau of Labor Statistics' announcement of the geographical revision can be viewed at *https://www.bls.gov/cpi/additional-resources/geographic-revision-2018.htm.*

for reasons other than failure to pay fees. An ANDA counts as one FAE; however, 75 percent of the fee paid for an ANDA that has been RTR shall be refunded according to GDUFA II if (1) the ANDA is refused for a cause other than failure to pay fees, or (2) the ANDA has been withdrawn prior to receipt (section 744B(a)(3)(D)(i) of the FD&C Act). Therefore, an ANDA that is considered not to have been received by FDA due to reasons other than failure to pay fees or withdrawn prior to receipt counts as one-fourth of an FAE. After an ANDA has been RTR, the applicant has the option of resubmitting. For user fee purposes, these resubmissions are equivalent to new original submissions—ANDA resubmissions are charged the full amount for an application (one FAE).

FDA utilized data from ANDAs submitted from October 1, 2017, to April 30, 2019, to estimate the number of new original ANDAs that will incur filing fees in FY 2020. For FY 2020, the Agency estimates that approximately 953 new original ANDAs will be submitted and incur filing fees. Not all of the new original ANDAs will be received by the Agency and some of those not received will be resubmitted in the same fiscal year. Therefore, the Agency expects that the FAE count for ANDAs will be 961 for FY 2020.

The FY 2020 application fee is estimated by dividing the number of FAEs that will pay the fee in FY 2020 (961) into the fee revenue amount to be derived from ANDA application fees in FY 2020 ($169,363,590). The result, rounded to the nearest dollar, is a fee of $176,237 per ANDA.

The statute provides that those ANDAs that include information about the production of active pharmaceutical ingredients other than by reference to a DMF will pay an additional fee that is based on the number of such active pharmaceutical ingredients and the number of facilities proposed to produce those ingredients (see section 744B(a)(3)(F) of the FD&C Act). FDA anticipates that this additional fee is unlikely to be assessed often; therefore, FDA has not included projections concerning the amount of this fee in calculating the fees for ANDAs.

IV. DMF Fee

Under GDUFA II, the DMF fee is owed by each person that owns a type II active pharmaceutical ingredient DMF that is referenced, on or after October 1, 2012, in a generic drug submission by an initial letter of authorization. This is a one-time fee for each DMF. This fee is due on the earlier of the date on which the first generic drug submission is submitted that references the associated DMF or the date on which the drug master file holder requests the initial completeness assessment. Under section 744B(a)(2)(D)(iii) of the FD&C Act, if a DMF has successfully undergone an initial completeness assessment and the fee is paid, the DMF will be placed on a publicly available list documenting DMFs available for reference.

To calculate the DMF fee, FDA assessed the volume of DMF submissions over time. The Agency assessed DMFs from October 1, 2017, to April 30, 2019, and concluded that averaging the number of fee-paying DMFs provided the most accurate model for predicting fee-paying DMFs for FY 2020. The monthly average of paid DMF submissions the Agency received in FY 2018 and FY 2019 is 37. To determine the FY 2020 projected number of fee-paying DMFs, the average of 37 DMF submissions is multiplied by 12 months, which results in 444 estimated FY 2020 fee-paying DMFs. FDA is estimating 444 fee-paying DMFs for FY 2020.

The FY 2020 DMF fee is determined by dividing the DMF target revenue by the estimated number of fee-paying DMFs in FY 2020. Section 744B(b)(2)(A) of the FD&C Act specifies that the DMF fees will make up 5 percent of the $513,223,000, which is $25,661,150. Dividing the DMF revenue amount ($25,661,150) by the estimated fee-paying DMFs (444), and rounding to the nearest dollar, yields a DMF fee of $57,795 for FY 2020.

V. Foreign Facility Fee Differential

Under GDUFA II, the fee for a facility located outside the United States and its territories and possessions shall be $15,000 higher than the amount of the fee for a facility located in the United States and its territories and possessions. The basis for this differential is the extra cost incurred by conducting an inspection outside the United States and its territories and possessions.

VI. FDF and CMO Facility Fees

Under GDUFA II, the annual FDF facility fee is owed by each person who owns an FDF facility that is identified in at least one approved generic drug submission owned by that person or its affiliates. The CMO facility fee is owed by each person who owns an FDF facility that is identified in at least one approved ANDA but is not identified in an approved ANDA held by the owner of that facility or its affiliates. These fees are due no later than the first business day on or after October 1 of each such year. Section 744B(b)(2)(C) of the FD&C Act specifies that the FDF and CMO facility fee revenue will make up 20 percent of the $513,223,000, which is $102,644,600.

To calculate the fees, data from FDA's Integrity Services (IS) were utilized as the primary source of facility information for determining the denominators of each facility fee type. IS is the master data steward for all facility information provided in generic drug submissions received by FDA. A facility's reference status in an approved generic drug submission is extracted directly from submission data rather than relying on data from self-identification. This information provided the number of facilities referenced as FDF manufacturers in at least one approved generic drug submission. Based on FDA's IS data, the FDF and CMO facility denominators are 192 FDF domestic, 248 FDF foreign, 75 CMO domestic, and 99 CMO foreign facilities for FY 2020.

GDUFA II specifies that the CMO facility fee is to be equal to one-third the amount of the FDF facility fee. Therefore, to generate the target collection revenue amount from FDF and CMO facility fees ($102,644,600), FDA must weight a CMO facility as one-third of an FDF facility. FDA set fees based on the estimate of 192 FDF domestic, 248 FDF foreign, 25 CMO domestic (75 multiplied by one-third), and 33 CMO foreign facilities (99 multiplied by one-third), which equals 498 total weighted FDF and CMO facilities for FY 2020.

To calculate the fee for domestic facilities, FDA first determines the total fee revenue that will result from the foreign facility differential by subtracting the fee revenue resulting from the foreign facility fee differential from the target collection revenue amount ($102,644,600) as follows. The foreign facility fee differential revenue equals the foreign facility fee differential ($15,000) multiplied by the number of FDF foreign facilities (248) plus the foreign facility fee differential ($15,000) multiplied by the number of CMO foreign facilities (99), totaling $5,205,000. This results in foreign fee differential revenue of $5,205,000 from the total FDF and CMO facility fee target collection revenue. Subtracting the foreign facility differential fee revenue ($5,205,000) from the total FDF and CMO facility target collection revenue ($102,644,600) results in a remaining facility fee revenue balance of $97,439,600. To determine the domestic FDF facility fee, FDA divides the $97,439,600 by the total weighted number of FDF and CMO facilities (498), which results in a domestic FDF facility fee of $195,662. The foreign FDF

facility fee is $15,000 more than the domestic FDF facility fee, or $210,662.

According to GDUFA II, the domestic CMO fee is calculated as one-third the amount of the domestic FDF facility fee. Therefore, the domestic CMO fee is $65,221, rounded to the nearest dollar. The foreign CMO fee is calculated as the domestic CMO fee plus the foreign fee differential of $15,000. Therefore, the foreign CMO fee is $80,221.

VII. API Facility Fee

Under GDUFA II, the annual API facility fee is owed by each person who owns a facility that is identified in (1) at least one approved generic drug submission or (2) in a Type II API DMF referenced in at least one approved generic drug submission. These fees are due no later than the first business day on or after October 1 of each such year. Section 744B(b)(2)(D) of the FD&C Act specifies the API facility fee will make up 7 percent of $513,223,000 in fee revenue, which is $35,925,610.

To calculate the API facility fee, data from FDA's IS were utilized as the primary source of facility information for determining the denominator. As stated above, IS is the master data steward for all facility information provided in generic drug submissions received by FDA. A facility's reference status in an approved generic drug submission is extracted directly from submission data rather than relying on data from self-identification. This information provided the number of facilities referenced as API manufacturers in at least one approved generic drug submission.

The total number of API facilities identified was 624; of that number, 76 were domestic and 548 were foreign facilities. The foreign facility differential is $15,000. To calculate the fee for domestic facilities, FDA must first subtract the fee revenue that will result from the foreign facility fee differential. FDA takes the foreign facility differential ($15,000) and multiplies it by the number of foreign facilities (548) to determine the total fee revenue that will result from the foreign facility differential. As a result of that calculation, the foreign fee differential revenue will make up $8,220,000 of the total API fee revenue. Subtracting the foreign facility differential fee revenue ($8,220,000) from the total API facility target revenue ($35,925,610) results in a remaining balance of $27,705,610. To determine the domestic API facility fee, we divide the $27,705,610 by the total number of facilities (624), which gives us a domestic API facility fee of $44,400. The foreign API facility fee is $15,000 more than the domestic API facility fee, or $59,400.

VIII. Generic Drug Applicant Program Fee

Under GDUFA II, if a person and its affiliates own at least one but not more than five approved ANDAs on October 1, 2019, the person and its affiliates shall owe a small business GDUFA program fee. If a person and its affiliates own at least 6 but not more than 19 approved ANDAs, the person and its affiliates shall owe a medium size operation GDUFA program fee. If a person and its affiliates own at least 20 approved ANDAs, the person and its affiliates shall owe a large size operation GDUFA program fee. These fees are due no later than the first business day on or after October 1 of each such year. Section 744B(b)(2)(E) of the FD&C Act specifies the GDUFA program fee will make up 35 percent of $513,223,000 in fee revenue, which is $179,628,050.

To determine the appropriate number of parent companies for each tier, the Agency asked companies to claim their ANDAs and affiliates in the Center for Drug Evaluation and Research (CDER) NextGen Portal. The companies were able to confirm relationships currently present in the Agency's records, while also reporting newly approved ANDAs, newly acquired ANDAs, and new affiliations.

In determining the appropriate number of approved ANDAs, the Agency has factored in a number of variables that could affect the collection of the target revenue: (1) Inactive ANDAs—applicants who have not submitted an annual report for one or more of their approved applications within the past 2 years; (2) FY 2018 Program Fee Arrears List—applicants who failed to satisfy the FY 2018 program fee and were unresponsive to attempts to collect; (3) Center for Biologics Evaluation and Research (CBER) approved ANDAs—applicants and their affiliates with CBER-approved ANDAs in addition to CDER's approved ANDAs; (4) withdrawals of approved ANDAs by April 1st—applicants who have submitted a written request for withdrawal of approval by April 1st of the previous fiscal year; (5) Abbreviated Antibiotic Applications (AADA) conversions—ANDAs (previously AADAs) for bulk antibiotic drug substance converted and refiled as DMFs; and (6) ANDAs with Conditional Approval status—a small number of pre-1984 ANDAs that are considered approved for marketing, but as to which additional information has been requested. The list of original approved ANDAs from the Generic Drug Review Platform as of April 30, 2019, shows 265 applicants in the small business tier, 71 applicants in the medium size tier, and 64 applicants in the large size tier. Factoring in all the variables for the third year of GDUFA II, the Agency estimates there will be 199 applicants in the small business tier, 63 applicants in the medium size tier, and 63 applicants in the large size tier for FY 2020.

To calculate the GDUFA program fee, GDUFA II provides that large size operation generic drug applicants pay the full fee, medium size operation applicants pay two-fifths of the full fee, and small business applicants pay one-tenth of the full fee. To generate the target collection revenue amount from GDUFA program fees ($179,628,050), we must weigh medium and small tiered applicants as a subset of a large size operation generic drug applicant. FDA will set fees based on the weighted estimate of 19.90 applicants in the small business tier (199 multiplied by 10 percent), 25.20 applicants in the medium size tier (63 multiplied by 40 percent), and 63 applicants in the large size tier, arriving at 108.10 total weighted applicants for FY 2020.

To generate the large size operation GDUFA program fee, FDA divides the target revenue amount of $179,628,050 by 108.10, which equals $1,661,684. The medium size operation GDUFA program fee is 40 percent of the full fee ($664,674), and the small business operation GDUFA program fee is 10 percent of the full fee ($166,168).

IX. Fee Schedule for FY 2020

The fee rates for FY 2020 are set out in table 4.

TABLE 4—FEE SCHEDULE FOR FY 2020

Fee category	Fees rates for FY 2020
Applications:	
Abbreviated New Drug Application (ANDA)	$176,237
Drug Master File (DMF)	57,795

TABLE 4—FEE SCHEDULE FOR FY 2020—Continued

Fee category	Fees rates for FY 2020
Facilities:	
Active Pharmaceutical Ingredient (API) Domestic	44,400
API—Foreign	59,400
Finished Dosage Form (FDF)—Domestic	195,662
FDF—Foreign	210,662
Contract Manufacturing Organization (CMO)—Domestic	65,221
CMO—Foreign	80,221
GDUFA Program:	
Large size operation generic drug applicant	1,661,684
Medium size operation generic drug applicant	664,674
Small business operation generic drug applicant	166,168

X. Fee Payment Options and Procedures

The new fee rates are effective October 1, 2019. To pay the ANDA, DMF, API facility, FDF facility, CMO facility, and GDUFA program fees, a Generic Drug User Fee Cover Sheet must be completed, available at *https://www.fda.gov/gdufa* and *https://userfees.fda.gov/OA_HTML/gdufaCAcdLogin.jsp,* and a user fee identification (ID) number must be generated. Payment must be made in U.S. currency drawn on a U.S. bank by electronic check, check, bank draft, U.S. postal money order, credit card, or wire transfer. The preferred payment method is online using electronic check (Automated Clearing House (ACH), also known as eCheck) or credit card (Discover, VISA, MasterCard, American Express). FDA has partnered with the U.S. Department of the Treasury to utilize *Pay.gov,* a web-based payment application, for online electronic payment. The *Pay.gov* feature is available on the FDA website after completing the Generic Drug User Fee Cover Sheet and generating the user fee ID number.

Secure electronic payments can be submitted using the User Fees Payment Portal at *https://userfees.fda.gov/pay.* (Note: Only full payments are accepted; no partial payments can be made online.) Once an invoice is located, ''Pay Now'' should be selected to be redirected to *Pay.gov.* Electronic payment options are based on the balance due. Payment by credit card is available for balances less than $25,000. If the balance exceeds this amount, only the ACH option is available. Payments must be made using U.S bank accounts as well as U.S. credit cards.

The user fee ID number must be included on the check, bank draft, or postal money order and must be made payable to the order of the Food and Drug Administration. Payments can be mailed to: Food and Drug Administration, P.O. Box 979108, St. Louis, MO 63197–9000. If checks are to be sent by a courier that requests a street address, the courier can deliver checks to: U.S. Bank, Attention: Government Lockbox 979108, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This U.S. Bank address is for courier delivery only. For questions concerning courier delivery, U.S. Bank can be contacted at 314–418–4013. This telephone number is only for questions about courier delivery.) The FDA post office box number (P.O. Box 979108) must be written on the check, bank draft, or postal money order.

For payments made by wire transfer, the unique user fee ID number must be referenced. Without the unique user fee ID number, the payment may not be applied. If the payment amount is not applied, the invoice amount will be referred to collections. The originating financial institution may charge a wire transfer fee. Applicable wire transfer fees must be included with payment to ensure fees are fully paid. Questions about wire transfer fees should be addressed to the financial institution. The following account information should be used to send payments by wire transfer: U.S. Department of the Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, account number: 75060099, routing number: 021030004, SWIFT: FRNYUS33. FDA's tax identification number is 53–0196965.

Dated: July 23, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–15906 Filed 7–25–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–1771]

Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions.'' This guidance provides recommendations for information and testing that should be included in 510(k) submissions for metal expandable biliary stents and their associated delivery systems intended to provide luminal patency of malignant strictures in the biliary tree.

DATES: The announcement of the guidance is published in the **Federal Register** on July 26, 2019.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted,

such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

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

Instructions: All submissions received must include the Docket No. FDA–2018–D–1771 for ''Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

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

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: April Marrone, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G218, Silver Spring, MD 20993–0002, 240–402–6510.

SUPPLEMENTARY INFORMATION:

I. Background

This guidance provides recommendations for 510(k) submissions for metal expandable biliary stents and their associated delivery systems. These devices are intended to provide luminal patency of malignant strictures in the biliary tree. The scope of this guidance is limited to metal expandable biliary stents regulated under 21 CFR 876.5010 (*Biliary catheter and accessories*) and with product code FGE (Catheter, Biliary, Diagnostic). This guidance applies only to biliary stents indicated for palliation of malignant strictures in the biliary tree. It does not apply to biliary stents indicated to treat benign strictures or stents intended to be used in the vasculature, tracheal/bronchial tubes, or other gastrointestinal anatomy.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** of July 18, 2018 (83 FR 33940). FDA revised the guidance as appropriate in response to the comments. This guidance updates and supersedes the guidance ''Guidance for the Content of Premarket Notifications for Metal Expandable Biliary Stents,'' issued on February 5, 1998, to reflect current review practices.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov.* Persons unable to download an electronic copy of ''Metal Expandable Biliary Stents—Premarket Notification (510(k)) Submissions'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1500070 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the following FDA regulations have been approved by OMB as listed in the following table:

21 CFR part	Topic	OMB Control No.
807, subpart E	Premarket Notification	0910–0120
812	Investigational Device Exemption	0910–0078
801	Medical Device Labeling Regulations	0910–0485
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation	0910–0073
50, 56	Protection of Human Subjects: Informed Consent; Institutional Review Boards	0910–0755
56	Institutional Review Boards	0910–0130

Dated: July 22, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–15889 Filed 7–25–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Rural Communities Opioid Response Program Performance Measures, OMB No. 0906-xxxx, New.

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

DATES: Comments on this ICR should be received no later than August 26, 2019.

ADDRESSES: Submit your comments, including the ICR title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Rural Communities Opioid Response Program Performance Measures, OMB No. 0906-xxxx, New

Abstract: The Rural Communities Opioid Response Program (RCORP) is a multi-initiative program that aims to: (1) Support treatment for, and prevention of, substance use disorder (SUD), including opioid use disorder (OUD); and (2) reduce morbidity and mortality associated with SUD, to include OUD, by improving access to prevention, treatment, and recovery support services to high-risk rural communities. To support this purpose, RCORP grant initiatives include:

- RCORP-Planning grants to strengthen the capacity of multi-sector consortia to collaborate and develop plans to deliver SUD/OUD prevention, treatment, and recovery services in high-risk rural communities;
- RCORP-Implementation grants to fund established networks and consortia to deliver SUD/OUD prevention, treatment, and recovery activities in high-risk rural communities; and
- RCORP-Medication Assisted Treatment Expansion grants to enhance access to medication-assisted treatment within eligible hospitals, health clinics, or tribal organizations in high-risk rural communities.

Additionally, all RCORP grant award recipients will be supported by five cooperative agreements: RCORP-Technical Assistance, which provides extensive technical assistance to award recipients; RCORP-Evaluation, which will evaluate the impact of the RCORP initiative on rural communities; and three RCORP-Rural Centers of Excellence in Substance Use Disorders, which will disseminate best practices related to the treatment for, and prevention of, SUD within rural communities. A 60-day notice was published in the **Federal Register** on April 12, 2019, vol. 84, No. 71; pp. 14949–14950. There were no public comments.

Need and Proposed Use of the Information: For this program, performance measures were developed to provide data on each RCORP initiative and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to the Federal Office of Rural Health Policy (FORHP), including: (a) Provision of, and referral to, SUD treatment and support services; (b) SUD prevention, treatment, and recovery process and outcomes; (c) education of health care providers and community members; (d) number of fatal and non-fatal opioid-related overdoses; and (e) consortium strength and sustainability. All measures will speak to FORHP's progress toward meeting the goals set.

Likely Respondents: The respondents will be the grant award recipients of RCORP initiatives.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent (annually)	Total responses	Average burden per response (in hours)	Total burden hours
Rural Communities Opioid Response Program Performance Measures	243	2	486	5.66	2,750
Total	243		486		2,750

Maria G. Button,

Director, Division of the Executive Secretariat.

[FR Doc. 2019–15883 Filed 7–25–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on Nurse Education and Practice; Meeting Cancellation

AGENCY: Health Resources and Services Administration; Department of Health and Human Services.

ACTION: Notice of meeting cancellation.

SUMMARY: This is to notify the public that the previously scheduled September 24, 2019, meeting of the National Advisory Council on Nurse Education and Practice (NACNEP) is cancelled. This meeting was announced in the **Federal Register**, Vol. 84, No. 45 on Thursday, March 7, 2019 (FR Doc. 2019–04074 Filed 3–6–19). Future meetings will occur in calendar year 2020 and be announced through the **Federal Register** at a later date.

FOR FURTHER INFORMATION CONTACT: Tracy L. Gray, MBA, MS, RN, Chief, Advanced Nursing Education Branch, Designated Federal Officer, NACNEP, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 945–3113 or email: *BHWNACNEP@hrsa.gov.*

Maria G. Button,

Director, Division of the Executive Secretariat.

[FR Doc. 2019–15894 Filed 7–25–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Health Resources and Service Administration Uniform Data System, OMB No. 0915–0193—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR must be received no later than September 24, 2019.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Health Resources and Services Administration Uniform Data System, OMB No. 0915–0193—Revision.

Abstract: The Health Center Program, administered by HRSA, is authorized under section 330 of the Public Health Service (PHS) Act, most recently amended by section 50901(b) of the Bipartisan Budget Act of 2018, Public Law 115–123. Health centers are community-based and patient-directed organizations that deliver affordable, accessible, quality, and cost-effective primary health care services to patients regardless of their ability to pay. Nearly 1,400 health centers operate approximately 12,000 service delivery sites that provide primary health care to more than 27 million people in every U.S. state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the Pacific Basin. HRSA uses the Uniform Data System (UDS) for annual reporting by certain HRSA award recipients, including Health Center Program awardees (those funded under section 330 of the PHS Act), Health Center Program look-alikes, and Nurse Education, Practice, Quality and Retention (NEPQR) Program awardees (specifically those funded under the practice priority areas of section 831(b) of the PHS Act).

Need and Proposed Use of the Information: HRSA collects UDS data annually to ensure compliance with legislative and regulatory requirements, improve clinical and operational performance, and report overall program accomplishments. These data help to identify trends over time, enabling HRSA to establish or expand targeted programs and to identify effective services and interventions that will improve the health of medically underserved communities. HRSA analyzes UDS data with other national health-related data sets to compare the Health Center Program patient populations and the overall U.S. population.

HRSA plans to continue aligning several clinical measures reported in the UDS with the Centers for Medicare & Medicaid Services' (CMS) electronic specified clinical quality measures (eCQM) and is considering the following changes for 2020 UDS data collection:

- *Retiring CMS126 Use of Appropriate Medications for Asthma:* The CMS eCQM is no longer being

updated when new asthma medications are approved for use. This measure was also retired from the Healthcare Effectiveness Data and Information Set, is no longer endorsed by the National Quality Forum, and there is currently no comparable eCQM for asthma. Thus, no replacement measure is planned at this time.

• *Replacing Dental Sealants for Children Between 6–9 years with CMS74v9 Primary Caries Prevention Intervention as Offered by Primary Care Providers, Including Dentists:* The replacement measure, which is the percentage of children age 0–20 years who received a fluoride varnish application, is applicable to a broader patient population than the use of dental sealants, more applicable to primary care settings by measuring oral health activities that health centers without dentists can employ, and is part of the CMS Merit-based Incentive Payment System quality payment program measure set.

• *Adding CMS159v8 Depression Remission at 12 Months:* The addition of the CMS depression remission measure at 12 months provides complementary mental health outcome data on how well health centers help patients reach remission. Improvement in the symptoms of depression and an ongoing assessment of the current treatment plan is crucial to the reduction of symptoms and psychosocial well-being of patients. The addition of *CMS159v8* further supports HRSA's commitment to HHS strategic objective to ''Reduce the impact of mental and substance use disorders through prevention, early intervention, treatment, and recovery support.''

• *Revising the HIV linkage to care measure:* The HIV linkage to care measure captures the percentage of patients whose first HIV diagnosis was made by health center staff between October 1 of the prior year and September 30 of the measurement year and who were seen for follow-up treatment within 90 days of that first diagnosis. This measure will be modified to change the follow-up treatment from 90 days to 30 days.

• *Adding CMS349v2 HIV Screening:* The addition of the CMS HIV screening measure will contribute to concerted efforts to better identify priority geographies, assist high risk groups among health center patients, and more effectively deploy interventions and resources in support of the ''Ending the HIV Epidemic'' Initiative.

• *Adding Prescription for Pre-Exposure Prophylaxis (PrEP) International Classification of Diseases (ICD) 10 Codes and Current Procedural Terminology (CPT) codes:* The addition of the PrEP ICD–10 and CPT codes will allow for the collection of this HIV prescription prevention data in health centers and further supports the ''Ending the HIV Epidemic'' Initiative.

• *Adding Diabetes Measures: CMS131v8 Diabetes Eye Exam; CMS123v7 Diabetes Foot Exam; and CMS134v8 Diabetes Medical Attention to Nephropathy:* Improving the treatment and management of patients with diabetes is a HRSA priority. Addition of these CMS eCQMs informs HRSA of the breadth of preventive care that patients with diabetes may receive in the health center setting that have profound impact on diabetes-related outcomes and quality of life.

• *Adding CMS125v8 Breast Cancer Screening:* There is substantial geographic and demographic variation in breast cancer death rates, suggesting that there are social and non-economic obstacles that affect breast cancer screening. [i] Preventive screening through timely access to mammograms can lead to early detection, better treatment prognosis, and has the potential to reduce health disparities. [ii]

• *Adding a Prescription Drug Monitoring Programs (PDMPs) Question to Appendix D: Health Center Health Information Technology (HIT) Capabilities:* PDMPs are effective tools for reducing prescription drug abuse and diversion. Improving provider utilization and access to real-time data has demonstrated meaningful results in reducing over-prescribing of medication. [iii]

• *Revising the Social Determinants of Health Question in Appendix E: Other Data Elements:* There is strong evidence that social and economic factors influence an individual's health. [iv]Several health care systems are exploring how to collect information on the social determinants of health. The inclusion of these questions into Appendix E allows HRSA to see how health centers are approaching this challenge and how many of their vulnerable patients are experiencing social and economic risks associated with poor health.

• *Adding ICD–10 Codes to Capture Human Trafficking and Intimate Partner Violence:* HRSA is aware that human trafficking [v] and intimate partner violence [vi] are part of the social determinants of health (SDOH) that can affect a wide range of health and quality of life outcomes. Addressing SDOH is a HRSA objective to improve the health and well-being of health center patients and the broader community in which they reside.

• *Uniform Data System Test Cooperative (UTC):* As part of HRSA's efforts to modernize the UDS we are creating the UTC as an enduring testing and piloting capability. The UTC consists of three main components: A steering committee, a coordinator, and health center test participants. Through this cooperative, HRSA will be able to pilot test innovative information technology and software, streamlining of clinical quality measures, and alternative data collection methodologies to reduce reporting burden and improve data quality and integrity.

Likely Respondents: Likely respondents will include Health Center Program award recipients, Health Center Program look-alikes, and NEPQR Program awardees funded under the practice priority areas of section 831(b) of the PHS Act.

Burden Statement: Burden includes the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and use technology and systems for the purpose of: Collecting, validating and verifying information, processing and maintaining information, disclosing and providing information. It also accounts for time to train personnel, respond to a collection of information, search data sources, complete and review the collection of information, and transmit or otherwise disclose the information. It will also include testing information necessary to support the UTC. No more than three tests would be conducted each calendar year and no more than 100 health centers would participate in 1 test. Participation is voluntary and will not affect their funding status. This sample size is sufficient to conduct a pilot test and determine if the

[i] *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4540479/.*

[ii] *https://www.thecommunityguide.org/findings/cancer-screening-reducing-structural-barriers-clients-breast-cancer.*

[iii] *https://www.pdmpassist.org/content/prescription-drug-monitoring-frequently-asked-questions-faq.*

[iv] *https://www.countyhealthrankings.org/explore-health-rankings/measures-data-sources/county-health-rankings-model/health-factors/social-and-economic-factors.*

[v] *https://www.acf.hhs.gov/otip/about/what-is-human-trafficking.*

[vi] *https://www.hrsa.gov/sites/default/files/hrsa/HRSA-strategy-intimate-partner-violence.pdf.*

innovation should be scaled across the Health Center Program. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Universal Report	1,471	1	1,471	223	328,033
Grant Report	504	1	504	30	15,120
UTC Tests	100	3	300	80	24,000
Total	2,075		2,275		367,153

HRSA specifically requests comments on: (1) The necessity and feasibility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Division of the Executive Secretariat.

[FR Doc. 2019–15902 Filed 7–25–19; 8:45 a.m.]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims (the Court) is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, Maryland 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the Court and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on June 1, 2019, through June 30, 2019. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation

Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, Maryland 20857. The Court's caption (*Petitioner's Name* v. *Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Dated: July 18, 2019.

George Sigounas,

Administrator.

List of Petitions Filed

1. Gary Radford, Washington, District of Columbia, Court of Federal Claims No: 19–0808V
2. Yong Yu, Flushing, New York, Court of Federal Claims No: 19–0809V
3. Robert Nocille, Sewell, New Jersey, Court of Federal Claims No: 19–0810V
4. Todd Garrison, Lewisburg, Pennsylvania, Court of Federal Claims No: 19–0811V
5. Victoria Marcus, Rockville, Maryland, Court of Federal Claims No: 19–0812V
6. Patricia McDorman, Bowie, Maryland, Court of Federal Claims No: 19–0814V
7. Stephen Winkelstein, Washington, District of Columbia, Court of Federal Claims No: 19–0815V
8. Jennifer Longo, Morrisville, North Carolina, Court of Federal Claims No: 19–0816V
9. Judy Bell, Madison, Florida, Court of Federal Claims No: 19–0817V
10. Ana Margarita Flores, Norwalk, California, Court of Federal Claims No: 19–0818V
11. Jean Draper, Rio Rancho, New Mexico, Court of Federal Claims No: 19–0819V
12. Ross Davenport, Spokane, Washington, Court of Federal Claims No: 19–0820V
13. Julian Paul, Louisville, Kentucky, Court of Federal Claims No: 19–0821V
14. Arati Katherine Johnston, Radnor, Pennsylvania, Court of Federal Claims No: 19–0822V
15. Michelle Maupin, Milroy, Indiana, Court of Federal Claims No: 19–0823V
16. Charles Eastwood, Manchester, New Hampshire, Court of Federal Claims No: 19–0824V
17. Lavada M. Hodd, Hayward, Wisconsin, Court of Federal Claims No: 19–0828V
18. Mary Clausen, Cape Coral, Florida, Court of Federal Claims No: 19–0829V
19. Daniel Joseph Martin, Elkhart, Indiana, Court of Federal Claims No: 19–0830V
20. Lyudmila Dutil, South Riding, Virginia, Court of Federal Claims No: 19–0831V
21. Ashlee Rodriguez, Boston, Massachusetts, Court of Federal Claims No: 19–0832V
22. Warren Lathan, Chicago, Illinois, Court of Federal Claims No: 19–0833V
23. Anita Gross, Yankton, South Dakota, Court of Federal Claims No: 19–0835V
24. Janet Yanchak Holick, Tucson, Arizona, Court of Federal Claims No: 19–0838V
25. Leonel Sanchez, Houston, Texas, Court of Federal Claims No: 19–0840V
26. Crystal Shuhart, Greenville, South Carolina, Court of Federal Claims No: 19–0842V
27. Marlene Gallichan, Seattle, Washington, Court of Federal Claims No: 19–0845V
28. Bruce Yoch, Pittsburgh, Pennsylvania, Court of Federal Claims No: 19–0849V
29. Michael J. McFall, Corning, New York, Court of Federal Claims No: 19–0850V
30. Sanela Nicocevic on behalf of S.R., Stamford, Connecticut, Court of Federal Claims No: 19–0853V
31. Anita McDonald, Philadelphia, Pennsylvania, Court of Federal Claims No: 19–0855V
32. Betty Myers-Noble, Los Angeles, California, Court of Federal Claims No: 19–0856V
33. Michaelene Widson, Reno, Nevada, Court of Federal Claims No: 19–0858V
34. Ralph L. Lamacchia, Milwaukee, Wisconsin, Court of Federal Claims No: 19–0860V
35. Debra Hatchett, Lake Forest, Illinois, Court of Federal Claims No: 19–0861V
36. Maria Carrillo, Chicago, Illinois, Court of Federal Claims No: 19–0862V
37. Douglas Sandhofer, Timonium, Maryland, Court of Federal Claims No: 19–0863V
38. Tammee Hinton, Winter Garden, Florida, Court of Federal Claims No: 19–0866V
39. David Glassman, M.D., Phoenix, Arizona, Court of Federal Claims No: 19–0867V
40. Lamise Al-Basha, Rockford, Illinois, Court of Federal Claims No: 19–0869V
41. Hannah Davis, Charlevoix, Michigan, Court of Federal Claims No: 19–0871V
42. Meagan Sevier, Andover, Kansas, Court of Federal Claims No: 19–0872V
43. Rachel Clemmer, Takoma Park, Maryland, Court of Federal Claims No: 19–0878V
44. Timothy Andrews, Memphis, Tennessee, Court of Federal Claims No: 19–0879V
45. Virginio Trevisan on behalf of Victoria Leonor Trevisan, Torrance, California, Court of Federal Claims No: 19–0880V
46. Antonio Illiano, Hampton, New Jersey, Court of Federal Claims No: 19–0884V
47. Olivia D. Thompson, Richmond, Virginia, Court of Federal Claims No: 19–0887V
48. George Youhana and Belina Youhana on behalf of C.Y.Y., Los Gatos, California, Court of Federal Claims No: 19–0888V
49. Linda Modderman, Spokane, Washington, Court of Federal Claims No: 19–0890V
50. Matthew Thompson, Belleville, Michigan, Court of Federal Claims No: 19–0891V
51. Autumn Morgan, East Stroudsburg, Pennsylvania, Court of Federal Claims No: 19–0893V
52. Norma Blair, Bourbonnais, Illinois, Court of Federal Claims No: 19–0894V
53. Maxfel Goodson, Vancouver, Washington, Court of Federal Claims No: 19–0895V
54. Michael Ball, Boone, North Carolina, Court of Federal Claims No: 19–0896V
55. Anthony Stefano, Newport Beach, California, Court of Federal Claims No: 19–0898V
56. Kelly Bennett, Cincinnati, Ohio, Court of Federal Claims No: 19–0902V
57. Brad Bundesen, Washington, District of Columbia, Court of Federal Claims No: 19–0903V
58. Dana Sherrod, Carrollton, Texas, Court of Federal Claims No: 19–0906V
59. Rhonda O'Brien, Washington, District of Columbia, Court of Federal Claims No: 19–0909V
60. Adriana Lopez, Boston, Massachusetts, Court of Federal Claims No: 19–0910V
61. Christina Witham, Gahanna, Ohio, Court of Federal Claims No: 19–0912V
62. Jacqueline Venable, Washington, District of Columbia, Court of Federal Claims No: 19–0913V
63. Kaminie Rampergash, Washington, District of Columbia, Court of Federal Claims No: 19–0914V
64. Jennifer Imm, Washington, District of Columbia, Court of Federal Claims No: 19–0915V
65. Edward Zhao, Washington, District of Columbia, Court of Federal Claims No: 19–0916V
66. Rosa Ortiz, Davenport, Iowa, Court of Federal Claims No: 19–0917V
67. Laura Zalewski, Chicago, Illinois, Court of Federal Claims No: 19–0918V
68. Angelena Walker, Bellefontaine, Ohio, Court of Federal Claims No: 19–0919V
69. Anna Nasher, Dresher, Pennsylvania, Court of Federal Claims No: 19–0920V
70. Lisa Simmons, Bellevue, Washington, Court of Federal Claims No: 19–0924V
71. Tammie Walden, Gray, Georgia, Court of Federal Claims No: 19–0927V
72. Abby L. Adams on behalf of Donald C. Adams, Deceased, Linwood, New Jersey, Court of Federal Claims No: 19–0929V
73. Melody Massi, Wayne, Pennsylvania, Court of Federal Claims No: 19–0930V
74. Bridgett Runkles, Tinker Air Force Base, Oklahoma, Court of Federal Claims No: 19–0934V
75. Judson Costlow, Richmond, Indiana, Court of Federal Claims No: 19–0935V
76. Griselda Ruiz, Richmond, Virginia, Court of Federal Claims No: 19–0936V
77. Virginia Carpanini, Hudson, New York, Court of Federal Claims No: 19–0940V
78. Ralph F. Harper, Fernley, Nevada, Court of Federal Claims No: 19–0941V
79. Sandra Lucchesi, Santa Rosa, California, Court of Federal Claims No: 19–0943V
80. Leanne Roth, Carpinteria, California, Court of Federal Claims No: 19–0944V
81. Gavin Beagley, American Fork, Utah, Court of Federal Claims No: 19–0948V

[FR Doc. 2019–15910 Filed 7–25–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Request for Information: Ensuring Patient Access and Effective Drug Enforcement

AGENCY: Office of the Assistant Secretary for Planning and Evaluation (ASPE), HHS.

ACTION: Request for information.

SUMMARY: This Request for Information (RFI) seeks comment on ensuring

legitimate access to controlled substances, including opioids, while also preventing diversion and abuse, as well as how federal, state, local, and tribal entities can collaborate to address these issues.

DATES: Comments must be received at one of the addresses provided below, no later than 5 p.m. on August 26, 2019.

ADDRESSES: Written comments can be provided by email, fax or U.S. mail.

Email: EPAEDEAreport@hhs.gov.

Fax: (202) 690–5882.

Mail: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Science and Data Policy, Attn: EPAEDEA Report Feedback, 200 Independence Avenue SW, Room 434E, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Jessica White, Office of the Assistant Secretary for Planning and Evaluation, 202–690–7100.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3 of the Ensuring Patient Access and Effective Drug Enforcement Act of 2016 (EPAEDEA), Public Law 114–145, called for the Department of Health and Human Services, acting through the Commissioner of Food and Drugs, the Administrator of the Substance Abuse and Mental Health Services Administration, the Director of the Agency for Healthcare Research and Quality, and the Director of the Centers for Disease Control and Prevention, and in coordination with the Administrator of the Drug Enforcement Administration and in consultation with the Secretary of Defense and the Secretary of Veterans Affairs, to submit a report to Congress that identifies:

- Obstacles to legitimate patient access to controlled substances
- issues with diversion of controlled substances
- how collaboration between Federal, State, local, and tribal law enforcement agencies and the pharmaceutical industry can benefit patients and prevent diversion and abuse of controlled substances;
- the availability of medical education, training opportunities, and comprehensive clinical guidance for pain management and opioid prescribing, and any gaps that should be addressed
- beneficial enhancements to State prescription drug monitoring programs, including enhancements to require comprehensive prescriber input and to expand access to the programs for appropriate authorized users
- steps to improve reporting requirements so that the public and Congress have more information regarding prescription opioids, such as the volume and formulation of prescription opioids prescribed annually, the dispensing of such prescription opioids, and outliers and trends within large data sets.

II. Solicitation of Comments

EPAEDEA requires that the report incorporate feedback and recommendations from the following: (1) Patient groups; (2) pharmacies; (3) drug manufacturers; (4) common or contract carriers and warehousemen; (5) hospitals, physicians, and other health care providers; (6) State attorneys general; (7) Federal, State, local, and tribal law enforcement agencies; (8) health insurance providers and entities that provide pharmacy benefit management services on behalf of a health insurance provider; (9) wholesale drug distributors; (10) veterinarians; (11) professional medical societies and boards; (12) State and local public health authorities; and (13) health services research organizations.

This RFI is seeking comment from these stakeholders on the aforementioned issue areas to be covered by the report.

III. 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.

Dated: July 16, 2019.

Brenda Destro,

Deputy Assistant Secretary for Planning and Evaluation (HSP).

[FR Doc. 2019–15952 Filed 7–25–19; 8:45 am]

BILLING CODE 4150–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 section 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 Neurological Disorders and Stroke Special Emphasis Panel; Review for: HEAL: Optimization of Non-addictive Therapies [Small Molecules and Biologics] to Treat Pain.

Date: July 26, 2019.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Marilyn Moore-Hoon, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Institute of Neurological Disorders and Stroke, Bethesda, MD 20892, 301–827–9087, *mooremar@mail.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. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 19, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–15879 Filed 7–25–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

[OMB Control Number 1653–0043]

Agency Information Collection Activities; Extension of a Currently Approved Collection: Electronic Funds Transfer Waiver Request; Comment Request

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: In accordance with the Paperwork Reductions Act (PRA) of 1995 the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) will submit the following Information Collection Request (ICR) to the Office of

Management and Budget (OMB) for review and clearance. This information collection was previously published in the **Federal Register** (84 FR 23577) on May 22, 2019, allowing for a 60-day comment period. ICE received one comment in connection with the 60-day notice. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until August 26, 2019.

ADDRESSES: Interested persons are invited to submit written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov* or faxed to (202) 395–5806. All submissions must include the words ''Department of Homeland Security'' and the OMB Control Number 1653–0043.

SUPPLEMENTARY INFORMATION:

Comments

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Electronic Funds Transfer Waiver Request.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* 10–002; U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government. Section 404(b) of the Immigration and Nationality Act (8 U.S.C. 1101 (note) provides for the reimbursement to States and localities for assistance provided in meeting an immigration emergency. This collection of information allows for State or local governments to request reimbursement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 650 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 325 annual burden hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated annual cost burden associated with this collection of information is $10,468.

Dated: July 23, 2019.

Scott Elmore,

PRA Clearance Officer.

[FR Doc. 2019–15887 Filed 7–25–19; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2018–N161; FXES11130200000–190–FF02ENEH00]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews of 36 Species in Arizona, New Mexico, Texas, Utah, and Mexico

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are conducting 5-year status reviews under the Endangered Species Act of 36 animal and plant species. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since the last review for the species.

DATES: To ensure consideration, we are requesting submission of new information no later than August 26, 2019. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For how to submit information, see Request for Information and How Do I Ask Questions or Provide Information? in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: For information on a particular species, contact the appropriate person or office listed in the table in the **SUPPLEMENTARY INFORMATION** section. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Why do we conduct a 5-year review?

Under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List). Wildlife and plants on the List can be found at *http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp* and *http://ecos.fws.gov/tess_public/pub/listedPlants.jsp,* respectively. Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, refer to our factsheet at *http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

What information do we consider in our review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the ESA); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes,

identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

Which species are under review?

The species in the following table are under active 5-year status review.

Common name	Scientific name	Listing status	Current range	Final listing rule (**Federal Register** citation and publication date)	Contact person, phone, email	Contact person's U.S. mail address
			Animals			
Big Bend gambusia.	*Gambusia gaigei.*	Endangered	Texas (USA)	32 FR 4001 3/11/67	Adam Zerrenner, 512–490–0057 (office phone), 512–577–6594 (direct line), or *Adam_Zerrenner@fws.gov* (email).	U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758.
Government Canyon Bat Cave meshweaver.	*Cicurina vespera.*	Endangered	Texas (USA)	65 FR 81419 12/26/00.		
Madla's Cave meshweaver.	*Cicurina madla*	Endangered	Texas (USA)	65 FR 81419 12/26/00.		
Austin blind salamander.	*Eurycea waterlooensis.*	Endangered	Texas (USA)	78 FR 51277 8/20/13.		
Barton Springs salamander.	*Eurycea sosorum.*	Endangered	Texas (USA)	62 FR 23377 4/30/97.		
Chupadera springsnail.	*Pyrgulopsis chupaderae.*	Endangered	New Mexico (USA)	77 FR 41088 7/12/12	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd. NE, Albuquerque, NM 87113–1001.
Cokendolpher Cave harvestman.	*Texella cokendolpheri.*	Endangered	Texas (USA)	65 FR 81419 12/26/00	Adam Zerrenner, 512–490–0057 (office phone), 512–577–6594 (direct line), or *Adam_Zerrenner@fws.gov* (email).	U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758.
Diamond tryonia.	*Pseudotryonia adamantina.*	Endangered	Texas (USA)	78 FR 41227 7/09/13.		
Diminutive amphipod.	*Gammarus hyalleloides.*	Endangered	New Mexico and Texas (USA)	78 FR 41227 7/09/13.		
Gonzales tryonia.	*Tryonia circumstriata* (=*stock tonensis*).	Endangered	Texas (USA)	78 FR 41227 7/09/13.		
Helotes mold beetle.	*Batrisodes venyivi.*	Endangered	Texas (USA)	65 FR 81419 12/26/00.		
Jemez Mountains salamander.	*Plethodon neomexicanus.*	Endangered	New Mexico (USA)	78 FR 55599 9/10/13	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd. NE, Albuquerque, NM 87113–1001.
Narrow-headed gartersnake.	*Thamnophis rufipunctatus.*	Threatened	Arizona and New Mexico (USA)	79 FR 38677 7/08/14	Jeff Humphrey, 602–242–0210 (phone) or *Jeff_Humphrey@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Northern Mexican gartersnake.	*Thamnophis eques megalops.*	Threatened	Arizona and New Mexico (USA)	79 FR 38677 7/08/14.		
Pecos amphipod.	*Gammarus pecos.*	Endangered	Texas (USA)	78 FR 41227 7/09/13	Adam Zerrenner, 512–490–0057 (office phone), 512–577–6594 (direct line), or *Adam_Zerrenner@fws.gov* (email).	U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758.
Phantom springsnail.	*Pyrgulopsis texana.*	Endangered	Texas (USA)	78 FR 41227 7/09/13.		
Phantom tyronia.	*Tryonia cheatumi.*	Endangered	Texas (USA)	78 FR 41227 7/09/13.		
San Bernardino springsnail.	*Pyrgulopsis bernardina.*	Threatened	Arizona (USA)	77 FR 23060 4/17/12	Jeff Humphrey, 602–242–0210 (phone) or *Jeff_Humphrey@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Sharpnose shiner.	*Notropis oxyrhynchus.*	Endangered	Texas (USA)	79 FR 45273 8/04/14	Debra Bills, 817–277–1100, ext. 2113 (phone), or *Debra_Bills@fws.gov* (email).	U.S. Fish and Wildlife Service, Arlington Ecological Services Field Office, 2005 NE Green Oaks Blvd., Suite 140, Arlington, TX 76006.
Smalleye shiner.	*Notropis buccula.*	Endangered	Texas (USA)	79 FR 45273 8/04/14.		
Soccoro springsnail.	*Pyrgulopsis neomexicana.*	Endangered	New Mexico (USA)	56 FR 49646 9/30/91	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd. NE, Albuquerque, NM 87113–1001.
Thick-billed parrot.	*Rhynchopsitta pachyrhyncha.*	Endangered	Mexico	35 FR 8491 6/2/70	Jeff Humphrey, 602–242–0210 (phone) or *Jeff_Humphrey@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.

Common name	Scientific name	Listing status	Current range	Final listing rule (**Federal Register** citation and publication date)	Contact person, phone, email	Contact person's U.S. mail address
Zuni bluehead sucker.	*Catostomus discobolus yarrowi.*	Endangered	Arizona and New Mexico (USA)	79 FR 43131 7/24/14	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd. NE, Albuquerque, NM 87113–1001.
Koster's springsnail.	*Juturnia kosteri*	Endangered	New Mexico (USA)	79 FR 43131 7/24/14.		
Noel's amphipod.	*Gammarus desperatus.*	Endangered	New Mexico (USA)	79 FR 43131 7/24/14.		
Pecos assiminea snail.	*Assiminea pecos.*	Endangered	New Mexico and Texas (USA)	70 FR 46304 8/09/05.		
Roswell springsnail.	*Pyrgulopsis roswellensis.*	Endangered	New Mexico (USA)	70 FR 46304 8/09/05.		
Pecos bluntnose shiner.	*Notropis simus pecosensis.*	Threatened	New Mexico (USA)	52 FR 5295 2/20/87.		
			Plants			
Acuña cactus.	*Echinomastus erectocentrus* var. *acunensis.*	Endangered	Arizona (USA)	78 FR 60607 10/01/13	Jeff Humphrey, 602–242–0210 (phone) or *Jeff_Humphrey@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Fickeisen plains cactus.	*Pediocactus peeblesianus fickeiseniae.*	Endangered	Arizona (USA)	78 FR 60607 10/01/13.		
Gierisch mallow.	*Sphaeralcea gierischii.*	Endangered	Arizona and Utah (USA)	78 FR 49149 8/13/13.		
Holy ghost ipomopsis.	*Ipomopsis sancti-spiritus.*	Endangered	New Mexico (USA)	59 FR 13836 3/23/94	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd NE, Albuquerque, NM 87113–1001.
Kearney's blue-star.	*Amsonia kearneyana.*	Endangered	Arizona (USA)	54 FR 2131 1/19/89	Jeff Humphrey, 602–242–0210 (phone) or *Jeff_Humphrey@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Terlingua Creek cat's-eye.	*Cryptantha crassipes.*	Endangered	Texas (USA)	56 FR 49634 9/30/91	Adam Zerrenner, 512–490–0057 (office phone), 512–577–6594 (direct line), or *Adam_Zerrenner@fws.gov* (email).	U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758.
Texas golden gladecress.	*Leavenworthia texana.*	Endangered	Texas (USA)	78 FR 56025 9/11/13	Chuck Ardizzone, 281–286–8282 (phone) or *Chuck_Ardizzone@fws.gov* (email).	U.S. Fish and Wildlife Service, Texas Coastal Ecological Services, 17629 El Camino Real, Ste 211, Houston, TX 77058.
Zuni fleabane.	*Erigeron rhizomatus.*	Threatened	Arizona and New Mexico (USA)	50 FR 16680 4/26/85	Susan Millsap, 505–761–4781 (phone) or *Susan_Millsap@fws.gov* (email).	U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd NE, Albuquerque, NM 87113–1001.

Request for Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See What Information Do We Consider in Our Review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

How do I ask questions or provide information?

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in the table above. You may also direct questions to those contacts. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the offices where the comments are submitted.

Completed and Active Reviews

A list of all completed and currently active 5-year reviews addressing species for which lead responsibility falls under Service offices located in Arizona, New Mexico, Oklahoma, and Texas can be found at *http://www.fws.gov/southwest/es/ElectronicLibrary_Main.cfm* (go to ''Select a Document Category'' and select ''5-Year Review'').

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 1, 2019.

Amy Lueders,

Regional Director, Southwest Region, U.S. Fish and Wildlife Service.

Editorial Note: This document was received for publication by the Office of the Federal Register on July 18, 2019.

[FR Doc. 2019–15666 Filed 7–25–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2019–N039; FXES11130800000–190–FF08E00000]

Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Status Reviews of 58 Species in California, Nevada, and the Klamath Basin of Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews of 58 species in California, Nevada, and the Klamath Basin of Oregon under the Endangered Species Act. A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any new information on these species that has become available since the last review.

DATES: To ensure consideration in our reviews, we are requesting submission of new information no later than September 24, 2019. However, we will continue to accept new information about any species at any time.

ADDRESSES: For how and where to send information, see Request for New Information.

FOR FURTHER INFORMATION CONTACT: For whom to contact for species-specific information, see Request for New Information. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Why do we conduct 5-year reviews?

Under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), we maintain lists of endangered and threatened wildlife and plant species (referred to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for wildlife) and 17.12 (for plants). Section 4(c)(2)(A) of the Act requires us to review each listed species' status at least once every 5 years. For additional information about 5-year reviews, refer to our factsheet at *http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

What information do we consider in our review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented to benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the Act); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

Which species are under review?

This notice announces our active review of the species listed in the table below.

Common name	Scientific name	Status	States where the species is known to occur	Final Listing rule (***Federal Register*** citation and publication date)	Lead fish and wildlife office
Animals					
Butterfly, Behren's silverspot	*Speyeria zerene behrensii*	E	CA	62 FR 64306; 12/5/1997	Arcata Fish and Wildlife Office.
Butterfly, lotis blue	*Lycaeides argyrognomon lotis.*	E	CA	41 FR 22041; 6/1/1976	Arcata Fish and Wildlife Office.
Kangaroo rat, San Bernardino Merriam's.	*Dipodomys merriami parvus.*	E	CA	63 FR 51005; 9/24/1998	Carlsbad Fish and Wildlife Office.
Rail, light-footed clapper	*Rallus longirostris levipes*	E	CA	34 FR 5034, 3/8/1969; 35 FR 16047; 10/13/1970.	Carlsbad Fish and Wildlife Office.
Chub, Mohave tui	*Gila bicolor mohavensis*	E	CA	35 FR 16047; 10/13/1970	Carlsbad Fish and Wildlife Office.
Trout, Paiute cutthroat	*Oncorhynchus clarkii seleniris.*	T	CA	32 FR 4001; 3/11/1967; 40 FR 29863, 7/16/1975.	Reno Fish and Wildlife Office.
Fox, San Joaquin kit	*Vulpes macrotis mutica*	E	CA	32 FR 4001; 3/11/1967	Sacramento Fish and Wildlife Office.
Kangaroo rat, Fresno	*Dipodomys nitratoides exilis.*	E	CA	50 FR 4222; 1/30/1985	Sacramento Fish and Wildlife Office.
Kangaroo rat, giant	*Dipodomys ingens*	E	CA	52 FR 283; 1/5/1987	Sacramento Fish and Wildlife Office.
Kangaroo rat, Tipton	*Dipodomys nitratoides nitratoides.*	E	CA	53 FR 25608; 7/8/1988	Sacramento Fish and Wildlife Office.
Lizard, blunt-nosed leopard	*Gambelia silus*	E	CA	32 FR 4001; 3/11/1967	Sacramento Fish and Wildlife Office.
Moth, Kern primrose sphinx	*Euproserpinus euterpe*	T	CA	45 FR 24088; 4/8/1980	Sacramento Fish and Wildlife Office.
Rabbit, riparian brush	*Sylvilagus bachmani riparius.*	E	CA	65 FR 8881; 2/23/2000	Sacramento Fish and Wildlife Office.
Shrew, Buena Vista Lake	*Sorex ornatus relictus*	E	CA	67 FR 10101; 3/6/2002	Sacramento Fish and Wildlife Office.
Snake, giant garter	*Thamnophis gigas*	T	CA	58 FR 54053; 10/20/1993	Sacramento Fish and Wildlife Office.
Snake, San Francisco garter	*Thamnophis sirtalis tetrataenia.*	E	CA	32 FR 4001; 3/11/1967	Sacramento Fish and Wildlife Office.
Whipsnake, Alameda (=striped racer).	*Masticophis lateralis euryxanthus.*	T	CA	62 FR 64306; 12/5/1997	Sacramento Fish and Wildlife Office.
Woodrat, riparian (=San Joaquin Valley).	*Neotoma fuscipes riparia*	E	CA	65 FR 8881; 2/23/2000	Sacramento Fish and Wildlife Office.
Mouse, salt marsh harvest	*Reithrodontomys raviventris.*	E	CA	35 FR 16047; 10/13/1970	San Francisco Bay-Delta Fish and Wildlife Office.

Common name	Scientific name	Status	States where the species is known to occur	Final Listing rule (*Federal Register* citation and publication date)	Lead fish and wildlife office
Dace, Ash Meadows speckled.	*Rhinichthys osculus nevadensis*.	E	NV	47 FR 19995; 5/10/1982; 48 FR 608, 1/5/1983; 48 FR 40178, 9/2/1983.	Southern Nevada Fish and Wildlife Office.
Naucorid, Ash Meadows	*Ambrysus amargosus*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Pupfish, Ash Meadows Amargosa.	*Cyprinodon nevadensis mionectes*.	E	NV	47 FR 19995; 5/10/1982; 48 FR 608, 1/5/1983; 48 FR 40178, 9/2/1983.	Southern Nevada Fish and Wildlife Office.
Pupfish, Warm Springs	*Cyprinodon nevadensis pectoralis*.	E	NV	35 FR 16047; 10/13/1970	Southern Nevada Fish and Wildlife Office.
Otter, southern sea	*Enhydra lutris nereis*	T	CA, Mexico	42 FR 2965; 1/14/1977	Ventura Fish and Wildlife Office.
Beetle, Ohlone tiger	*Cicindela ohlone*	E	CA	66 FR 50340; 10/3/2001	Ventura Fish and Wildlife Office.
Salamander, Santa Cruz long-toed.	*Ambystoma macrodactylum croceum*.	E	CA	32 FR 4001; 3/11/1967	Ventura Fish and Wildlife Office.
Plants					
Rock-cress, McDonald's	*Arabis macdonaldiana*	E	CA, OR	43 FR 44810; 9/28/1978	Arcata Fish and Wildlife Office.
Wallflower, Menzies'	*Erysimum menziesii*	E	CA	57 FR 27848; 6/22/1992	Arcata Fish and Wildlife Office.
Bird's-beak, salt marsh	*Cordylanthus maritimus* ssp. *maritimus*.	E	CA, Mexico	43 FR 44810; 10/29/1978	Carlsbad Fish and Wildlife Office.
Bush-mallow, San Clemente Island.	*Malacothamnus clementinus*.	E	CA	42 FR 40682; 8/11/1977	Carlsbad Fish and Wildlife Office.
Paintbrush, San Clemente Island.	*Castilleja grisea*	T	CA	42 FR 40682; 8/11/1977; 78 FR 45406; 7/26/2013.	Carlsbad Fish and Wildlife Office.
Larkspur, San Clemente Island.	*Delphinium variegatum* ssp. *kinkiense*.	E	CA	42 FR 40682; 8/11/1977	Carlsbad Fish and Wildlife Office.
Lotus, San Clemente Island	*Acmispon dendroideus* var. *traskiae* (=*Lotus d.* ssp. *traskiae*).	T	CA	42 FR 40682; 8/11/1977	Carlsbad Fish and Wildlife Office.
Milk-vetch, triple-ribbed	*Astragalus tricarinatus*	E	CA	63 FR 53596; 10/6/1998	Carlsbad Fish and Wildlife Office.
Rock-cress, Santa Cruz Island.	*Sibara filifolia*	E	CA	62 FR 42692; 8/8/1997	Carlsbad Fish and Wildlife Office.
Woodland-star, San Clemente Island.	*Lithophragma maximum*	E	CA	62 FR 42692; 8/8/1997	Carlsbad Fish and Wildlife Office.
Cactus, Bakersfield	*Opuntia treleasei*	E	CA	55 FR 29361; 7/19/1990	Sacramento Fish and Wildlife Office.
Checker-mallow, Keck's	*Sidalcea keckii*	E	CA	65 FR 7757; 2/16/2000	Sacramento Fish and Wildlife Office.
Jewelflower, California	*Caulanthus californicus*	E	CA	55 FR 29361; 7/19/1990	Sacramento Fish and Wildlife Office.
Mallow, Kern	*Eremalche kernensis*	E	CA	55 FR 29361; 7/19/1990	Sacramento Fish and Wildlife Office.
Wooly-threads, San Joaquin	*Monolopia* (=*Lembertia*) *congdonii*.	E	CA	55 FR 29361; 7/19/1990	Sacramento Fish and Wildlife Office.
Blazing-star, Ash Meadows	*Mentzelia leucophylla*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Centaury, spring-loving	*Centaurium namophilum*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Gumplant, Ash Meadows	*Grindelia fraxino-pratensis*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Ivesia, Ash Meadows	*Ivesia kingii* var. *eremica*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Milk-vetch, Ash meadows	*Astragalus phoenix*	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Niterwort, Amargosa	*Nitrophila mohavensis*	E	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Sunray, Ash Meadows	*Enceliopsis nudicaulis* var. *corrugata*.	T	NV	50 FR 20777; 5/20/1985	Southern Nevada Fish and Wildlife Office.
Amole, purple	*Chlorogalum purpureum*	T	CA	65 FR 14878; 3/20/2000	Ventura Fish and Wildlife Office.
Clover, Monterey	*Trifolium trichocalyx*	E	CA	63 FR 43100; 8/12/1998	Ventura Fish and Wildlife Office.
Dudleya, Santa Cruz Island	*Dudleya nesiotica*	T	CA	62 FR 40954; 7/31/1997	Ventura Fish and Wildlife Office.
Gilia, Monterey	*Gilia tenuiflora* ssp. *arenaria*.	E	CA	57 FR 27848; 6/22/1992	Ventura Fish and Wildlife Office.
Milk-vetch, Ventura Marsh	*Astragalus pycnostachyus* var. *lanosissimus*.	E	CA	66 FR 27901; 5/21/2001	Ventura Fish and Wildlife Office.
Pentachaeta, Lyon's	*Pentachaeta lyonii*	E	CA	62 FR 4172; 1/29/1997	Ventura Fish and Wildlife Office.
Polygonum, Scotts Valley	*Polygonum hickmanii*	E	CA	68 FR 16979; 4/8/2003	Ventura Fish and Wildlife Office.
Potentilla, Hickman's	*Potentilla hickmanii*	E	CA	63 FR 43100; 8/12/1998	Ventura Fish and Wildlife Office.
Sandwort, Marsh	*Arenaria paludicola*	E	CA, WA	58 FR 41378; 8/3/1993	Ventura Fish and Wildlife Office.
Spineflower, Monterey	*Chorizanthe pungens* var. *pungens*.	T	CA	59 FR 5499; 2/4/1994	Ventura Fish and Wildlife Office.

Request for New Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See What information do we consider in our review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

To get more information on a species, submit information on a species, or review information we receive, please use the contact information for the Lead Fish and Wildlife Office for the species specified in the table above.

Arcata Fish and Wildlife Office: Kathleen Brubaker, 707–822–7201

(phone); *Kathleen_brubaker@fws.gov* (email); or 1655 Heindon Road, Arcata, CA 95521 (U.S. mail, hand-delivery, or in-person review of documents);

Carlsbad Fish and Wildlife Office: Bradd Baskerville-Bridges, 760–431–9440 (phone); *fw8cfwocomments@fws.gov* (email); or 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008 (U.S. mail, hand-delivery, or in-person review of documents);

Reno Fish and Wildlife Office: Shawna Theisen, 775–861–6378 (phone); *shawna_theisen@fws.gov* (email); or 1340 Financial Boulevard, Suite 234, Reno, NV 89502 (U.S. mail, hand-delivery, or in-person review of documents);

Sacramento Fish and Wildlife Office: Josh Hull, 916–414–6742 (phone); *fw8sfwocomments@fws.gov* (email); or 2800 Cottage Way, Suite W2605, Sacramento, CA 95825 (U.S. mail, hand-delivery, or in-person review of documents);

San Francisco Bay-Delta Fish and Wildlife Office: Steven Detwiler, 916–930–2640 (phone); *steven_detwiler@fws.gov* (email); or 650 Capitol Mall, Sacramento, CA 95814 (U.S. mail, hand-delivery, or in-person review of documents);

Southern Nevada Fish and Wildlife Office: Glen Knowles, 702–515–5230 (phone); *glen_knowles@fws.gov* (email); or 4701 N. Torrey Pines Dr., Las Vegas, NV 89130 (U.S. mail, hand-delivery, or in-person review of documents); or

Ventura Fish and Wildlife Office: Cat Darst, 805–677–3318 (phone); *cat_darst@fws.gov* (email); or 2493 Portola Road, Suite B, Ventura,+ CA 93003 (U.S. mail, hand-delivery, or in-person review of documents).

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the offices to which the comments are submitted.

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Jody Holzworth,

Deputy Regional Director, Pacific Southwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2019–15943 Filed 7–25–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X 1109AF LLUT930000 LI6100000.DQ0000.LXSSJ0650000]

Notice of Availability of the Bears Ears National Monument Indian Creek and Shash Jáa Units Proposed Monument Management Plans and Final Environmental Impact Statement, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Canyon Country District Office, in coordination with the United States Forest Service (USFS), Manti-La Sal National Forest, has prepared the Proposed Monument Management Plans (MMPs) and Final Environmental Impact Statement (EIS) for the Bears Ears National Monument (BENM) Indian Creek and Shash Jáa Units and by this notice is announcing its availability and the opening of a protest period concerning the Proposed MMPs. In accordance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, this notice also announces the opening of a 60-day public comment period regarding the proposed closure of recreational target shooting (referred to as ''target shooting'' in the MMPs) at campgrounds, developed recreation sites, petroglyph sites, and structural cultural sites within the Bears Ears National Monument.

DATES: The BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the BLM's Proposed MMPs and Final EIS. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

To ensure that comments on the proposed target shooting closure will be considered, the BLM must receive written comments within September 24, 2019.

ADDRESSES: The Proposed MMPs and Final EIS is available on the BLM ePlanning project website at *https://goo.gl/uLrEae.* Click the Documents and Report link on the left side of the screen to find the electronic versions of these materials. Hard copies of the Proposed MMPs and Final EIS are available for public inspection at the Canyon Country District Office.

Instructions for filing a protest with the Director of the BLM regarding the Proposed MMPs may be found online at *https://www.blm.gov/filing-a-plan-protest* and at 43 CFR 1610.5–2.

You may submit comments on the proposed target shooting closure using either of the following methods:

Email: blm_ut_monticello_monuments@blm.gov.

Mail: BLM, Canyon Country District Office, 82 East Dogwood, Moab, Utah 84532, Attn: Lance Porter.

FOR FURTHER INFORMATION CONTACT: Lance Porter, District Manager, at BLM Canyon Country District Office, 82 East Dogwood, Moab, UT 84532; by telephone, 435–259–2100; or by email, *l50porte@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question for the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On December 4, 2017, President Donald J. Trump signed Proclamation 9681 modifying the Bears Ears National Monument designated by Proclamation 9558 to exclude from its designation and reservation approximately 1,150,860 acres of land. The revised BENM boundary includes two units—Shash Jáa and Indian Creek Units—that are reserved for the care and management of the objects of historic and scientific interest within their boundaries. The planning area is located entirely in San Juan County, Utah, and encompasses 169,289 acres of BLM managed lands and 32,587 acres of National Forest System Lands. All of the National Forest System Lands are within the Shash Jáa Unit.

The BLM is the lead agency for the preparation of the EIS, and the U.S. Forest Service (USFS) is participating as a cooperating agency.

The planning effort is needed to identify goals, objectives, and management actions necessary for the proper care and management of the

Monument objects and values identified in Proclamations 9558, as modified by Proclamation 9681. The BENM is jointly administered by the BLM and USFS under the Monticello Resource Management Plan (BLM 2008), as amended, and the Manti-La Sal Land and Resource Management Plan (LRMP), as amended (USFS 1986).

Each agency will continue to manage their lands within the Monument pursuant to their respective applicable legal authorities. The responsible official for the BLM is the Utah State Director; the responsible official for the USFS is the Manti-La Sal Forest Supervisor. These MMPs would amend the existing Monticello Resource Management Plan (RMP) to remove the BENM from the Monticello RMP decision area, and would replace the management from the Monticello RMP for the BLM-administered lands within the Monument. The USFS would use the information in the MMPs/EIS to amend the existing Manti-La Sal LRMP to guide future management of USFS-administered lands within the BENM. The USFS will use the BLM's administrative review procedures, as provided by the USFS 2012 Planning Rule, at 36 CFR 219.59(b).

The BLM and USFS have reviewed public scoping comments to identify planning issues that directed the formulation of alternatives and framed the scope of analysis in the Draft MMPs/EIS. Issues identified include management of cultural resources, including protection of American Indian sacred sites, traditional cultural properties, and access by members of Indian tribes for traditional cultural and customary uses; recreation and access; livestock grazing; and wildlife, water, vegetation, and soil resources. This planning effort also considers the management of lands with wilderness characteristics.

The formal public scoping process for the MMPs and EIS began on January 16, 2018, with the publication of a Notice of Intent in the **Federal Register** (83 FR 2181) and ended on April 11, 2018. The BLM held public scoping meetings in Blanding and Bluff, Utah, in March 2018. The Notice of Availability for the Draft MMPs/EIS was published on August 17, 2018 (83FR 41111), and the BLM accepted public comments on the range of alternatives, effects analysis and draft MMPs for 90 days, ending on November 15, 2018. During the public comment period, the BLM and USFS hosted public meetings in Blanding, Bluff, and Montezuma Creek, Utah.

The Draft MMPs/EIS evaluated four alternatives in detail. Alternative A is the No Action alternative, which is a continuation of existing decisions in the Monticello RMP, as amended, and the Manti-La Sal Forest Plan, as amended, to the extent that those decisions are compatible with the proclamations. Alternative B emphasizes resource protection and conservation. This alternative imposes the greatest restrictions on recreation and other uses to ensure the proper care and management of objects and values. Alternative C represents a balance among levels of restriction on recreation and other uses and emphasizes adaptive management to protect the long-term sustainability of Monument objects and values while providing for other multiple uses. Alternative D applies the least restrictive management prescriptions and allows for more discretion for multiple uses and review of proposed actions on a case-by-case basis. Comments on the Draft MMPs/EIS received from the public, the Bears Ears Monument Advisory Committee, cooperating agencies and tribes, and internal BLM review were considered and incorporated as appropriate into the Proposed MMPs/Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change the range of alternatives considered. Alternative E was developed in response to comments received on the Draft MMPs/EIS and includes elements of Alternatives A, B, C, and D. Alternatives B, C, D, and E were developed using input from the public, stakeholders, and cooperating agencies. The BLM and USFS have identified Alternative E as the agencies' Proposed MMPs. Identification of this alternative, however, does not represent final agency direction.

In the Proposed MMPs, the BLM proposes that recreational target shooting (referred to as ''target shooting'' in the MMPs) shall not be allowed on certain lands managed by the BLM in both the Indian Creek and Shash Jáa units of BENM. As proposed, target shooting would generally be allowed, but would be prohibited at campgrounds, developed recreation sites, petroglyph sites, and structural cultural sites. The proposed closure would help protect the cultural objects and values for which the BENM was designated, and provide for public safety at campgrounds and developed recreation sites. The proposed closure would ensure that irreplaceable petroglyphs and structural cultural sites would not inadvertently, or purposefully, be damaged by target shooting activities in the Monument. In addition, the proposed closure would enhance the safety of the public visiting campgrounds and developed recreation sites in the BENM, which would improve their experience. The proposed closure does not apply to the USFS-managed land in the BENM.

In accordance with John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019 (Dingell Act, Pub. L. 116–9, Section 4103), the BLM is announcing the opening of a 60-day public comment period on the proposed target shooting closure. As such, the BLM is only accepting comments on the proposed target shooting closure. All comments must be received by the date set forth in the **DATES** section earlier and must be submitted using one of the methods listed in the **ADDRESSES** section earlier. All protests must be in writing and submitted, as set forth in the **DATES** and **ADDRESSES** sections earlier.

The BLM Director will render a written decision on each protest. The decision will be mailed to the protesting party. The decision of the BLM Director shall be the final decision of the Department of the Interior on each protest. Responses to protest issues will be compiled and formalized in a Director's Protest Resolution Report made available following issuance of the decisions.

Upon resolution of all protests, the BLM and USFS will issue Records of Decision and Approved MMPs (BLM), and an approved LRMP (USFS). Before including your address, phone number, email address, or other personal identifying information in your protest, please be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6 40 CFR 1506.10 43 CFR 1610.2 and 36 CFR 219.59.

Edwin L. Roberson,

State Director.

[FR Doc. 2019–15905 Filed 7–25–19; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS01000.L58530000.EQ0000.241A; MO# 4500130984]

Notice of Realty Action: Recreation and Public Purposes Act Classification: Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) has examined these public lands in Clark County, Nevada, and has found them suitable for classification for lease or conveyance to Clark County School District under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended; Sec. 7 of the Taylor Grazing Act; and Executive Order No. 6910. Clark County School District proposes to use the land to develop a middle school. The area described contains 30 acres in the southwest portion of the Las Vegas Valley, Clark County, Nevada.

DATES: Submit written comments regarding this classification (serialized N–96476) on or before September 9, 2019. Comments may be mailed or hand delivered to the BLM office address below, or faxed to 702–515–5010. The BLM will not consider comments received via telephone calls or email.

ADDRESSES: Mail written comments to the BLM Las Vegas Field Office, Assistant Field Manager, Division of Lands, 4701 North Torrey Pines Drive, Las Vegas, NV 89130. Detailed information including, but not limited to, a development and management plan and documentation relating to compliance with applicable environmental and cultural resource laws, is available for review during business hours, 8:00 a.m. to 4:30 p.m. Pacific Time, Monday through Friday, except during Federal holidays, at the BLM Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, Nevada 89130.

FOR FURTHER INFORMATION CONTACT: Sheryl May, Realty Specialist, by telephone at 702–515–5196. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Clark County School District proposes to use the land for development of a middle school. Clark County School District has not applied for more than the 6,400-acre limitation for recreation uses in a year, nor more than 640 acres for each of the programs involving public resources other than recreation. Clark County School District has submitted a statement in compliance with the regulations at 43 CFR 2741.4(b), describing a definitely proposed project for the use of these 30 acres. The lands for lease or conveyance under the R&PP Act are legally described as:

Mount Diablo Meridian, Nevada

T. 22 S, R. 60 E,
Sec. 34, W½NE¼SE¼NE¼, NW¼SE¼NE¼, SW¼SE¼NE¼, and W½SE¼SE¼NE¼.

The area described contains 30 acres.

The Clark County School District filed an application to develop a school consisting of five school buildings, sixth to eighth grade classrooms, and sixth, seventh, and eighth grade learning centers. There will be fine arts and technology centers, as well as a student's presentation center, areas for a botanical learning center, basketball courts, ball fields, bike racks, shaded rest areas, turf play area, playgrounds, and a tetherball court area. Additionally, there would be parking for the public, school staff, and school buses to pick up and drop off students, as well as a fire department access road.

Lease or conveyance of these public lands are consistent with the BLM Las Vegas Resource Management Plan dated October 5, 1998. The lands are not needed for any other Federal purposes.

All interested parties will receive a copy of this Notice once it is published in the **Federal Register**. Additionally, a copy of the Notice will be published in the newspaper of local circulation once a week for three consecutive weeks. The regulations at 43 CFR Subpart 2741 addressing requirements and procedures for conveyances under the R&PP Act do not require a public meeting.

Upon publication of this Notice in the **Federal Register**, the lands will be segregated from all other forms of appropriation under the public land laws, including locations under the mining laws, except for lease or conveyance under the R&PP Act and leasing under the mineral leasing laws.

The lease or conveyance of the land, when issued, will be subject to the following terms, conditions, and reservations:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States Act of August 30, 1890 (26 Stat. 391; 43 U.S.C. 945).

2. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior.

3. All mineral deposits in the land leased or patented, and the right to prospect for, mine, and remove such deposits from the same under applicable law and regulations as established by the Secretary of the Interior are reserved to the United States, together with all necessary access and exit rights.

4. Lease or conveyance of the parcel is subject to valid existing rights.

5. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or occupations on the leased/patented lands.

6. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

Classification Comments: Interested persons may submit comments involving the suitability of the land for development of a middle school. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, and if the use is consistent with State and Federal programs.

Application Comments: Interested persons may submit comments regarding the specific use in the application and plan of development and management, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the lands for a middle school.

Any adverse comments will be reviewed by the BLM Nevada State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification will become effective on September 24, 2019. The lands will not be offered for conveyance until after the classification becomes effective.

Before including your address, phone number, email address, or other personal identifying information in any comment, be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2741.5.

Shonna Dooman,

Acting Field Manager, Las Vegas Field Office.

[FR Doc. 2019–15924 Filed 7–25–19; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUTW02000–L51010000–ER0000–LVRWJ18J5120–18X—UTU–90095]

Notice of Availability of the Final Environmental Impact Statement for the Sevier Playa Potash Project, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Federal Land Policy and Management Act of 1976, as amended, the Mineral Leasing Act of 1920, as amended, and Secretarial Order 3355, the Bureau of Land Management (BLM) has prepared a Final Environmental Impact Statement (EIS) for Peak Minerals Inc. DBA Crystal Peak Minerals' (CPM) Sevier Playa Potash Project (Project), and by this notice is announcing the availability.

DATES: The BLM will not issue a final decision on the proposal for a minimum of 30 days after the date that the Environmental Protection Agency publishes its Notice of Availability of the Final EIS in the **Federal Register**.

ADDRESSES: The Final EIS is available to those parties who participated in the process as well as other interested parties. Electronic copies of the Final EIS can be acquired from the BLM by any of the following methods:

- *Email: blm_ut_fm_sevier_playa_potash_project@blm.gov.*
- *Fax:* (435) 743–3136
- Download the document from BLM's ePlanning site at *https://bit.ly/2CZPeWy.*
- *Mail:* Bureau of Land Management Fillmore Field Office, Attn: Clara Stevens—Sevier Playa Potash Project, 95 East 500 North, Fillmore, UT 84631.

Copies of the Final EIS and supporting documents are available at the following locations:

(1) The BLM Fillmore Field Office at the above address and

(2) The BLM West Desert District Office at 2370 South Decker Lake Blvd., West Valley City, UT 84119.

FOR FURTHER INFORMATION CONTACT: Clara Stevens, Project Manager, telephone (435) 743–3119; address 95 East 500 North, Fillmore, UT 84631; email *c1steven@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 FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM served as the lead agency for the preparation of this EIS. The BLM worked with six cooperating agencies including the U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, U.S. Department of Defense, State of Utah, Beaver County, and Millard County.

The Project would be located in central Millard County in southwestern Utah. The Sevier Playa is a large terminal playa that is normally dry on the surface and contains subsurface potassium-bearing saline brines. The playa is approximately 26 miles long and averages 8 miles wide.

CPM through an agreement controls the rights to develop and operate potassium mineral leases on 117,814 acres of Federal lands administered by the BLM and an additional 6,409 acres of potash leases on State lands. CPM proposes to exercise their lease rights by constructing and operating the Project, which would produce approximately 372,000 tons per year of potassium sulfate (K_2SO_4), also known as sulfate of potash (SOP), and related minerals over the 35-year lifetime of the Project.

The Project is a potash mine proposed on 124,223 acres of Federal and State mineral leases. The proposal includes mining facilities located on-lease with off-lease supporting infrastructure. On-lease facilities include evaporation ponds; a brine extraction system (trenches, wells, and conveyance canals); a recharge system (trenches, canals, and Sevier River diversion); a waste product storage area (purge brine and tailings); water monitoring wells, access roads, and processing facilities. The off-lease facilities, proposed on approximately 4,283 acres of rights-of-way (ROWs), include power and communication lines, a natural gas pipeline, a rail loadout facility and rail spur; water supply wells; water monitoring wells; communication towers; portions of the preconcentration ponds; segments of recharge canals, the brine transfer canal, and the playa perimeter road; and access roads. Three gravel pits would also be developed.

Potassium-bearing brines would be extracted from trenches and wells on the Sevier Playa, and routed through a series of ponds, using solar evaporation to concentrate the brine. The preconcentration ponds would concentrate the brine causing halite (NaCl, table salt) and other non-commercial salts to precipitate. These salts would be stored in the preconcentration ponds. The saturated brine would be transferred to the production ponds for further evaporation, causing potassium-rich salts to precipitate. The production ponds would be harvested year-round, with the potassium-rich salts moved directly to the processing facility for processing into SOP. The SOP would be trucked to the rail loadout facility for distribution. Purge brine containing primarily magnesium chloride ($MgCl_2$) would be removed from the production ponds before harvesting begins and would be piped to an on-playa purge brine storage pond. Process by-products (solid tailings) from the processing facility would be trucked to the on-playa tailings storage area.

The Final EIS analyzes CPM's Mining Plan, prepared for development of Federal potassium mineral leases acquired in 2011 and potash mineral leases acquired in 2008 on State lands. These leases were amalgamated under BLM casefile number UTU–88387. In addition, the Final EIS analyzes CPM's request for ROWs to construct various ancillary facilities on public lands in the vicinity of the mineral leases, but outside the lease boundary. CPM prepared a Plan of Development (POD) for the ROWs that they have requested. The Final EIS also analyzes CPM's request to purchase mineral materials for gravel to support construction and operation of the Project. Although the BLM may only make decisions pertaining to public lands managed by BLM, the EIS analyzes the complete Project including portions located on State and private lands.

This EIS evaluates, in detail, the no action alternative, the proposed action, and five action alternatives. Alternative (1) would route a cross-country segment of the off-lease 69-kV power and communication line to an alignment along existing roads, including SR 257 and SR–257 Cutoff Road; Alternative (2) would route a cross-country segment of the off-lease 69-kV power and communication line to a more southern orientation along existing roads, including Crystal Peak Road and Crystal Peak Spur Road; Alternative (3) would route a segment of the off-lease natural gas pipeline entirely on BLM land to avoid crossing private lands; Alternative (4) would route a cross-country segment of the off-lease natural gas pipeline to a similar alignment as Alternative 2 along existing roads, including Crystal Peak Road and Crystal Peak Spur Road; and Alternative (5) is an alternative method of diverting flows from the Sevier River into the recharge system. This alternative would relocate the on-lease Sevier River diversion facilities,

including diversion channel, recharge canal, diversion culvert and sump, and perimeter and access roads slightly to the west, within the boundary of the playa.

In selecting the preferred alternative, the BLM considered all information that has been received consistent with the Federal Lands Policy Management Act (FLPMA), the Mineral Leasing Act, and ROW permitting responsibilities. The agency preferred alternative is the proposed action, based on CPM's Mining Plan, POD, and Gravel Pit Mining Plan. The agency preferred alternative includes design features, supplemental plans, and specific mitigation measures BLM has worked with CPM to develop an environmentally sound and technically viable proposal that addresses comments and suggestions received from the cooperating agencies and the public.

The BLM published a Notice of Intent for the Project on March 12, 2014 (79 FR 14078). Scoping was extended through August 31, 2015. A public scoping meeting was held in Delta, Utah on August 5, 2015. The public was offered the opportunity to provide written comments throughout the scoping process.

In 2015, pursuant to Executive Order 13175, the BLM initiated government-to-government consultation with the following federally recognized tribes: Confederated Tribes of the Goshute Reservation, the Hopi Tribe, the Kaibab Band of Paiute Indians, the Navajo Nation, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians, and the Ute Indian Tribe. Beginning in 2015, the BLM coordinated with the Utah State Historic Preservation Office and seven other consulting parties that requested to participate in the Section 106 process, to develop a Programmatic Agreement, which outlines a process to be used to avoid, mitigate, or treat adverse effects to historic properties. The BLM reached out to consult with the tribes again on November 19, 2018, with follow up phone calls and emails. On June 21, 2019, the BLM sent an update to the tribes on the project and inviting continued consultation on the Project.

In August 2015, the BLM invited jurisdictional agencies to participate as Cooperating Agencies in the Project. The following agencies accepted the invitation: The U.S. Department of Defense (Utah Test and Training Range), the Environmental Protection Agency, the U.S. Fish and Wildlife Service, the State of Utah, and Millard and Beaver Counties. These agencies and governments reviewed the Final EIS before it was available to the public and their comments have been incorporated into the document.

On November 30, 2018, the BLM published a Notice of Availability of the Draft EIS in the **Federal Register** (83 FR 61668) as did the EPA (83 FR 61632) which started a 45-day comment period. The Draft EIS comment period ran from November 30, 2018, until January 14, 2019. However, any comments received by the BLM by January 29, 2019, were considered in the Final EIS. During the public comment period on the Draft EIS, the BLM Fillmore Field Office received 10 comment letters and emails from cooperating agencies, local governments, interested parties, and the public. The majority of the concerns which were raised through the comments included (1) impacts to water resources and water quality including adverse effects to: Surface water, groundwater basins, existing water rights holders; (2) adverse effects to air quality in the form of fugitive dust and the criteria pollutant NO_2 produced during construction and operation of the mine facilities; (3) impacts to migratory bird and bat populations; (4) the socioeconomic effects of water right acquisition for recharge water; (5) the NEPA process including the range of alternatives and alternatives considered but not analyzed in detail; (6) lands with wilderness characteristics; and (7) impacts to dark night skies.

Before including your address, phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Edwin L. Roberson,

State Director.

[FR Doc. 2019–15903 Filed 7–25–19; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVB0I000.L51100000. GN0000.LVEMF1604910 MO# 4500135252]

Notice of Availability for the Environmental Impact Statement for the Proposed Deep South Expansion Project, Lander and Eureka Counties, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Mount Lewis Field Office, Battle Mountain, Nevada, has prepared a Final Environmental Impact Statement (EIS) and by this notice is announcing its availability. Barrick Cortez, Inc. (BCI) is proposing to expand its existing Cortez Hills Project mining operations, which are located southeast of Battle Mountain in Eureka and Lander Counties, Nevada.

DATES: The BLM will not issue a final decision on the proposal for a minimum of 30 days after the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Final EIS for the Deep South Expansion Project and other documents pertinent to this proposal may be examined at the Mount Lewis Field Office, 50 Bastian Road, Battle Mountain, Nevada 89820. The document is also available for download at *https://go.usa.gov/xmQR9.*

FOR FURTHER INFORMATION CONTACT: Kevin Hurrell, Project Manager; telephone: 775–635–4000; address: 50 Bastian Road, Battle Mountain, Nevada 89820; or email: *blm_nv_mlfo_deepsoutheis@blm.gov.* Contact Kevin Hurrell to have your name added to BLM's mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: There are 54,825 acres of public lands within the Plan of Operations boundary that are administered by the BLM Mount Lewis Field Office, and 3,268 acres of private lands controlled by BCI. BCI was

previously authorized to disturb 16,700 acres within their Plan of Operations boundary.

The proposed mine expansion, named the Deep South Expansion Project (Proposed Project) would require a modification to the Plan of Operations to increase the plan boundary by 4,279 acres: from 58,093 acres to 62,372 acres. The proposed modification would result in approximately 3,846 acres of new disturbance inside the new proposed plan boundary, of which 2,779 acres are public lands.

BCI currently employs about 1,250 people from the northern Nevada towns of Elko, Battle Mountain, Winnemucca, Eureka, Carlin, and surrounding areas. If the Deep South Expansion Project is approved, the company expects to extend the mine life and employment opportunities for its workforce by another 12 years.

BCI's purpose for the Deep South Expansion Project is to continue to profitably recover gold and silver from reserves and resources on federal mining claims in the Project Area utilizing, to the extent practical, existing facilities at BCI's currently permitted operations within the Project Area.

The Final EIS describes and analyzes the Proposed Project's direct, indirect, and cumulative impacts on all affected resources. In addition to the Proposed Project, the Final EIS analyzes one additional action alternative (the Gold Acres Pit Partial Backfill alternative) and the No Action Alternative.

Under the Gold Acres Pit Partial Backfill Alternative, the proposed expansion of the existing Gold Acres Pit would be completed prior to development of the proposed satellite pits (Alta, Bellwether, and Pasture), with the waste rock from the satellite pits (30 million tons) placed as backfill in the Gold Acres Pit to an approximate elevation of 5,440 feet above mean sea level (amsl) (Figures 2–18 and 2–19). This would result in a 72-acre reduction in the proposed new disturbance for the Gold Acres North Waste Rock Facility. The pit bottom elevations for the expanded Gold Acres Pit and proposed satellite pits would be the same as described for the Proposed Action. No dewatering would be required for the proposed expansion of open pit operations at the Gold Acres Complex as the proposed pit bottom elevations would be above the groundwater table. Therefore, proposed dewatering and water management operations would be the same as under the Proposed Action.

Under the No Action Alternative, the proposed facilities and facility modifications as well as the proposed operations modifications that comprise the Deep South Expansion Project would not be developed or implemented. Under this alternative, the existing mining and processing operations in the Project Area and the current off site transport of refractory ore to the Goldstrike Mill for processing and backhaul of Arturo Mine oxide ore to the Pipeline Complex for processing would continue under the terms of current permits and approvals as authorized by the BLM and State of Nevada.

On March 29, 2017, a Notice of Intent was published in the **Federal Register** (80 FR 58501) inviting scoping comments on the Proposed Action. The BLM held three public scoping meetings on April 18, 19, and 20, 2017, in Battle Mountain, Crescent Valley, and Elko, Nevada respectively. The BLM received six scoping comment submittals during the scoping period. Concerns raised included impacts to water resources, air quality, wildlife, and recreation.

The Notice of Availability (NOA) for the Draft EIS was published in the **Federal Register** on October 22, 2018 (83 FR 53292), commencing a 45-day comment period that ended on December 5, 2018. The BLM held three public comment meetings on November 6, 7, and 8, 2018 in Battle Mountain, Crescent Valley, and Elko, Nevada respectively. A total of 29 comment letters were received on the Draft EIS via mail and email. All agency and public comments on the Draft EIS were given careful consideration in preparation of the Final EIS. Each comment, as well as a corresponding response, is provided in Appendix F of the Final EIS.

The BLM has utilized and coordinated the NEPA scoping and comment process to help fulfill the public involvement requirements under the National Historic Preservation Act (NHPA) (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), and the agency continues to do so. The information about historical and cultural resources within the area potentially affected by the Proposed Project has assisted the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and the NHPA.

The BLM has consulted and continues to consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including potential impacts to cultural resources, have been analyzed in the Final EIS.

Bradlee Matthews,

Acting Field Manager, Mount Lewis Field Office.

[FR Doc. 2019–15828 Filed 7–25–19; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Child Resistant Closures With Slider Devices Having a User Actuated Insertable Torpedo for Selectively Opening the Closures and Slider Devices Therefor, DN 3399;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of

Reynolds Presto Products, Inc. on July 22, 2019. The complaint alleges violations of section 337 of the Tariff Act of 1930 (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 child resistant closures with slider devices having a user actuated insertable torpedo for selectively opening the closures and slider devices therefor. The complaint names as respondents: Dalian Takebishi Packing Industry Co., Ltd. of China; Dalian Altma Industry Co., Ltd. of China; Japan Takebishi Co., Ltd. of Japan; Takebishi Co., Ltd. of Japan; Shanghai Takebishi Packing Material Co., Ltd. of China; and Qingdao Takebishi Packing Industry Co., Ltd of China. The complainant requests that the Commission issue a general exclusion order or, in the alternative issue a limited exclusion order, a cease and desist order and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3399'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: July 23, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–15888 Filed 7–25–19; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.3*

INTERNATIONAL TRADE COMMISSION

[Investigation No. 37–TA–1016 (Modification Proceeding)]

Certain Access Control Systems and Components Thereof; Notice of the Commission's Final Determination in a Modification Proceeding; Termination of the Modification Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined to modify the remedial orders issued in the underlying investigation to exempt Respondents' redesigned wireless garage door opener products as non-infringing. The above-captioned modification proceeding is hereby 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 at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the underlying investigation on August 9, 2016, based on a complaint filed by The Chamberlain Group, Inc. (''Chamberlain'') of Elmhurst, Illinois. 81 FR 52713 (Aug. 9, 2016). The complaint alleged a violation of 19 U.S.C. 1337, as amended (''Section 337''), in the importation, sale for importation, or sale in United States after importation of certain access control systems and components thereof that allegedly infringe one or more claims of U.S. Patent Nos. 7,161,319 (''the '319 patent''), 7,339,336 (''the '336 patent''), and 7,196,611 (''the '611 patent''). The '611 patent was subsequently withdrawn and terminated from the investigation. Order No. 28 (May 3, 2017), *not rev'd,* Comm'n Notice (May 31, 2017).

The notice of investigation named Techtronic Industries Co., Techtronic Industries North America, Inc., One World Technologies, Inc., and OWT Industries, Inc., and ET Technology (Wuxi) Co. (collectively ''Techtronic'') among the respondents. 81 FR 52713. Ryobi Technologies, Inc. was initially named as a respondent but was later terminated. Order No. 6 (Oct. 17, 2016), *not rev'd,* Comm'n Notice (Nov. 7, 2016). The Office of Unfair Import Investigations (''OUII'') was not named as a party to the investigation. 81 FR 52713.

On October 23, 2017, the then-presiding administrative law judge (''ALJ'') issued a final initial determination (''ID'') in the underlying investigation, finding that Techtronic violated Section 337 by importing and selling garage door openers that infringe asserted claims 1–4, 7–12, 15, and 16 of the '319 patent. ID at 294. The ID found no infringement and hence no violation with respect to the '336 patent. *Id.* The ID found none of the claims invalid as obvious, but found claim 34 of the '336 patent invalid under 35 U.S.C. 101 (''Section 101'').

The Commission did not review, and thereby adopted, the ID's findings on infringement but determined to review the ALJ's findings on invalidity. 82 FR 61792 (Dec. 29, 2017). The Commission ultimately affirmed the ID's finding that none of the claims is invalid as obvious and took no position on invalidity under Section 101. Comm'n Op. at 34–38 (Mar. 23, 2018). The Commission found a violation of Section 337 by reason of infringement of the '319 patent but not the '336 patent, and issued a limited exclusion order and cease and desist orders against Techtronic. 83 FR 13517 (Mar. 29, 2018). Chamberlain and Techtronic have cross-appealed the Commission's final determination to the U.S. Court of Appeals for the Federal Circuit. *The Chamberlain Group, Inc.* v. *International Trade Comm'n,* Appeal Nos. 18–2002, 18–2191 (consolidated).

On August 2, 2018, Techtronic filed a petition to institute a modification proceeding, pursuant to 19 U.S.C. 1337(k), to determine whether its redesigned wireless garage door openers infringe the '319 patent and are covered by the remedial orders issued in the underlying investigation. Chamberlain filed its opposition to the petition on August 13, 2018.

On September 4, 2018, the Commission issued a notice of its determination to institute the modification proceeding. 83 FR 45676 (Sept. 10, 2018). OUII was not named as a party to the modification proceeding. *Id.*

After a period for fact and expert discovery, motions, and pre-hearing briefing, the chief administrative law judge (''CALJ'') held an evidentiary hearing on December 12, 2018, on the issues raised by the parties. The parties filed their post-hearing briefs on December 21, 2018, and their reply briefs on January 30, 2019. In view of the partial shutdown of the federal government in January 2019, the CALJ issued an ID to revise the procedural schedule and extend the deadline for issuance of the RD from March 11, 2019, to April 22, 2019. Order No. 48 (Jan. 31, 2019). The Commission subsequently extended the target date for completion of this modification proceeding to July 22, 2019. Comm'n Notice (Mar. 4, 2019).

On April 22, 2019, the CALJ issued his RD, finding that Techtronic's redesigned garage door openers do not infringe the '319 patent and recommending that the remedial orders be modified to exempt Techtronic's non-infringing products. On May 3, 2019, Chamberlain filed comments on the RD asking the Commission to review and reverse the subject RD. Techtronic did not file a reply to Chamberlain's comments.

On June 7, 2019, the Commission determined to review the subject RD and asked the parties to submit additional briefing. Comm'n Notice at 2–3 (June 7, 2019). The parties filed their initial responses on June 20, 2019, and their reply briefs on June 27, 2019.

Having considered the parties' submissions, the RD, and the evidence of record, the Commission has determined that Techtronic's redesigned wireless products do not infringe the '319 patent and thus are not covered by the remedial orders issued in the underlying investigation. The Commission has further determined to modify the limited exclusion order and cease and desist orders issued in that investigation to exempt Techtronic's non-infringing products. A separate modification order will be issued herewith.

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: July 22, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–15877 Filed 7–25–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree and Release of Draft Restoration Plan Under The Comprehensive Environmental Response, Compensation, and Liability Act

On July 18, 2019, the Department of Justice lodged a proposed consent decree with the United States District Court for the Middle District of North Carolina in the lawsuit entitled *United States, the State of North Carolina, and the Commonwealth of Virginia* v. *Duke Energy Carolinas, LLC,* Civil Action No. 1:19–cv–00707.

The settlement resolves civil claims by the United States, the State of North Carolina, and the Commonwealth of Virginia (collectively the ''Trustees'') against Duke Energy Carolinas, LLC (''Duke Energy'') under the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'') for injury to, impairment of, destruction of, and loss of use of natural resources in the Dan River in North Carolina and Virginia as a result of a coal ash spill from Duke Energy's Dan River Steam Station near Eden, Rockingham County, North Carolina on February 2, 2014 (the ''Release). Under the proposed Consent

Decree, Duke Energy will restore, replace, rehabilitate, or acquire the equivalent of those resources injured by the Release and compensate the public for lost recreational opportunities, as proposed in the draft Restoration Plan. In addition, Duke Energy agrees to pay $57,310 to the Trustees for restoration planning and oversight costs. Duke Energy will receive from the Trustees a covenant not to sue for natural resource damages under CERCLA, the Clean Water Act, and applicable state law.

In accordance with CERCLA, the Trustees have also written a draft Restoration Plan that describes proposed alternatives for restoring the natural resources and natural resource services injured by the Release. The four preferred restoration alternatives selected by the Trustees in the draft Restoration Plan are: (1) Abreu Grogan Park improvements; (2) establishment of public boat launch facilities on the Dan River; (3) Pigg River Power Dam removal (benefiting the endangered Roanoke logperch); and (4) Mayo River land conservation. These are the same projects that Duke Energy agrees to perform in the Consent Decree.

The publication of this notice opens a period for public comment on the proposed Consent Decree and draft Restoration Plan. Comments on the proposed Consent Decree should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, the State of North Carolina, and the Commonwealth of Virginia* v. *Duke Energy Carolinas, LLC,* D.J. Ref. No. 90–5–1–1–11057/2. All comments must be submitted no later than forty-five (45) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *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 $39.50 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $9.75.

Comments on the draft Restoration Plan may be submitted to the Trustees either by email or by mail:

To submit comments:	*Send them to:*
By email	*Sara_Ward@fws.gov* or *Susan_Lingenfelser@fws.gov.*
By mail	USFWS Virginia Field Office, 6669 Short Lane, Gloucester, VA 23061, Attn: Dan River Restoration Plan.

All comments must be submitted no later than forty-five (45) days after the publication date of this notice. During the public comment period, a copy of the draft Restoration Plan will be available electronically at *https://www.cerc.usgs.gov/orda_docs/CaseDetails?ID=984.* A copy of the draft Restoration Plan may also be examined at the Virginia Ecological Services Field Office. Arrangements to view the documents must be made in advance by contacting Susan Lingenfelser at (804) 824–2415.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–15843 Filed 7–25–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Amended Consent Decree Under The Comprehensive Environmental Response, Compensation and Liability Act

On July 18, 2019, the Department of Justice lodged a proposed Amended Consent Decree with the United States District Court for the Southern District of Iowa in the lawsuit entitled *United States* v. *ACC Chemical Company, et al.,* Civil Action No. 3–91–CV–10096.

This case concerns the Chemplex Superfund Site in Clinton, Iowa. The United States originally brought this action in 1991 under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9601, *et seq.,* to require defendants ACC Chemical Company, Four Star Oil & Gas Company, Getty Chemical Company, Primerica Holdings, Inc., Skelly Oil Company, Quantum Chemical Corporation, Equistar Chemicals, LP, and the City of Clinton, Iowa, to implement EPA's selected remedy for the Chemplex Site, and to pay costs incurred by the United States in response to releases of hazardous substances at the Site. The original Consent Decree required the defendants to pay $597,838.29 in reimbursement of response costs incurred by EPA, to reimburse EPA's future oversight costs at the Site, and to implement EPA's selected remedy for the Site.

The Amended Consent Decree requires the defendants to implement EPA's amended remedy for the Site, adopted by EPA in its Amended Record of Decision for the Site, dated December 26, 2012. Since that date, the defendants have been working cooperatively with EPA to implement EPA's amended remedy. The Amended Consent Decree formalizes their obligation to continue doing so.

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. *ACC Chemical Company, et al.,* D.J. Ref. No. 90–11–2–543/3. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *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 $14.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Jeffrey Sands,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–15846 Filed 7–25–19; 8:45 am]

BILLING CODE 4410–15–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.*

DATES: Comments regarding this information collection are best assured of having their full effect if received by August 26, 2019.

FOR FURTHER INFORMATION CONTACT: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street NW, Room 10235, Washington, DC 20503, and Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

Copies of the submission may be obtained by calling 703–292–7556.

SUPPLEMENTARY INFORMATION: NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden 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 the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Title of Collection: Grantee Reporting Requirements for Partnerships for Research and Education in Materials (PREM).

OMB Number: 3145–0232.

Type of Request: Intent to seek approval to renew an information collection.

Overview of this Information Collection: The Partnerships for Research and Education in Materials (PREM) aims to enhance diversity in materials research and education by stimulating the development of formal, long-term, collaborative research and education relationships between minority-serving colleges and universities and centers, institutes and facilities supported by the NSF Division of Materials Research (DMR). With this collaborative model PREMs build intellectual and physical infrastructure within and between disciplines, weaving together knowledge creation, knowledge integration, and knowledge transfer. PREMs conduct world-class research through partnerships of academic institutions, national laboratories, industrial organizations, and/or other public/private entities. New knowledge thus created is meaningfully linked to society, with an emphasis on enhancing diversity.

PREMs enable and foster excellent education, integrate research and education, and create bonds between learning and inquiry so that discovery and creativity more fully support the learning process. PREMs capitalize on diversity through participation and collaboration in center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

PREMs will be required to submit annual reports on progress and plans, which will be used as a basis for performance review and determining the level of continued funding. To support this review and the management of the award PREMs will be required to develop a set of management and performance indicators for submission annually to NSF via the Research Performance Project Reporting module in *Research.gov.* These indicators are both quantitative and descriptive and may include, for example, the characteristics of personnel and students; sources of financial support and in-kind support; expenditures by operational component; research activities; education activities; patents, licenses; publications; degrees granted to students involved in PREM activities; descriptions of significant advances and other outcomes of the PREM effort.

Each PREM's annual report will include the following categories of activities: (1) Research, (2) education (3) outreach, (4) partnerships, (5) diversity, (6) management, and (7) budget issues.

For each of the categories the report will describe overall objectives for the year, problems the PREM has encountered in making progress towards goals, anticipated problems in the following year, and specific outputs and outcomes.

PREMs are required to file a final report through the RPPR and external technical assistance contractor. Final reports contain similar information and metrics as annual reports but are retrospective.

Use of the Information: NSF will use the information to continue funding of PREMs, and to evaluate the progress of the program.

Estimate of Burden: 50 hours per PREM for 15 PREMs for a total of 750 hours.

Respondents: Non-profit institutions.

Estimated Number of Responses per Report: One from each of the fifteen PREMs.

Dated: July 23, 2019.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2019–15947 Filed 7–25–19; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0154]

Release of Patients Administered Radioactive Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–8057, ''Release of Patients Administered Radioactive Material.'' This proposed guide, Revision 1, provides licensees with more detailed instructions to provide to patients

before and after they have been administered radioactive material than was in Revision 0. In addition, the guide includes a new section on ''Death of a Patient Following Radiopharmaceutical or Implants Administrations,'' as well as requirements for recordkeeping. Also, Table 3, ''Dosages of Radiopharmaceuticals That Require Instructions and Records When Administered to Patients Who Are Breastfeeding an Infant or Child,'' has been revised to provide information for the recommended duration of interruption of breastfeeding to ensure that the dose to an infant or child meets the NRC's regulatory requirements.

DATES: Submit comments by August 26, 2019. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with the regulatory guides (RGs) currently being developed or improvements in all published RGs are encouraged at any time.

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

- *Federal rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2019–0154. Address questions about docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.BorgesRoman@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7A06, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on accessing information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Vered Shaffer, telephone: 630–829–9862, email: *Vered.Shaffer@nrc.gov,* and Harriet Karagiannis, telephone: 301–415–2493, email: *Harriet.Karagiannis@nrc.gov.* Both are staff members of the Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0154 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document, by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2019–0154.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The DG–8057 is available in ADAMS under Accession No. ML19108A463.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2019–0154 in your comment submission. The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *https://www.regulations.gov/* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific issues or postulated events, and data that the staff needs in its review of applications for permits and licenses.

The DG, entitled, ''Release of Patients Administered Radioactive Material,'' is temporarily identified by its task number, DG–8057. The DG–8057 is proposed Revision 1 to RG 8.39

This revision of the guide (Revision 1) provides licensees with more detailed instructions to provide to patients before and after they have been administered radioactive material than was in Revision 0. In addition, the guide includes a new section on ''Death of a Patient Following Radiopharmaceutical or Implants Administrations,'' as well as additional guidance for requirements for recordkeeping.

Also, Table 3, ''Dosages of Radiopharmaceuticals That Require Instructions and Records When Administered to Patients Who Are Breastfeeding an Infant or Child,'' has been revised to provide information for the recommended duration of interruption of breastfeeding to ensure that the dose to an infant or child meet the NRC regulatory requirements.

III. Backfitting and Issue Finality

As discussed in the Implementation section of DG–8057, the NRC does not intend or approve any imposition of the guidance in this draft regulatory guide. Backfitting and issue finality considerations do not apply to licensees or applicants when performing activities under part 35 of title 10 of the *Code of Federal Regulations* (CFR). Therefore, the NRC has determined that its backfitting and issue finality regulations would not apply to this draft regulatory guide, if ultimately issued as Revision 1 to RG 8.39, because the draft regulatory guide does not include any provisions within the scope of matters covered by the backfitting provisions in 10 CFR parts 50, 70, 72, or 76 or the issue finality provisions of 10 CFR part 52.

Dated at Rockville, Maryland, this 22nd day of July 2019.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2019–15868 Filed 7–25–19; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86429; File No. SR–CBOE–2019–038]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Maintenance Listing Standards for Options on Certain Indexes Under Rule 24.2.01(b)(2)

July 22, 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 July 22, 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 Act [3] 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 its maintenance listing standards for options on certain indexes under Rule 24.2.01(b)(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 amend the listing criteria in Rule 24.01(b) for options that overlie certain indexes. Specifically, Rule 24.2.01(b) establishes maintenance listing standards that apply to options on the MSCI Emerging Markets (''EM'') Index. The proposed rule change does not impact options on the MSCI EAFE (''EAFE'').[5] Rule 24.2.01(b)(2), requires that the total number of component securities in the index may not increase or decrease by more than 35% from the number of component securities in the index at the time of its initial listing. Due to global market trends and the overall objectives of the EM Index, as described below, the EM Index no longer meets the maintenance listing standard set forth under Rule 24.2.01(b)(2), and, thus, the Exchange now seeks approval to amend its rules in order to continue to list series of options on the EM Index. Specifically, the Exchange proposes to amend Rule 24.4.01(b)(2) to provide an exception for the EM Index component securities in which the total of the component securities in the index may not increase or decrease more than 10% over the last six month period.

The EM Index is designed to capture large and mid-cap representation across emerging market countries. In particular, it is built to ''be flexible enough to adjust quickly to a constantly changing opportunity set'', that is, emerging markets.[6] It seeks ''to capitalize on the unique attributes of these vibrant economies'', which includes ''superior growth potential''.[7] Indeed, EM has experienced a continuous rise in the number of its component securities, which has recently climbed to over a 35% increase from the number of its total initial components. When initially listed on the Exchange in 2015, the EM Index consisted of the following 23 emerging market country indexes: Brazil, Chile, China, Colombia, Czech Republic, Egypt, Greece, Hungary, India, Indonesia, Korea, Malaysia, Mexico, Peru, Philippines, Poland, Qatar, Russia, South Africa, Taiwan, Thailand, Turkey and United Arab Emirates. At that time, the EM Index had 834 constituents which covered approximately 85% of the free float-adjusted market capitalization in each country. Since its initial listing, Argentina,[8] Pakistan,[9] and Saudi Arabia [10] have joined the list of countries represented in the EM Index, and its number of constituents has grown to a total of 1,194, which still covers approximately 85% of the free float-adjusted market capitalization in each country represented. As a result of the growth of the emerging markets represented, the index has experienced continued expansion. The Exchange notes that the cumulative average growth rate of the EM Index component securities since 2015 has averaged 4.5% every 6 months. In the 6-month window from January 2019 through July 2019 the EM Index experienced approximately a 6.2% increase in component securities, and, in the second quarter of 2019 alone, 26 Chinese stocks, 30 Saudi Arabian stocks, eight Argentinian stocks were added to the EM Index. Over recent years, the component securities of the EM Index have grown to a market capitalization of 5,521,075.33 (USD Millions) (up from 3,219,779.13 in 2016) and average market capitalization per constituent of 4,624.02 (up from 3,846.81 in 2016). In addition to this, the components securities have an average daily volume of over 42 billion, and an average daily volume per constituent of over 35 million. Additionally, the largest constituent in the EM Index currently only accounts for 4.67% of the weight of the EM Index.[11]

Given the increasingly high number of constituents and capitalization of the EM Index, the deep and liquid markets for the securities underlying the index, and the low percentage each constituent comprises of the total EM Index weight, and the recent growth patterns, as well as the Exchange's expectations that these growth trends will continue into the future, the concerns for market manipulation and/or disruption in the underlying markets are greatly reduced. The Exchange also notes that 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).

[5] The Rule also governs options on the FTSE Emerging and FTSE Developed Europe indexes. The Exchange has not listed FTSE Developed Europe Index options and delisted FTSE Emerging Index options on January 5, 2018. *See http://www.cboe.com/publish/OptionClassDelistings/Class%20Delisting%20010518.pdf* (January 5, 2018).

[6] *See* MSCI Emerging Markets Index brochure (dated May 2019) located at: *https://www.msci.com/documents/1296102/15035999/USLetter-MIS-EM-May2019-cbr-en.pdf/fb580e1e-d54c-4c68-1314-977bbff69bd7?t=1559125400402*.

[7] *Id*.

[8] Added in June 2018.

[9] Added in June 2017.

[10] Added in June 2018.

[11] *See* MSCI Emerging Markets Index fact sheet (dated June 28, 2019) located at: *http://www.msci.com/resources/factsheets/index_fact_sheet/msci-emerging-markets-index-usd-price.pdf*.

proposed amended listing standard is designed to prevent more than 10% decreases over 6-month periods at a time, which, in turn, ensures that no significant decreases will occur over shorter periods of time that could potentially render the EM Index more susceptible to manipulation and/or disruption in the underlying markets.

Regarding the proposed threshold, the Exchange believes that 10% component securities changes applied every 6 months is sufficient to detect significant increases or, more importantly, successive decreases over time that could, in theory, reduce component securities to a point that might potentially raise concerns regarding manipulation of the index itself. The Exchange also notes that the proposed threshold is sufficient in monitoring for material increases that might potentially change the character of the index over which broad-based index options are issued; if the index grows too quickly it may raise surveillance issues and the Exchange must ensure it has the capacity to enforce its own rules so as for surveillance to continuously to be able to properly monitor the index. The Exchange also believes that the proposed threshold is wide enough to allow for the more rapid, shorter-term changes (*e.g.* an average 4.5% increase in constituents every 6 months since 2015) experienced by emerging markets that the EM Index is designed to capture. For example, the proposed standard would allow for the swift growth in the emerging markets like that of the most recent EM Index component increase of approximately 6.2% over the first 6 months of 2019, and, if in the second half of 2019, the component makeup of the index decreased 10% from its total in July, it would not be listed until compliant with the threshold. Under the current component threshold, which measures a 35% decrease or increase from the EM Index's initial listing, such a swift, shorter-term change would likely not be detected and/or addressed, potentially exposing the underlying securities to increased risk of manipulation and/or disruption. The Exchange believes that the proposed threshold is more restrictive than the 35% threshold, which other exchanges also have in place,[12] as it measures for smaller increases over shorter period of time, which is better aligned with the way the EM Index has continuously grown over the past three years and is expected to grow.[13] The 10% over 6 month threshold is more restrictive because it will capture incremental changes in the component securities before they compound to greater, material levels of change, for which the 35% threshold allows. As the EM Index stands today, the current 35% threshold would allow for the component securities to decrease by approximately 54.5%, that is, from the current 1,194 component securities to 543 component securities, which is the number of component securities that would constitute just over a 35% decrease from the 834 component securities when initially listed. Therefore, the Exchange believes that the proposed threshold is more restrictive as it would not allow for such significant changes to occur. The Exchange notes that, theoretically, incremental decreases over a long period of time could evolve into a greater, material change like that described above, however, this is unlikely given the extensive growth patterns of the EM Index over the recent years and the Exchange's expectation that similar growth will continue. The Exchange currently maintains ''watch lists'' made up of countries and indexes with large constituent count changes which it reviews at least quarterly. If the Exchange determines from its reviews that a downside change in an index's composition would affect the protection of investors, it may cease listing series on such index pursuant to Rule 5.4, even if the index is still compliant with the component security threshold. Furthermore, the Exchange notes that while a component threshold fixed at the point of initial listing may be aligned with an index that is meant to represent a relatively fixed constituent count reflection of large-cap stocks, such as the S&P 500 Index, this criteria is not compatible with the EM Index, which contain mid-cap components and is designed to be flexible to change over time as the represented markets change.

The Exchange represents that reducing the threshold and specifying a certain period of time from which the threshold is measured will not have an adverse impact on the Exchange's surveillance program. The Exchange will continue to use the same surveillance procedures currently utilized for each of the Exchange's other index options. Currently, the Exchange conducts formal semi-annual reviews, as well as intermediate reviews on at least a quarterly basis to identify potential compliance concerns in connection with the continued listing standards in advance of its formal semi-annual index maintenance reviews. The Exchange believes the frequency of these reviews will continue to successfully identify and address continued listing compliance risks for the EM Index.

EM options are currently listed for trading on the Exchange. The Exchange generally adds new series after an expiration, which allows trading to commence in the new series on the first trading day after the expiration date. The Exchange currently lists EM options that expire monthly, as well as Friday-expiring weekly options. In addition to this, the Exchange offers FLEX options on this index, which may only be listed if the standard options on an index are authorized to be listed. Specifically, additional series of weekly EM options may no longer be scheduled to be added, nor will additional monthly series after expiration on July 19, 2019, which would allow trading to commence in the additional series on the next trading day of July 22, 2019. Without this amendment, EM options cannot meet the continuing listing criteria of Rule 24.2.01(b), specifically the criteria under (b)(2), which will prevent the Exchange from adding weekly and monthly EM options.

Market participants have already begun to express concern to the Exchange regarding interruption in their trading of series on the EM Index. Indeed, market participants that intend to write optionality with weekly expiration dates in the upcoming weeks will, instead, have to take their volume OTC. This poses counter party risks to which a market participant would not otherwise have exposure if series were available on the EM Index. The inability to add the EM options would be a detriment to market participants seeking to hedge positions in ETPs based on the EM Index, options on EEM and EM futures, and European-traded derivatives on the EM Index. Further, there are ETPs that use options on the EM Index as part of their investment strategy. Without the ability to add the EM options, these ETPs could be unable to achieve their investment objective, to the detriment of investors. Additionally,

[12] *See* NASDAQ Options Rules, Chapter XIV, Sec. 3(e).

[13] The Exchange also notes that the generic listing standards applicable to ETPs listed on other national securities exchanges (*e.g.,* Cboe BZX Exchange Rule 14.11(c)(3)(A)(ii)) do not include any requirements based on the increase or decrease in component securities, and instead only require that an ETP based on an index that includes non-U.S. component stocks includes at least 20 component securities, among other diversification, liquidity, and market cap requirements. As such, an ETP based on the EM Index would not be delisted based on a percentage increase or decrease in component securities as long as it continued to have at least 20 component securities. Therefore, the Exchange believes that the proposed threshold is more restrictive than the current standard for listing products on the EM Index.

to the extent market participants want to roll a position in EM options that expire in July to series at a later expiration date and at a favorable or comparable price, they will be prevented from doing so without this amendment. Furthermore, in the time in which the Exchange may not list additional series on EM, FLEX trades which may result in the creation of new FLEX series will be nullified, which may cause confusion and prove burdensome to market participants.

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [15] 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) [16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange does not believe that the EM Index is easily susceptible to manipulation. This index is a broad-based index and has high market capitalization. As described above, the EM Index is comprised of 1,194 component securities, the component securities have a market capitalization of 5,521,075.33 (USD Millions) and an average daily volume of over 42 billion, and no single component comprises more than 4.67% of the index, making it not easily subject to market manipulation.

The proposed change will 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, because it is designed to allow the Exchange to continue to list EM options in a manner that is aligned with the EM Index's objective to be flexible enough to adjust quickly to constantly changing emerging markets and capitalize on their ''superior growth potential'', while also ensuring that its underlying markets do not become susceptible to manipulation and/or disruption by monitoring for significant component changes (importantly, decreases) over a shorter-term period of time, which is better aligned with the way in which emerging markets change over time. The Exchange believes that the 10% component threshold is sufficient to detect significant decreases that may pose risk of manipulation or disruption in the underlying securities, while also being wide enough to allow for the rapid and continuous changes emerging markets experience that the EM Index is designed to capture. The Exchange believes this protects investors by allowing the continued listing of EM Index options as the EM Index continues to change (as it is designed to do), and therefore the continued, uninterrupted investor participation in such options, while also ensuring that the underlying securities do not become susceptible to risk of manipulation and/or disruption.

The Exchange believes that the proposed change serves to protect investors and the public interest because it is more restrictive than the current component threshold, as well as component thresholds on other exchanges.[17] As stated, the current 35% threshold would allow for significant decreases in the number of component securities, whereas the proposed threshold allows only for smaller decreases in the component securities captured over shorter periods of time, which is in line with the more rapid way in which the EM Index changes and ensures component changes are flagged prior to becoming greater, material changes to the EM Index. Given the historical growth trends and the Exchange's expectations that these growth trends will continue into the future for the EM Index, the Exchange does not believe that incremental decreases will aggregate to a material decrease. The Exchange maintains and monitors its constituent and country watch list, and, if it determines that a component change adversely impacts investors, it may cease listing series on an index pursuant to Rule 5.4, even if the index is still compliant with the threshold.

In addition to this, because a total component securities standard is not essential to the continued listing standards for EM Index-based products, the Exchange believes the proposed change is not a novel change and serves to protect investors as it is an additional protection against potential manipulation and/or disruption in the underlying securities in a manner that maintains stability during both upside and downside swings, as well as the integrity of the index continuously over time.

As stated above, without this amendment, the Exchange is no longer able to list new series of weekly or monthly options on the EM Index. The Exchange believes that the proposed amendment is necessary for the protection of investors and the public interest, as without such an amendment, EM options cannot meet the continuing listing criteria under Rule 24.2.01(b)(2), which will prevent the Exchange from adding the weekly and monthly EM options. Indeed, market participants that intend to write optionality with weekly expiration dates in the upcoming weeks will, instead, have to take their volume OTC. OTC poses counter party risks for investors that they would not normally otherwise choose to be subject to if series on the EM Index were available for trading. The inability to add the EM options would be a detriment to market participants seeking to hedge positions in ETPs based on the EM Index (*e.g.,* EEM), options on EEM and EM futures, and European-traded derivatives on the EM Index. Further, there are ETPs that use options on the EM Index as part of their investment strategy. Without the ability to add the EM options, these ETPs could be unable to achieve their investment objective, to the detriment of investors. Additionally, market participants that wish to roll a position in EM options that expire in July to a position in a series with a later expiration month at a favorable or comparable price, will be prevented from doing so without this amendment. Furthermore, in the time in which the Exchange may not list additional series on EM, FLEX trades which may result in the creation of new FLEX series will be nullified, which may cause confusion and prove burdensome to market participants. Since the discontinuation of new series listed on the EM Index on July 1, 2019, multiple market participants have express their concern to the Exchange regarding interruption of their activity in EM Index series.

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

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

[17] *See* supra note 12.

of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of Act as the proposed rule change will facilitate the continued listing and trading of options on the EM Index, on which series are already listed and readily available for all market participants to trade, as will be the case for series added following the EM Index's compliance with the implementation of the proposed continued listing standards.

The Exchange does not believe that the proposed change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of Act as the proposed rule change does not alter the types of products offered by the Exchange in which market participants already may choose to participate. The proposed change merely allows the Exchange to continue listing certain index options in light of shifting global markets and continue to adequately surveil for any concerning changes.

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)(iii) of the Act [18] and subparagraph (f)(6) of Rule 19b–4 thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [20] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In its filing, Cboe Options requested that the Commission waive the 30-day operative delay. The Exchange indicated that its proposed revised component threshold for options on the EM index is more restrictive than the current component threshold in that it will allow only for smaller decreases in the number of component securities captured over shorter periods of time, which the Exchange believes is more in line with the way in which the EM index changes and will better ensure that the Exchange can flag component changes prior to becoming material changes to the EM index. In addition, the Exchange explained that waiver of the operative delay will allow it to continue to list options on the EM index in a manner that is in line with the index's objective, with the flexibility to capture the growth in emerging markets, allowing for investor participation in options on this index while avoiding an interruption caused by a discontinuation of new series. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest as the revised standard applies only to options on the EM index and is narrowly tailored within the bounds of existing listing requirements by imposing a lower component securities change threshold measured over a shorter period of time. Further, waiver is consistent with the protection of investors and the public interest in that it will avoid the potential for disruption associated with an interruption in the continuity of listings of index options on the EM index. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.[21]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2019–038 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–2019–038. 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–2019–038 and should be submitted on or before August 16, 2019.

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 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).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–15873 Filed 7–25–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86426; File No. SR–GEMX–2019–09]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 2 (Options Market Participants) and Options 3 (Options Trading Rules)

July 22, 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 July 17, 2019, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 2 (Options Market Participants) and Options 3 (Options Trading Rules) relating to certain order types.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqgemx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is amend Options 2 (Options Market Participants) and Options 3 (Options Trading Rules) relating to certain order types. Each change is described in more detail below.

Stopped Orders

The Exchange proposes to amend its rules to remove Stopped Orders as an order type. A Stopped Order is a limit order that meets the requirements of Options 5, Section 2(b)(8).[3] As provided in Options 5, Section 2(b)(8), a ''stopped order'' is defined as an order for which, at the time of receipt for the order, a Member had guaranteed an execution at no worse than a specified price, where: (i) The stopped order was for the account of a Customer; (ii) the Customer agreed to the specified price on an order-by-order basis; and (iii) the price of the Trade-Through was, for a stopped buy order, lower than the national Best Bid in the options series at the time of execution, or, for a stopped sell order, higher than the national Best Offer in the options series at the time of execution. To execute Stopped Orders, Members must enter them into the Facilitation Mechanism or Solicited Order Mechanism pursuant to Options 3, Section 11.[4]

Due to a lack of demand for Stopped Orders, the Exchange plans to decommission the functionality supporting this order type.[5] To reflect this elimination, the Exchange proposes to delete all references to Stopped Orders as follows:

- Options 2, Section 6(a), which currently allows Market Makers to enter all order types in the options classes to which they are appointed, except for Stopped Orders, Reserve Orders, and Customer Cross Orders.
- Options 3, Section 7(b)(5), which defines a Stopped Order.

The Exchange proposes to implement the amendments relating to Stopped Orders by November 1, 2019.

All-Or-None Orders

The Exchange also proposes to amend Options 3, Section 8 (Opening) to remove specific references to the manner in which All-Or-None Orders[6] (''AONs'') will be treated in the Exchange's opening process. The Exchange previously amended its rules to provide that an AON may only be entered into the System with a time-in-force designation of Immediate-Or-Cancel,[7] and deleted related rule text that described an AON as persisting in the Exchange's order book.[8] The Exchange, however, inadvertently did not remove such AON references from the opening process rule in Options 3, Section 8. At the time the Exchange's opening process was adopted, AONs were not restricted and could trade as a limit or market order to be executed in its entirety or not at all.[9] With the amendments in SR–ISEGemini–2017–08, an AON does not persist in the order book and is therefore treated the same as any other Immediate-or-Cancel Order. As such, the carve-outs specified in Section 8(b), (g) and (j)(6) are unnecessary since an All-or-None Order would execute immediately or cancel similar to other orders which trade in the same manner. The Exchange believes removing these references will eliminate confusion.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Options 3, Section 7(b)(5).

[4] Stopped orders were originally introduced on the Exchange as a Trade-Through exception under the Options Order Protection and Locked/Crossed Market Plan (the ''Plan''). GEMX adopted rules to implement the Trade-Through exception for stopped orders as an order type. *See* Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (File No. 10–209).

[5] No member has used this order type since the Exchange's previous trading system migrated over to Nasdaq INET technology in 2017.

[6] An All-Or-None Order is a limit or market order that is to be executed in its entirety or not at all. An All-Or-None Order may only be entered as an Immediate-or-Cancel Order. *See* Options 3, Section 7(c).

[7] An Immediate-Or-Cancel Order is a limit order that is to be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled. *See* Options 3, Section 7(b)(3). *See* Securities Exchange Act Release No. 80102 (February 24, 2017), 82 FR 12381 (March 2, 2017) (SR–ISEGemini–2017–08) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to All-or-None Orders).

[8] *See* Securities Exchange Act Release No. 82128 (November 20, 2017), 82 FR 56082 (November 27, 2017) (SR–GEMX–2017–51).

[9] *See* Securities Exchange Act Release No. 80014 (February 10, 2017), 82 FR 10952 (February 16, 2017) (SR–ISEGemini–2016–18).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

system, and, in general to protect investors and the public interest.

The Exchange believes that removing Stopped Orders as an order type is consistent with the Act because it would simplify the functionality available on the Exchange and reduce the complexity of its order types. The Exchange's affiliated options markets, Nasdaq BX (''BX''), The Nasdaq Options Market (''NOM''), Nasdaq PHLX (''Phlx'') and Nasdaq ISE, LLC do not offer stopped orders as an order type.

The Exchange also believes that it is consistent with the Act to remove unnecessary and confusing references to AONs in the opening rule set forth in Options 3, Section 8 as AONs will now immediately trade or cancel. The Exchange originally specified the manner in which AONs would trade in the opening because at the time the opening process was adopted, this order type traded differently as compared to other order types. That distinction has become unnecessary because AONs trade the same as other Immediate-or-Cancel Orders. Updating Options 3, Section 8 to remove an unnecessary and inaccurate distinction will protect investors and the public interest by clarifying the rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would allow the Exchange to remove an order type that no Member uses today, and eliminate unnecessary and inaccurate references to AONs within its opening rule, thereby making clear the order types available for trading on the Exchange and reducing potential confusion.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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–GEMX–2019–09 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–GEMX–2019–09. 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–GEMX–2019–09 and should be submitted on or before August 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–15875 Filed 7–25–19; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86424; File No. SR–MRX–2019–15]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate Rules From Its Current Rulebook Into Its New Rulebook Shell

July 22, 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 July 8, 2019, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to relocate rules from its current Rulebook into its new Rulebook shell.

The text of the proposed rule change is available on the Exchange's website at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

http://nasdaqmrx.cchwallstreet.com/, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to relocate MRX rules into the new Rulebook shell with some amendments to the shell.[3] Nasdaq ISE, LLC recently relocated its rules.[4] MRX proposes relocate its rules so the Rulebook is similar to ISE. The other Nasdaq affiliated markets will also relocate their Rulebooks in order to harmonize its rules, where applicable, across Nasdaq markets. The relocation and harmonization of the MRX Rules is part of the Exchange's continued effort to promote efficiency and conformity of its rules with those of its Affiliated Exchanges. The Exchange believes that the placement of the MRX Rules into their new location in the shell will facilitate the use of the Rulebook by Members and Members of Affiliated Exchanges.

Universal Changes

The Exchange proposes to amend the defined term ''System'' [5] and replace ''trading system'' or ''system'' with the defined term throughout the new rules. The Exchange proposes to capitalize the defined term ''market maker'' within proposed Options 1, Section 1(a)(20) and also capitalize the term throughout the Rulebook. The Exchange proposes to capitalize the defined term ''Member'' [6] throughout the new rules where it is not already capitalized. The Exchange proposes to capitalize the ''t'' in the defined term ''Exchange Transactions'' [7] where the term is not properly capitalized within the Rules. The Exchange proposes to change references to ''Commentary'' to ''Supplementary Material'' to conform the term throughout the Rulebook. References to the term ''Regulatory Information Circular'' or ''circular'' are being amended to the updated term ''Options Regulatory Alert.''

The Exchange proposes to update all cross-references within the Rule to the new relocated rule cites. The Exchange proposes to replace internal rule references to simply state ''this Rule'' where the rule is citing itself without a more specific cite included in the Rule. For example, if MRX Rule 715 refers currently to ''Rule 715'' or ''this Rule 715'' the Exchange will amend the phrase to simply ''this Rule.'' The Exchange proposes to conform numbering and lettering in certain rules to the remainder of the Rulebook. Finally, the Exchange proposes to delete any current Rules that are reserved in the Rulebook.

General 1

The Exchange proposes to relocate certain definitions from Rule 100 into proposed General 1, Section 1 and the remainder of the rules into Options 1, Section 1. The Exchange proposes to relocate definitions that are specific to the options product into Options 1, Section 1 and the more general definitions will be relocated into the General provisions.[8]

General 2

The Exchange will not relocate MRX Rules 200–203 into General 2 Organization and Administration. The Exchange will separately file a proposed rule change to delete these rules. General 2 would be comprised of the following rules:

Proposed new rule No.	Current rule No.
Section 1	Rule 204. Divisions of the Exchange.
Section 2	Rule 205. Participant Fees (renamed Fees, Dues and Other Charges).
Section 3	Rule 207. Exchange's Costs of Defending Legal Proceedings.
Section 4	Rule 309. Limitation on Affiliation between the Exchange and Members.

Rule 208, Sales Value Fee, will be relocated into Options 7. The Exchange intends to locate similar rules within other Nasdaq Rulebooks in similar locations when it files to relocate other Affiliate Exchange Rulebooks in separate rule changes. The Exchange proposes to reserve Sections 5 and 6 within General 2.

General 3

The Exchange proposes to relocate the following rules into General 3, ''Membership and Access.''

Proposed new rule No.	Current rule No.
Section 1	Rule 300. Membership/Rule 301. Qualification of Members (combined into one rule).
Section 2	Rule 303. Denial of and Conditions to Becoming a Member.
Section 3	Rule 305. Persons Associated with Members.
Section 4	Rule 307. Documents Required of Applicants and Members.
Section 5	Rule 302. Member Application Procedures.
Section 6	Rule 308. Dissolution and Liquidation of Members.

[3] Previously, the Exchange added a shell structure to its Rulebook with the purpose of improving efficiency and readability and to align its rules closer to those of its five sister exchanges, Nasdaq BX, Inc.; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; ISE; and Nasdaq GEMX, LLC (''Affiliated Exchanges''). The shell structure currently contains eight (8) Chapters which, once complete, will apply a common set of rules to the Affiliated Exchanges.

[4] *See* SR–ISE–2019–17 (not yet published).

[5] The term ''System'' is defined at Rule 100(a)(64).

[6] The term ''Member'' is defined at Rule 100(a)(32).

[7] The term ''Exchange Transactions'' is defined at Rule 100(a)(23).

[8] These rules are being relocated into Section 1 of the General Provisions: Chapter I (a)(4), (7), (10), (11) (14A), (19), (21), (21A), (23), (25), (26), (27), (29), (30), (32), (33), (49), (60), (61), (65), and (69).

General 5

The Exchange proposes to relocate the following rules into General 5 Disciplinary:

Proposed new rule No.	Current rule No.
Section 1	16. Disciplinary Jurisdiction.
Section 2	80. Investigations and Sanctions.
Section 3	90. Code of Procedure.

The Exchange proposes to note the rule text contained within Chapter 16 within General 5, Section 1 and also replicate that text within Options 11, Section 1 as Jurisdiction and Minor Rule Plan Violations are combined currently in Chapter 16 currently.

Options 1

The Exchange proposes to rename current Options 1 from ''Options Definitions'' to ''General Provisions.'' The Exchange proposes to relocate certain definitions from Rule 100 into proposed General 1, Section 1 and the remainder of the rules into Options 1, Section 1. The Exchange proposes to relocate definitions that are specific to the options product into Options 1, Section 1. Section 2 of Options 1 is being reserved.

Options 2

The Exchange proposes to rename Options 2 from ''Options Trading Rules'' to ''Options Market Participants'' and relocate the following rules into this chapter:

Proposed new rule No.	Current rule No.
Section 1	Rule 800. Registration of Market Makers.
Section 2	Rule 801. Designated Trading Representatives.
Section 3	Rule 802. Appointment of Market Makers.
Section 4	Rule 803. Obligations of Market Makers.
Section 5	Rule 804. Market Maker Quotations except 804(h) which will be relocated into Options 3.
Section 6	Rule 805. Market Maker Orders.
Section 7	Rule 807. Securities Accounts and Orders of Market Makers.
Section 8	Rule 809. Financial Requirements for Market Makers.

Sections 9 and 10 will be reserved. Rule 802 references to foreign currency options were not included in the relocated rule because Chapter 22 does not exist in the Rulebook.

Options 2A

The Exchange proposes a new Options Section 2A titled ''MRX Market Maker Rights'' and proposes to relocate Rule 304, ''Approval to Operate Multiple Memberships'' into new Section 2. The Exchange proposes to reserve Section 1.

Options 3

The Exchange proposes to rename Options 3 from ''Options Market Participants'' to ''Options Trading Rules'' and relocate the following rules into this chapter:

Proposed new rule No.	Current rule No.
Section 1	Rule 700. Days and Hours of Business.
Section 2	Rule 708. Units of Trading/Rule 709. Meaning of Premium Quotes and Orders (combined into one rule).
Section 3	Rule 710. Minimum Trading Increments.
Section 4	Rule 711. Acceptance of Quotes and Orders, except (c) and (d).
Section 5	Reserved.
Section 6	Rule 704. Collection and Dissemination of Quotations.
Section 7	Rule 715. Types of Orders.
Section 8	Rule 701. Opening.
Section 9	Rule 702. Trading Halts/Rule 703. Trading Halts Due To Extraordinary Market Volatility.
Section 10	Rule 713. Priority of Quotes and Orders.
Section 11	Rule 716. Auction Mechanisms.
Section 12	Rule 721. Crossing Orders.
Section 13	Rule 723. Price Improvement Mechanism for Crossing Transactions.
Section 14	Rule 722. Complex Orders.
Section 15	Rule 714. Automatic Execution of Orders (renamed Simple Order Risk Protections).
Section 16	Rule 724. Complex Order Risk Protections.
Section 17	Kill Switch (relocating 711(c)).
Section 18	Detection of Loss of Communication (relocating 711(d)).
Section 19	Reserved.
Section 20	Rule 720. Nullification and Adjustment of Options Transactions including Obvious Errors/Rule 720A. Erroneous Trades due to System Disruptions and Malfunctions (combined into one rule).
Section 21	Rule 706. Access to and Conduct on the Exchange.
Section 22	Rule 717. Limitations on Orders.
Section 23	Rule 718. Data Feeds and Trade Information.
Section 24	Rule 719. Transaction Price Binding.

Proposed new rule No.	Current rule No.
Section 25	Reserved.
Section 26	Message Traffic Mitigation (relocating Rule 804(h).
Section 27	Rule 705. Limitation of Liability.

The Exchange proposes to combine MRX Rules 708 and 709 within Section 2.[9] MRX Rule 714 is being relocated into Options 3, Section 15 and is being renamed from ''Automatic Execution of Orders'' to ''Simple Order Risk Protections.'' MRX Rules 702 and 703 are being combined into Section 9. The Exchange proposes to combine MRX Rules 720 and 720A into Section 20.[10] The Exchange proposes to relocate MRX Rule 711(c) and (d) into new separate Rules at Sections 17 and 18. The Exchange proposes to create a separate rule in Section 26 relocated from Rule 804(h) and title the rule ''Message Traffic Mitigation.''

Options 4

The Exchange proposes to relocate rules from MRX Chapter 5 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 5, within Options 4 Options Listing Rules.

Options 4A

The Exchange proposes to relocate rules from MRX Chapter 20 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 20, within new proposed Options 4A, which is proposed to be titled ''Options Index Rules.''

Options 5

The Exchange proposes to relocate rules from MRX Chapter 19 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 19, within Options 5. The Exchange also proposes to rename Options 5 from ''Options Trade Administration'' to ''Order Protections and Locked and Crossed Markets.''

Options 6

The Exchange proposes to rename Options 6 from ''Order Protections and Locked and Cross Markets'' to ''Options Trade Administration'' and relocate rules within Options 6 as follows:

Proposed new rule No.	Current rule No.
Section 1	Rule 707. Authorization to Give Up.
Section 2	Rule 712. Submission of Orders and Clearance of Transactions.
Section 3	Rule 806. Trade Reporting and Comparison.
Section 4	Rule 808. Letters of Guarantee.

Options 6A

The Exchange proposes to relocate rules from MRX Chapter 10 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 10, within Options 6A. The Exchange proposes to title Options 6A as ''Closing Transactions.''

Options 6B

The Exchange proposes to relocate rules from MRX Chapter 11 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 11, within Options 6B. The Exchange proposes to title Options 6B as ''Exercises and Deliveries.''

Options 6C

The Exchange proposes to relocate rules from MRX Chapter 12 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 12, within Options 6B. The Exchange proposes to title Options 6C as ''Margins.''

Options 6D

The Exchange proposes to relocate rules from MRX Chapter 13 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 13, within Options 6D. The Exchange proposes to title Options 6D as ''Net Capital Requirements.''

Options 6E

The Exchange proposes to relocate rules from MRX Chapter 14 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 14, within Options 6D. The Exchange proposes to title Options 6E as ''Records, Reports and Audits.''

Options 7

The Exchange proposes to relocate Rule 208 titled ''Sales Value Fee'' to Options 7, Options Pricing at new proposed Section 8.

Options 9

The Exchange proposes to relocate rules from MRX Chapter 4 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 4, within Options 9. The Exchange proposes to title Options 9 as ''Business Conduct.''

Options 10

The Exchange proposes to relocate rules from MRX Chapter 6 which incorporates those Rules by reference to Nasdaq ISE, LLC (''ISE'') Chapter 6, within Options 10. The Exchange proposes to title Options 10 as ''Doing Business with the Public.''

Options 11

The Exchange proposes to note the rule text contained within Chapter 16 within Options 11, Section 1 as Jurisdiction and Minor Rule Plan Violations and also replicate that rule text within General 5, Section 1. The text is currently combined in Chapter 16. The Exchange proposes to title Options 11 as ''Minor Rule Plan Violations.''

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by bringing greater transparency to its rules by relocating its Rules into the new Rulebook shell together with other rules which have already been relocated. The Exchange's proposal is consistent with the Act and will protect investors and the public interest by harmonizing its rules, where applicable, across Nasdaq markets so

[9] The Exchange is not proposing any substantive changes in consolidating these rules.

[10] *Id.*

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

that Members can readily locate rules which cover similar topics. The relocation and harmonization of the MRX Rules is part of the Exchange's continued effort to promote efficiency and conformity of its rules with those of its Affiliated Exchanges. The Exchange believes that the placement of the MRX Rules into their new location in the shell will facilitate the use of the Rulebook by Members. Specifically, the Exchange believes that market participants that are members of more than one Nasdaq market will benefit from the ability to compare Rulebooks.

The Exchange is not substantively amending rule text unless noted otherwise within this rule change. The renumbering, re-lettering, deleting reserved rules, amending cross-references and other minor technical changes will bring greater transparency to MRX's Rules. The Exchange intends to file other rule changes to relocate Affiliated Exchange Rulebooks to corresponding rules into the same location in each Rulebook for ease of reference. The Exchange believes its proposal will benefit investors and the general public by increasing the transparency of its Rulebook and promoting easy comparisons among the various Nasdaq Rulebooks.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed amendments do not impose an undue burden on competition because the amendments to relocate the Rules are non-substantive. This rule change is intended to bring greater clarity to the Exchange's Rules. Renumbering, re-lettering, deleting reserved rules and amending cross-references will bring greater transparency to MRX's Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 Act[13] and Rule 19b–4(f)(6) thereunder.[14]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[15] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[16] 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 requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. As the proposed rule change raises no novel issues and is largely organizational, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MRX–2019–15 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–MRX–2019–15. 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–MRX–2019–15, and should be submitted on or before August 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–15872 Filed 7–25–19; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 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.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86425; File No. SR–BX–2019–022]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete the Exchange's Existing Membership Rules and To Incorporate by Reference the Membership Rules of The Nasdaq Stock Exchange, LLC

July 22, 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 July 10, 2019, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to incorporate by reference into the Exchange's rules the membership rules of The Nasdaq Stock Exchange, LLC.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange's Rule 1000 Series prescribes the qualifications and the procedures for applying for membership on the Exchange. The Exchange now proposes to delete and replace these rules, as described below.[3]

The Exchange proposes to delete most of its existing Rule 1000 Series rules (with certain exceptions identified below) and replace them with the membership rules of The Nasdaq Stock Market, LLC (''Nasdaq''), which exist in the Rule 1000 Series of the Nasdaq Rulebook (the ''Nasdaq Rule 1000 Series'' or the ''Nasdaq Membership Rules''). The Exchange proposes to incorporate the Nasdaq Membership Rules by reference into its own Rule 1000 Series.[4] In a recent filing,[5] Nasdaq amended its own Rule 1000 Series; immediately prior to Nasdaq's rule filing, the Nasdaq Rule 1000 Series was the same, in all material respects, as the Exchange's Rule 1000 Series. By incorporating by reference the revised Nasdaq Rule 1000 Series, the Exchange seeks to incorporate the changes that Nasdaq made to the Nasdaq Rule 1000 Series into the BX Rule 1000 Series.

As compared to the Exchange's existing Rule 1000 Series, by virtue of incorporating by reference the Nasdaq Rule 1000 Series into Exchange's Rulebook, the Exchange's revised membership rules (the ''Proposed Rule 1000 Series'' or the ''Proposed Rules'') will be organized in a more logical order. The Proposed Rule 1000 Series will eliminate duplicative provisions that exist in the existing Rule 1000 Series, eliminate unnecessary complexity in the membership process, and otherwise streamline the existing membership rules and their associated procedures. The Proposed Rule 1000 Series will relax needlessly rigid deadlines that the rules prescribe for taking certain actions with respect to membership applications.[6]

Summary of Proposed Changes

A comparison between the Exchange's existing Rule 1000 Series and the Proposed Rule 1000 Series, is summarized below. For ease of comparison, this summary refers to the deletion of the existing Rule 1000 Series and its replacement with the Proposed Rule 1000 Series, as incorporated by reference, as ''amendments'' to, ''restatements'' of, or ''moves'' of the existing rules. Exhibit 3A to this proposal compares the Exchange's existing Rule 1000 Series to the Nasdaq Rule 1000 Series and shows the changes described below.

Rule 1001

Existing Exchange Rule 1000 includes a reference to the fact that FINRA is in the process of consolidating certain NASD rules into a new FINRA rulebook, and that if a NASD rule that is incorporated by reference into a BX rule is transferred to the FINRA rulebook, then the BX rule will be construed to require Exchange members to comply with the FINRA rule, as it may be renumbered or amended. This same reference exists, not only in existing Rule 1000, but also IM–1002–4, 1012(j), and 1017(g). The Proposed Rule 1000 Series deletes these references in all of these Rules because they will no longer be necessary going forward. The Proposed Rule 1000 Series rules does not cite specific FINRA (or NASD) Rules.

Rule 1002

Proposed Rule 1002 differs from the existing Exchange Rule 1000 in several respects. First, Proposed Rule 1002 deletes existing paragraph (c), which pertains to the payment by Members and Associated Persons of dues, fees, assessments and other charges, because the requirement of Members and Associated Persons to make such payments is set forth elsewhere in the Rules, such that existing paragraph (c) is unnecessary.[7] The Proposed Rule 1000 Series also moves existing paragraph 1002(d), which governs the reinstatement of membership and registration, to a new Proposed Rule 1018 that will consolidate all provisions

[3] The Exchange proposes to separately request an exemption from the rule filing requirements of Section 19(b) of the Act for changes to the Rule 1000 Series to the extent such rules are effected solely by virtue of a change to the Nasdaq Rule 1000 Series. The Exchange's proposed rule change will not become effective unless and until the Commission approves this exemption request.

[4] The Exchange notes that Nasdaq ISE, LLC, Nasdaq GEMX, LLC, Nasdaq MRX, LLC, and Nasdaq PHLX, LLC (together with Nasdaq and Nasdaq BX, the ''Affiliated Exchanges'') each plan to propose similar changes to their respective membership processes and associated rules that will also render them the same or substantially similar to those of Nasdaq.

[5] *See* Securities Exchange Act Release No. 34–85513 (Apr. 4, 2019), 84 FR 14429 (Apr. 10, 2019) (SR–NASDAQ–2019–022).

[6] The Exchange does not believe that any of the proposed changes will adversely impact the existing rights of prospective or existing Members or Associated Persons. Likewise, the Exchange does not believe that the proposed changes will compromise the ability of the Exchange or its Membership Department to scrutinize prospective or existing Members or Associated Persons.

[7] *See* Rule 9553.

of the Rules relating to transfer, resignation, termination, and reinstatement of membership. Additionally, the Proposed Rule 1000 Series consolidates and moves to Proposed Rule 1002, as newly-renumbered paragraph (d), largely duplicative provisions relating to the registration of branch offices and the designation of offices of supervisory jurisdiction, which presently reside in Rule 1012(j) and IM–1002–4, respectively.[8] Within the new paragraph (d), the Proposed Rule deletes language from existing Rule 1012(j)(1) that requires a Member to pay dues, fees, and charges associated with a branch office—as that provision is superfluous for reasons discussed above. Under paragraph (d)(3)(A) of the Proposed Rule, the Exchange also simplifies the existing rules for determining compliance with branch office registration and supervisory office designation requirements. Whereas the existing processes—as set forth in existing Rule 1012(j) and IM–1002–4—provide that Exchange Members that are also FINRA members are deemed to comply with the branch office and designated supervisory office requirements to the extent that they comply with NASD–1000–4 and Article IV, Section 8 of the NASD's By-Laws, the Proposed Rule 1000 Series states that such Exchange Members are deemed to comply to the extent that they keep current Form BR, which contains the requisite information and which is accessible electronically to the Exchange. Members that are not FINRA members shall continue to submit to the Exchange a Branch Office Disclosure Form, as they have done previously.[9]

Existing Rule 1002(f) provides for broker-dealers who were approved as member organizations and associated persons of the Boston Stock Exchange prior to its acquisition by the Nasdaq OMX Group (now, Nasdaq, Inc.) (and its subsequent re-launching as Nasdaq BX) to have their status grandfathered into Nasdaq BX. The Proposed Rule 1000 Series does not have this provision; it is no longeris necessary given that Nasdaq acquired the Boston Stock Exchange and launched Nasdaq BX more than ten years ago. All grandfathered Boston Stock Exchange members and associated persons are duly accounted for in the Exchange's membership rolls.

Lastly, the Proposed Rule 1000 Series moves IM–1002–1, which prohibits a Member or an Associated Person from filing with the Exchange misleading information in connection with membership or registration, and requires misleading information to be corrected, to Proposed Rule 1012 (General Application Provisions), where the Exchange believes it more logically fits.[10]

Rule 1011

Proposed Rule 1011, which includes definitions for the Proposed Rule 1000 Series, defines the term ''Investment banking or securities business'' differently from existing Rule 1011 in that the Proposed Rule eliminates the reference to ''investment banking.'' The Exchange does not accept applications from firms that are engaged in the investment banking business but are not otherwise brokers or dealers in securities. The Exchange believes that references to the investment banking business in the existing Rule and elsewhere in the Exchange's membership rules are unintended errors.

Whereas existing Rule 1011(g) includes the defined term ''material change in business operations,'' the Proposed Rule 1000 Series omits this definition and instead incorporates its substance into Proposed Rule 1017(a)(5), which is the only context in which it actually applies.

Rule 1012

Existing Rule 1012, which is presently entitled ''General Provisions,'' differs from the proposed version of the Rule in several ways. Principally, the Proposed Rule limits its scope to include only general provisions relating to applications, and the title of the Rule reflects that narrowed scope (''General Application Provisions''). It also omits several existing provisions that are outside of this scope, including existing paragraphs (b) (lapses in applications), (c) (ex parte communications), (d) (recusals and disqualifications from membership appeal proceedings), (g) (resignation of Exchange Members), (i) (transfer and termination of Exchange membership), and (j) (registration of branch offices). As is discussed in further detail below, the Proposed Rule 1000 Series locates these provisions in other Rules to which they more logically relate. The Exchange does not believe that relocating these provisions as described will have any substantive effect.

Rule 1012(a) is presently entitled ''Filing by Applicant or Service by the Exchange.'' Proposed Rule 1012(a) retitles the paragraph for clarity purposes as ''Instructions for Filing Application Materials with the Exchange and Requirements for Service of Documents by the Exchange.'' Whereas existing subparagraph (a)(1) presently permits an Applicant to file an application only by first-class mail, overnight courier, or hand delivery, the Proposed Rule modernizes this provision by allowing for electronic filing as well. In a new subparagraph (a)(3)(E) of the Proposed Rule, the Exchange states that service by electronic filing shall be deemed complete on the day of transmission, except that service or filing will not be deemed to have occurred if, subsequent to transmission, the serving or filing party receives notice that its attempted transmission was unsuccessful.

Furthermore, Proposed Rule 1012 eliminates existing paragraph (f) (similarity of membership names) because the Exchange believes that it is unnecessary for it to monitor for similarities in the names of prospective Members given that FINRA, through WebCRD, and the SEC monitor this.

Finally, the Proposed Rule 1000 Series relocates and restates IM–1002–1 (regarding misleading information as to membership or registration) and the last paragraph of Rule 1013(a)(1) (requiring Members and Applicants to keep application materials current) to Proposed Rule 1012(c). Rather than state, as does IM–1002–1, that Applicants, Members, and Associated Persons shall not file false or misleading membership information with the Exchange, the Proposed Rule states in paragraph (c)(1) that they shall have an affirmative duty to ensure that their membership information is accurate, complete, and current at the time of filing. The Exchange believes that the proposed formulation is more

[8] In subparagraph (d)(3)(B) of the Proposed Rule, the Exchange clarifies the existing rule text in Rule 1012(j) and IM–1002–4, which provide that Members that are not FINRA members shall designate offices of supervisory jurisdiction and branch offices by submitting to the Exchange a ''written filing'' to the Exchange ''in such form as the Exchange may prescribe.'' The Proposed Rule clarifies that this written filing is the ''Branch Office Disclosure Form.'' The Branch Office Disclosure Form is presently in use for this purpose and it is not a new form. Nevertheless, the Exchange believes that it will be helpful in the Rule to identify the specific form that must be filed rather than refer vaguely to a filing in such form as the Exchange may prescribe.

[9] The existing Rule states that Members that are not FINRA members shall designate offices of supervisory jurisdiction and branch offices by submitting to the Exchange ''a written filing in such form as the Exchange may prescribe.'' The form that the Exchange presently prescribes for this purpose is the Branch Office Disclosure Form. To improve clarity, the Proposed Rule identifies this form by name in the Rule. The Exchange proposes no substantive changes to this Form.

[10] The Proposed Rule also amends the definition of a ''Proprietary Trading Firm'' in paragraph (o) to make clear that such entities may be both Applicants and Members of the Exchange for purposes of the Rules.

comprehensive than the existing one.[11] Likewise, rather than merely require, as does existing Rule 1013(a)(1), that Applicants shall keep current their application materials after filing them, the Proposed Rule, in paragraph (c)(2), more broadly requires Applicants, Members, and Associated Persons to ensure that their membership applications and supporting materials remain accurate, complete, and current at all times, by filing supplementary amendments with the Department, as is necessary. (The Proposed Rule omits the language in existing Rule 1013(a)(1) that specifies that supplementary amendments shall be filed by electronic means insofar as Proposed Rule 1012(a) specifies the acceptable methods by which membership materials shall be filed with the Department.) [12]

Rule 1013

Proposed Rule 1013 is a substantial restatement of existing Rule 1013, which sets forth procedures for filing applications for new membership on the Exchange.

In paragraph (a) of Proposed Rule 1013, which describes the contents of new membership applications and procedures for filing, the Proposed Rule amends subparagraphs (a)(1)(A) and (B), which presently require an Applicant to file a copy of its current Form BD as well as an Exchange-approved fingerprint card for each Associated Person who will be subject to SEC Rule 17f–2.[13] The corresponding subparagraphs in the Proposed Rule provide that the Applicant must provide copies of this Form and card only if the Exchange is not able to access them through the Central Registration Depository (''CRD'' or ''WebCRD'') or a similar source. The language in the Proposed Rule relieves Applicants of the burden of filing a Form or fingerprint cards that the Exchange can readily retrieve itself.

Whereas subparagraph (a)(1)(C) of the existing Rule requires an Applicant to provide a ''check'' for such fees as it may be required to pay under the Exchange's Rules, the corresponding provision of the Proposed Rule deletes the word ''check'' and replaces it with a more general term, ''payment,'' so as to afford an Applicant flexibility to pay the fee through additional means, such as wire transfer.

Subparagraph (a)(1)(G) of the existing Rule requires disclosure of the Applicant's principal place of business and ''all other offices, if any, whether or not such offices would be required to be registered under the Equity Rules.'' The corresponding Proposed Rule clarifies this provision by specifying that it applies to ''branch'' offices. The Proposed Rule also omits the phrase ''whether or not such offices would be required to be registered under the Equity Rules,'' as the Exchange deems it unnecessary for the Applicant to list offices other than those that must be registered. Finally, the Proposed Rule states that an Applicant need not separately provide this branch office information to the Exchange to the extent that the information is otherwise available to the Exchange electronically through WebCRD or a similar source.

Next, Proposed Rule 1013 consolidates subparagraphs (a)(1)(J) and (a)(1)(K) of the existing Rule. Whereas existing subparagraph (a)(1)(J) presently requires the Applicant to state whether it is currently or has been in the prior ten years the subject of certain investigations or disciplinary proceedings that have not been reported to the CRD, the corresponding provision in the Proposed Rule adds language—in subparagraph (a)(1)(K) of the existing Rule—which states that the obligation to disclose the Applicant's disciplinary history pertains, not only to the Applicant itself, but also ''any person listed on Schedule A of the Applicant's Form BD.'' [14] Proposed Rule 1013 omits subparagraph (a)(1)(K), as it is duplicative of Proposed Rule 1013(a)(1)(J).

Compared to subparagraph (a)(1)(N) of the existing Rule, which requires an Applicant to disclose how it complies with Rule 3011, the corresponding Proposed Rule clarifies that Rule 3011 requires Members to have anti-money laundering compliance programs.

In subparagraph (a)(1)(P) of the Proposed Rule, the Exchange omits language that presently permits an Applicant to submit a Form U–4 for each person conducting and supervising the conduct of the Applicant's market making and other trading activities. The Proposed Rule omits the existing requirement that an Applicant submit a Form U–4 because the information that the Form contains is otherwise accessible to the Exchange through WebCRD, such that submission of the Form itself is unnecessary.

In subparagraph (a)(1)(Q) of the Proposed Rule, the Exchange omits the requirement in the corresponding provision of the existing Rule that the Applicant provide to the Exchange a FINRA Entitlement Program agreement and Terms of Use and an Account Administration Entitlement Form, if not previously provided to FINRA. The Proposed Rule omits this requirement because the Exchange has determined that the requirement is unnecessary. Any Applicant for membership will have already completed and submitted this agreement and form prior to applying to the Exchange. The completion and submission of the agreement and form will be evident to the Exchange from the fact that FINRA has granted the Applicant access to WebCRD. The Exchange understands that completion of the Account Administration Entitlement Form is a prerequisite to the creation of a registered BD and receiving WebCRD access.

The Proposed Rule amends subparagraphs (a)(1)(T), (U), and (V) of the existing Rule, which presently require an Applicant to submit to the Exchange an agreement to comply with the federal securities laws, the rules and regulations thereunder, the Exchange's Rules, and all rulings, orders, directions, decisions, and sanctions thereunder, as well as an agreement to pay such dues, assessments, and other charges in the manner and in the amount as the Exchange prescribes. The Proposed Rule prefaces these requirements with a more general requirement that an Applicant submit a duly executed copy of the Exchange's Membership Agreement. The Membership Agreement comprises the foregoing commitments, among others, and Applicants presently submit an executed copy of the Membership Agreement to satisfy existing subparagraphs (a)(1)(T) and (U). The Proposed Rule inserts the new language in subparagraph (a)(1)(T) and moves the language in existing subparagraphs (a)(1)(T) and (U) to new subparagraphs (a)(1)(T)(1) and (2). The Proposed Rule renumbers existing subparagraph (a)(1)(V) as subparagraph (a)(1)(U).

The Proposed Rule omits existing subparagraph (a)(2) of the existing Rule, which presently requires an Applicant to submit uniform registration forms,

[11] The reformatted text of the Proposed Rule also omits the references in IM–1002–1 to registration decisions (which are now covered elsewhere in the Exchange's Rules).

[12] The language of existing Rule 1013(a)(1)(V), which provides that amendments to a membership application must be filed with the Exchange not later than 15 business days after a Member ''knew or should have known'' of the facts or circumstances giving rise to the need for the amendment, differs from the corresponding Proposed Rule 1012(c), which provides that the amendment must be filed not later than 15 business days after a Member ''learns of'' the facts or circumstances giving rise to the amendment, The Exchange believes that this difference between the two provisions is immaterial.

[13] The existing provision exempts Applicants from filing fingerprint cards if it has already filed them with another self-regulatory organization.

[14] Such persons listed on Form BD include the Applicant's direct owners (as that term is defined on Form BD), and certain partners, trusts and trustees, and limited liability company members, and executive officers of the Applicant.

due to the fact that the information that these forms contain is readily accessible to the Exchange through WebCRD.

Next, the Proposed Rule restates the Exchange's requirements and procedures for deeming applications to be filed, for dealing with incomplete applications, and for requesting additional information from an Applicant or a third party in connection with a pending application. The Proposed Rule restates these requirements and procedures to improve their clarity, to relax certain procedural deadlines that are needlessly rigid, and to provide additional due process to Applicants.

First, in lieu of the omitted text in subparagraph (a)(2) of the existing Rule, the Proposed Rule includes a new provision, entitled ''When an Application is Deemed to be Filed,'' which states expressly what is now only implied in existing Rule 1013—that the Department will deem an application to be filed on the date when it is ''substantially complete,'' meaning the date on which the Department receives from the Applicant all material documentation and information required under Rule 1013. The Exchange believes that Applicants will benefit from this clarification, particularly because it affords the Department discretion to deem an application to be filed when it obtains sufficient information or documentation from the Applicant to enable the Department to commence processing the application. The new provision in the Proposed Rule also requires the Department to inform the Applicant in writing when the Exchange deems an application to be substantially complete so that there will be no ambiguity as to when the Department will begin to process the application.

Second, the Proposed Rule omits existing subparagraph (a)(3), which presently governs the rejection of applications that are not substantially complete. In lieu of the omitted text, the Proposed Rule contains two new provisions that deal with lapses in applications that are not substantially complete, and the rejection of filed applications that remain or become incomplete after filing.

Subparagraph (a)(3)(A) of the Proposed Rule, which governs lapses of applications, also replaces existing Rule 1012(b). This provision of the Proposed Rule states that if the Department does not deem an application to be substantially complete (and thereby filed, in accordance with proposed subparagraph (a)(2)) within 90 calendar days after an Applicant initiates it, then absent a showing of good cause by the Applicant, the Department may, at its discretion, deem the application to have lapsed without filing, such the Department will take no action in furtherance of the application. The Proposed Rule is conceptually different from existing Rule 1012(b). The Proposed Rule conceives of a lapsed application as one that an Applicant initiates but does not substantially complete even after a prolonged period of time, such that the Department treats it as having been abandoned prior to filing. Under existing Rule 1012(b), by contrast, the Exchange treats lapses more broadly as any unexcused failure of an Applicant to complete an application, to respond to the Department's requests for information or documents, to participate in a membership interview, or to file with the Exchange an executed membership agreement. As is discussed below, the Proposed Rule treats an Applicant's post-filing non-responsiveness to the Department's requirements as a basis for rejection of an application, not a lapse of an application, because once an application is deemed filed, the Department will begin to take action in furtherance of the application. Also unlike the existing Rule, the Proposed Rule provides that the Department merely has discretion to, but need not deem an application to have lapsed once it meets the requirements of the subparagraph. Moreover, the Proposed Rule requires that once the Department deems an application to have lapsed, then the Department must serve a written notice of that determination on the Applicant and refund any application fees that the Applicant paid to the Exchange (provided that the Exchange did not, in fact, take action in furtherance of the lapsed application). Finally, the Proposed Rule states that an Applicant that still wishes to apply for membership on the Exchange after receiving notice of a lapse in its application must submit a new application pursuant to these Rules and pay a new application fee for doing so, if applicable.

Subparagraph (a)(3)(B) of the Proposed Rule governs the circumstances in which the Department may reject an application that it already has deemed to be ''substantially complete'' and thus filed. Specifically, the Proposed Rule states that if a pending application remains incomplete after filing, or becomes incomplete after filing due to the fact that the Applicant has not timely responded to the Department's request for supplemental information or documents, then the Department will serve notice on the Applicant of the nature of the incompleteness and afford the Applicant a reasonable time period in which to address it. If the Applicant fails to address the incompleteness within the time period that the Department prescribes in the notice, then, absent a showing of good cause by the Applicant, the Department may—but again it is not required to—deem the application to be rejected and it must serve written notice of any such determination upon the Applicant. The Proposed Rule states, moreover, that if the Department deems an application to be rejected, then the Applicant shall not be entitled to a refund of any fees that the Applicant may have paid in connection with its application so that the Exchange can recover its costs associated with processing the filed application prior to rejecting it. Finally, the Proposed Rule states that if an Applicant chooses to continue to pursue membership following a rejection of its application, then it must submit a new application and pay any associated fees that are required under the Rule.

Third, the Proposed Rule restates subparagraph (a)(4) of the existing Rule, which governs requests made by the Department for additional information or documents during its consideration of an application. The Proposed Rule also restates and consolidates into subparagraph (a)(4) the provision of existing Rule 1013 that governs membership interviews and information pertinent to the application that the Department gathers from third party sources other than the Applicant (existing paragraph (b)). The Exchange believes that rules governing supplemental information and document requests, membership interviews, and third party information are related and should be consolidated into a single provision. Moreover, the Exchange notes that it does not, as a practical matter, opt to conduct formal membership interviews because it is more efficient and less onerous for all parties to instead engage in informal discussions when questions and concerns arise. Because the Exchange does not exercise its discretion to conduct formal interviews the Exchange believes that it is reasonable to eliminate the concept and the procedures that govern such interviews in the new subparagraph.

In particular, the subparagraph, as restated in the Proposed Rule, provides that at any time before the Department serves its decision on a membership application,[15] it may issue a request for

[15] The restated provision of the Proposed Rule eliminates the requirement in the existing Rule that

additional information or documents—either from the Applicant or from a third party—if the Department deems such information or documentation to be necessary to clarify, verify, or supplement the application materials. The Proposed Rule states that the Department may request that the information or documentation be provided in writing or through an in-person or telephonic interview. The Proposed Rule furthermore states that the Department shall serve its request in writing. The Proposed Rule states that the Department must afford the recipient a reasonable amount of time within which to respond to the request[16] and that the failure of an Applicant to respond within the allotted time may serve as a basis for the Department to reject an application under subparagraph (a)(3)(B), described above. Finally, the Proposed Rule for the first time affords the Applicant due process in the event that the Department obtains information or documentation about the Applicant from a third party that the Department reasonably believes could adversely impact its decision on an application.[17] In such a circumstance, the Proposed Rule requires the Department to promptly inform the Applicant in writing and describe the third party information or documentation that the Department obtained. The Department must also afford the Applicant a reasonable opportunity to discuss with it or object to the Department's use of the third party information or documentation in its application decision prior to the Department rendering the decision.

Fourth, the Proposed Rule 1000 Series includes a new Rule 1013(b), entitled ''Special Application Procedures,'' which restates and expands upon the special application procedures set forth in subparagraph (a)(5) of the existing Rule 1013. Presently, subparagraph (a)(5)(A) states that when an Applicant is applying for FINRA membership and Exchange membership at the same time, then the Exchange will wait to process the application until the applicant becomes a FINRA member.[18] Presently, subparagraph (a)(5)(C) states that expedited application procedures will apply to Applicants that are already members of FINRA and Nasdaq, or Nasdaq PHLX LLC. The Proposed Rule omits subparagraph (a)(5)(A) and (B) because the Exchange believes that these provision add little value, especially in light of other changes that the Exchange adopted in the Proposed Rules. Likewise, the Proposed Rule omits subparagraph (a)(5)(C) because it has become outdated in that it does not provide expedited application procedures for Applicants that are members of the Exchange's other affiliates; this provision also does not explain what an ''expedited'' application process entails.

In lieu of the existing subparagraph (a)(5), the Proposed Rule includes two types of special applications in Rule 1013(b). First, Proposed Rule 1013(b)(1) prescribes a special application process for Applicants that are already FINRA members. Specifically, the Proposed Rule states that such an Applicant will have the option to ''waive-in'' to become an Exchange Member and to register with the Exchange all persons associated with it whose registrations FINRA has approved (in categories recognized by the Exchange's rules). The Proposed Rule defines the term ''waive-in'' to mean that the Department will rely substantially upon FINRA's prior determination to approve the Applicant for FINRA membership when the Department evaluates the Applicant for Exchange membership. That is, the Department will normally permit a FINRA member to waive-into Exchange membership without conducting an independent examination of the Applicant's qualifications for membership on the Exchange, provided that the Department is not otherwise aware of any basis set forth in Rule 1014 to deny or condition approval of the application.

Procedurally, the Proposed Rule states that a FINRA member that wishes to waive-into Exchange membership must do so by submitting to the Department an application form (the standard application form contains an option to select waive-in membership) and an executed Exchange Membership Agreement. The Department, in turn, will act upon a duly submitted waive-in application within a reasonable time frame not to exceed 20 days from submission of the application, unless the Department and the Applicant agree to a longer time frame for issuing a decision.[19] If the Department fails to issue a decision on a waive-in application within the prescribed time frame, then the Applicant may petition the Exchange's Board of Directors to force the Department to act, as set forth in Rule 1014(c)(3). Finally, the Proposed Rule states that a decision issued under this provision shall have the same effectiveness as set forth in Rule 1014 and shall be subject to review as set forth in Rules 1015 and 1016.

The second special application process, which is set forth in Proposed Rule 1013(b)(2), permits Applicants for Exchange membership that are already approved members of one or more of the Affiliated Exchanges to waive-into the Exchange membership. In this context, ''waive-in'' means that the Department will rely substantially upon an Affiliated Exchange's prior determination to approve the Applicant for membership on the Affiliated Exchange when the Department evaluates the Applicant for Exchange membership. The procedures in the Proposed Rule for an Applicant to submit a waive-in application under this provision and for the Department to issue a decision based upon such an application are identical to the procedures described above for FINRA members that seek to waive-into Exchange membership. The Exchange amends its application form to reflect the fact that Applicants may waive-into membership on the Exchange based upon their membership on any of the other five Affiliated Exchanges.

Rule 1014

In several respects, Proposed Rule 1014 differs from the existing Rule, which governs the issuance of membership application decisions by the Department.

First, to improve clarity, the Proposed Rule is reorganized relative to the existing Rule. Rather than begin the

the Department must serve an initial supplemental request for information or documents within 15 business days after an application is deemed to be filed. The Exchange finds no good reason to distinguish in the rule between an ''initial'' and a subsequent supplemental Departmental request or to impose a specific deadline for the Department to issue any such requests; the Department has a shared interest with the Applicant in issuing supplemental requests expeditiously such that no artificial deadline is necessary.

[16] Rather than impose a minimum time period for a response, the Proposed Rule requires only that the Department prescribe a reasonable deadline for a response. The Exchange believes that the appropriate response period will vary depending upon the nature of the information or documentation requested. Moreover, the Exchange again believes that the Department and the Applicant have a shared interest in ensuring that the Applicant has adequate time to respond to a request.

[17] The Department may consult third parties, such as other SROs of which an Applicant is or was a member previously, to obtain additional information about or to confirm aspects of an application or the Applicant's character or history. The Department might also consult third party services to investigate or verify the Applicant's financial condition or history.

[18] Existing subparagraph (a)(5)(B) also specifies that Applicants that are already members of another registered securities association or exchange must submit a regular application form.

[19] The Proposed Rule prescribes this time frame to accommodate FINRA, which will review waive-in applications on behalf of the Exchange to verify that the Applicants are FINRA members in good standing. As a practical matter, the Exchange expects to act on waive-in applications prior to the 20 day deadline.

Rule with a paragraph that describes the bases for the Department to issue a decision on an application, as is the case presently, the Proposed Rule begins with a paragraph (a) entitled ''Authority of Department to Approve, Approve with Restrictions, or Deny an Application.'' This new paragraph sets forth the general authority of the Department to act on an application by approving it, denying it, or approving it subject to restrictions: (1) That are reasonably designed to address a specific (financial, operational, supervisory, disciplinary, investigatory, or other regulatory) concern; or (2) that mirror a restriction placed upon the Applicant by FINRA or an Affiliated Exchange. It incorporates elements of what is now Rule 1014(b) (which the Exchange proposes to delete going forward).

Second, the Proposed Rule renumbers existing paragraph (a) as new paragraph (b). This paragraph is retitled ''Bases for Approval, Conditional Approval, or Denial'' but otherwise is the same.

Third, as noted above, existing paragraph (b) is omitted from the Proposed Rule.

Fourth, the Proposed Rule amends paragraph (c), which prescribes the time period within which the Department must issue and serve a written decision on a membership application. Presently, the provision requires the Department to serve a written decision within 15 business days after the Applicant concludes its membership interview (if any) or files all of its required information or documents, whichever is later. The Proposed Rule relaxes this requirement by stating that the Department must respond in a reasonable time period, not to exceed 45 (calendar) days after the Applicant files and provides to the Exchange all required and requested information or documents in connection with the application, unless the Department and the Applicant agree to further extend the decision deadline.[20] The Proposed Rule includes these amendments because the Exchange adjudges the existing timeframe to be needlessly short and inflexible. In certain instances where the Department has outstanding questions or concerns associated with an application, the existing Rule may force the parties to rush to address outstanding questions and resolve outstanding issues. The Proposed Rule allows for such questions and issues to be addressed with less time pressure involved. The Exchange notes that it does not intend for the Proposed Rule to routinely lengthen the Department's timeframe for serving application decisions. Under the existing Rule, the Exchange typically issues decisions far in advance of the 15 business day deadline and the Exchange expects that it will continue to do so in most instances. Indeed, the Exchange has a self-interest in issuing decisions as soon as is possible. The 45 day decision period in the Proposed Rule is merely intended to allow for the parties to have flexibility in unusual circumstances.

Fifth, the Proposed Rule omits existing paragraph (d), which states that a decision by the Department to approve an application is contingent upon the Applicant filing with the Department an executed written membership agreement that contains the Applicant's agreement to abide by any restriction specified in the Department's decision and to obtain the Department's approval prior to undertaking a change in ownership, control, or business operations, or prior to modifying or removing a membership restriction. The Proposed Rule omits this provision because, as explained above, the Exchange expressly requires, in Proposed Rule 1013, that an Applicant must file a duly executed copy of the Membership Agreement as part of its application. The existing Membership Agreement contains the undertakings described in existing paragraph (d). Accordingly, existing paragraph (d) is superfluous.

Rule 1015

The Proposed Rule 1000 Series amends existing Rule 1015, which states that the Department's membership decisions are subject to review by the Exchange Review Council. Specifically, the Proposed Rule 1000 Series moves from existing Rule 1012(c) to Proposed Rule 1015(k) a provision that prohibits *ex parte* communications involving membership decisions subject to review among certain Exchange staff, members of the Exchange Review Council, members of a Subcommittee of the Council, and the Board of Directors. Similarly, the Proposed Rule 1000 Series moves from existing Rule 1012(d) to Proposed Rule 1015(l) a provision that governs the recusal and disqualification of a member of the Exchange Review Council, a Subcommittee thereof, or the Board of Directors from participating in a review of a membership decision. The Proposed Rule 1000 Series moves these provisions because the Exchange believes that they fit logically within the section of the membership rules that govern appeals of membership decisions. The Proposed Rules contain no substantive changes to these provisions[21] and the Exchange does not believe that moving them will have any substantive effect.

Rule 1017

The Proposed Rule 1000 Series contains substantial changes to existing Rule 1017, which requires Members to obtain approval prior to effecting a change in ownership, control, or business operations. These changes are generally intended to streamline and simplify the existing Rule, which the Exchange believes are unnecessary onerous and complex. As much as possible, the Proposed Rule applies the same procedures to these applications for approval as it does to its applications for membership under Proposed Rules 1013 and 1014.

The first difference between the existing and Proposed Rule 1017 concerns Rule 1017(a), which presently defines the events that require Members to file applications. The existing paragraph states that a Member shall file an application for approval prior to effecting the following changes: (1) A merger of the Member with another Member (unless both are members or the surviving member will continue to be a member of the New York Stock Exchange (''NYSE'')); (2) a direct or indirect acquisition by the Member of another Member (unless the acquiring Member is a member of the NYSE); (3) direct or indirect acquisitions or transfers of 25% or more in the aggregate of the Member's assets or any asset, business line or line of operations that generates revenues comprising 25% or more in the aggregate of the Member's earnings measured on a rolling 36 month basis (unless both the seller and acquirer are members of the NYSE); (4) a change in the equity ownership or partnership capital of the Member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital; or (5) a ''material change in business operations.'' Existing Rule 1011(g), in turn, defines a ''material change in business operations'' to mean, among other things: (1) Removing or modifying a membership restriction; (2) acting as a dealer for the first time; (3) market making for the first time on the Exchange (except when the member's market making has been approved

[20] The Proposed Rule also contains conforming amendments to Rule 1014(c)(3), which addresses failures of the Department to serve a decision within the prescribed time frame.

[21] The Proposed Rule omits the requirement in existing Rule 1015(a) that an applicant file a request for review ''by first-class mail.'' Proposed Rule 1012(a) now provides for a more modern array of filing options that includes electronic submission.

previously by FINRA or Nasdaq); (4) adding business activities that require higher minimum net capital under SEC Rule 15c3–1; and (5) adding business activities that would cause a proprietary trading firm no longer to meet the definition of that term contained in the rule.

For ease of reference, the Proposed Rule 1000 Series incorporates into Proposed Rule 1017(a)(5) the definition of a ''material change in business operations'' rather than define it separately in Rule 1011(g). The Proposed Rule 1000 Series also takes the existing exclusion from that definition—excluding first time market makers on the Exchange whose market making activities have been approved previously by FINRA or Nasdaq—and applies it more broadly to all of Rule 1017(a). That is, none of the changes enumerated in Proposed Rule 1017(a) require prior Departmental approval to the extent that the Member's Designated Examining Authority (''DEA''), or an Affiliated Exchange, has approved the change previously in accordance with their respective rules and provided that the Member provides written evidence to the Department of such prior approval. The Exchange believes that this is prudent because in all instances in which a Member's DEA or any Affiliated Exchange [22] have already approved a change, the Exchange can be reasonably confident that such prior approval would be consistent with its own judgment on the matter, such that no purpose would be served in requiring the Department to independently approve the same change.[23] The Proposed Rule 1000 Series also eases burdens on Members that wish to make changes to their businesses and which presently require multiple approvals to do so. The Exchange notes that in the Proposed Rules, it retains authority to require approval of a proposed change where the nature, terms, or conditions of the change have altered since the Member's DEA or an Affiliated Exchange approved it.

Next, the Proposed Rule 1000 Series makes several organizational and clarifying amendments to existing Rule 1017(b), which governs the filing and content of applications filed under Rule 1017. to the Proposed Rule prefaces subparagraph (b)(2)—which presently states vaguely that the ''application'' shall contain certain items—with language clarifying that the provision pertains to applications for approval of a change in ownership or control or a material change in the business operations of a member. It also breaks out the last sentence of (b)(2) into new subparagraphs (2)(A) and (2)(B). Furthermore, the Proposed Rule contains clarifying changes in (2)(A) (specifying that a description of a ''change in ownership, control, or business operations'' means a ''proposed'' change in ownership, control, or ''material'' business operations) and (2)(B) (specifying that the Member must ''attach'' rather than ''include'' a business plan, pro forma financials, an organizational chart, and written supervisory procedures relating to the ''proposed'' change). Finally, the Proposed Rule renumbers the remainder of the existing Rule.

Proposed Rule 1017(c) is more limited in its scope than is existing Rule 1017(c). Specifically, the proposed Rule omits from subparagraph (c)(1) the ability of a Member to effect a change in ownership or control prior to receiving approval from the Department and the ability of the Department to impose interim restrictions on the Member pending final Department approval. The Exchange believes that the concepts of interim changes and restrictions are overly complex, potentially disruptive, and ultimately unnecessary given the short time frames that the Rules prescribe for the Department to act on applications.[24] Additionally, the Exchange notes that in its experience reviewing applications under Rule 1017, these provisions never have been invoked. Finally, the Proposed Rule changes the title of this provision to reflect the omission of the foregoing. Whereas now, the title is ''Effecting Change and Imposition of Interim Restrictions,'' the Proposed Rule is entitled ''When Applications Shall or May Be Filed.''

Existing paragraphs (d), (e), and (f) of Rule 1017, prescribe standards for rejecting applications that are not substantially complete, authorize the Department to serve a request for additional documents and information, and permit the Department to conduct interviews of Applicants, respectively. Proposed Rule 1017 omits these provisions and replaces them with provisions that are more consistent with Proposed Rule 1013(a)(2), (3), and (4). That is, Proposed Rule 1017(d) states that the Department will deem an application to be filed on the date when it is substantially complete, meaning the date on which the Department receives from the Applicant all material documentation and information required under the Rule. It also requires the Department to inform the Applicant in writing when the Department deems an application to be substantially complete. Proposed Rule 1017(d) states that the Department may treat an application filed under this Rule as having lapsed, and the Department may reject an application filed under this Rule, in accordance with Proposed Rule 1013(a)(3), except that the Department may treat an application as having lapsed if it is not substantially complete for 30 days or more after the applicant initiates it.[25] Finally, Proposed Rule 1017(f) states that at any time before the Department serves its decision on an application filed under Rule 1017, the Department may request additional information or documentation from the Applicant or from a third party in accordance with Rule 1013(a)(4).[26]

Existing Rule 1017(g) prescribes a complex system for the Department to issue decisions in response to applications filed under Rule 1017. For example, it differentiates between decisions issued with respect to Members that are and are not FINRA members (or required to be FINRA members). With respect to Members that are FINRA members, the Rule requires the Department to consider whether the Applicant and its Associated Persons meet the standards set forth in NASD (FINRA) Rule 1014(a). It also prescribes specific criteria for issuing decisions where the Applicant seeks a

[22] Exchange notes that the existing Rule is under-inclusive in that it does not account for prior approvals granted by all of the Affiliated Exchanges. The Exchange believes that there is no reasonable basis for it to defer to a prior approval granted by Nasdaq and to not do the same with respect to prior approvals granted by the other Affiliated Exchanges.

[23] Proposed Rule 1017(a) eliminates exceptions relating to NYSE membership. The Exchange believes that this proposal is reasonable insofar as the NYSE's rules may, at times, diverge with those of the Exchange. Going forward, the Exchange feels more confident deferring to the prior judgment of a Member's DEA or of an Affiliated Exchange as to the specific change event at issue than it does to the mere fact that a Member or its counterparty in a business transaction are NYSE members.

[24] The Exchange also notes that FINRA is also publicly contemplating eliminating the concept of allowing its members to effect business changes on an interim basis. *See* FINRA, Regulatory Notice 18–23: Membership Application Proceedings (Request for Public Comment), Attachment B (July 26, 2018), available at *http://www.finra.org/sites/default/files/Attachment-B_Regulatory-Notice-18-23.pdf.*

[25] The Exchange notes that this 30 day time period for deeming an application to have lapsed derives from existing Rule 1017(d).

[26] As stated previously, circumstances where the Department may consult a third party include to seek additional information about or to verify aspects of an application. For example, the Department may consult another SRO to verify the financial status or prior disciplinary history of a Member's prospective new ownership.

modification or removal of a membership restriction. The Exchange believes that this complex system is unnecessary and can be simplified considerably, particularly in light of the proposal described above to exempt a Member from obtaining the Exchange's approval to effect a change in ownership or control or a material change in its business operations when FINRA has already approved the change previously. That is, there is no reason for the Exchange to make an independent assessment of whether the proposed change complies with FINRA rules if FINRA has already made that determination.

In lieu of the existing provisions, Proposed Rule 1017 states that the Department will render a decision on an application filed under Rule 1017 in accordance with the standards set forth in Rule 1014, except with respect to applications to modify or remove a membership restriction, in which case the Department will consider the factors presently set forth in existing Rule 1017(g)(1)(D) (Proposed Rule 1017 renumbers this provision as subparagraph (g)(1)).

Additionally, in lieu of existing Rule 1017(g)(2), which requires the Department to serve a written decision on an application filed under Rule 1017 within 30 (calendar days) after conclusion of a membership interview or the filing of additional information or documents (whichever is later), Proposed Rule 1017 states that the Department will serve a written decision in accordance with Rule 1013(c).[27] The Proposed Rule 1000 Series makes this change to 1017(g)(2) for the same reasons that it discussed above with respect to Rule 1013(c).

Finally, the Proposed Rule 1000 Series omits existing Rule 1017(k). This provision presently states that if an application for approval of a change in ownership lapses or is denied and all appeals are exhausted or waived, the Member must, within 60 days, submit a new application, unwind the transaction, or file a Form BDW. It also provides for the Department to shorten or lengthen the 60 day period under certain circumstances. Due to the fact that the Exchange—as explained previously—will eliminate the ability of a Member to effect a change in ownership while its application for Departmental approval is pending, this provision is no longer be necessary. That is, there will be no interim change in ownership that will need to be unwound or otherwise addressed if the Department denies an application or it lapses.

Rule 1018

The Proposed Rule 1000 Series consolidates within Proposed Rule 1018, which is reserved under the existing Rules, existing provisions of the Rules pertaining to the resignation of members (existing Rule 1012(g), transfer of membership (existing Rule 1012(i)(1)), termination of membership (existing Rule 1012(i)(2)), and reinstatement of membership (existing Rule 1002(d)). The Exchange believes that these provisions are logically related and belong together in a single Rule. Proposed Rule 1018 maintains the substance of these consolidated provisions unchanged from their existing state, except that resignations no longer require a 30 day time period to become effective. Also, the provision on reinstatement applies to membership only and not to registration, which is covered separately in the Exchange's Rules.

Other Miscellaneous Changes

The Proposed Rule 1000 Series contains other non-substantive differences from the existing Rule 1000 Series, as follows. Where the existing Rules refer specifically to ''Nasdaq BX'' or ''BX,'' the Proposed Rules replace such references with more general term ''Exchange.'' This difference makes it easier in the future to harmonize the Exchange's membership rules with those of the other Affiliated Exchanges. The Proposed Rule 1000 Series also updates obsolete references to the ''NASD'' to reflect the fact that the NASD is now known as ''FINRA.'' Finally, where applicable, the Proposed Rule 1000 Series renumbers the Rules and updates or corrects cross-references.

Proposed Introductory Paragraph to the BX Rule 1000 Series

The Exchange proposes to include an introductory paragraph to the BX Rule 1000 Series which states that it incorporates by reference the Nasdaq Rule 1000 Series (other than Nasdaq Rules 1031, 1050, 1090, 1130, 1150, 1160, and 1170),[28] and that such Nasdaq Rules shall be applicable to Exchange Members, Associated Persons, and other persons subject to the Exchange's jurisdiction.

These proposed introductory paragraphs also list instances in which cross references in the Nasdaq Rule 1000 Series to other Nasdaq rules should be read to refer instead to the Exchange rules, and references to defined Nasdaq terms shall be read to refer to the Exchange-related meanings of those terms. For example, references in the Nasdaq Rule 1000 Series to the following defined terms shall be read to refer to the Exchange-specific meanings of those terms: ''Exchange'' or ''Nasdaq'' shall be read to refer to the Nasdaq BX Exchange; ''Rule'' or ''Exchange Rule'' shall be read to refer to the Exchange Rules; the defined term ''Applicant'' in the Nasdaq Rule 1000 Series shall be read to refer to an Applicant to the Nasdaq BX Exchange; the defined terms ''Board'' or ''Exchange Board'' in the Nasdaq Rule 1000 Series shall be read to refer to the Nasdaq BX Board of Directors; the defined term ''Director'' in the Nasdaq Rule 1000 Series shall be read to refer to a Director of the Board of the Nasdaq BX Exchange; the defined term ''Exchange Review Council'' in the Nasdaq Rule 1000 Series shall be read to refer to the Nasdaq BX Exchange Review Council; the defined term ''Subcommittee'' in the Nasdaq Rule 1000 Series shall be read to refer to a Subcommittee of the Nasdaq BX Exchange Review Council; the defined term ''Interested Staff'' in the Nasdaq Rule 1000 Series shall be read to refer to Interested Staff of Nasdaq BX; the defined term ''Member'' in the Nasdaq Rule 1000 Series shall be read to refer to a Nasdaq BX Member; the defined term ''Associated Person'' shall be read to refer to a Nasdaq BX Associated Person; the defined terms ''Exchange Membership Department'' or ''Membership Department'' shall be read to refer to the Nasdaq BX Membership Department; and the defined term ''Exchange Regulation Department'' shall be read to refer to the Nasdaq BX Regulation Department.

Additionally, the proposed introduction to the BX Rule 1000 Series states that cross references in the Nasdaq Rule 1000 Series to ''Rule 0120'' shall refer to Nasdaq BX Rule 0120, cross references in the Nasdaq Rule 1000 Series to Rule 3010 shall refer to Nasdaq BX Rule 3010; cross references in the Nasdaq Rule 1000 Series to Rule 3011 shall refer to Nasdaq BX Rule 3011; and cross references to ''General 4, Section 1.1200 Series'' shall be read to refer to the Nasdaq BX Rule 1200 Series.

[27] The Exchange notes that the cross-reference to Rule 1013(c) in the Proposed Rules also addresses the Applicant's rights in the event that the Department does not serve it with a timely written decision. Accordingly, the Proposed Rule omits existing subparagraph (g)(3), which covers the same topic.

[28] The Exchange notes that these rules, both for BX and Nasdaq, are separate from the membership rules. The proposal will not supplant or amend BX Rules 1031, 1050, 1090, 1130, 1150, 1160, or 1170.

Conclusion

The changes proposed herein will allow the Exchange to harmonize its membership rules and processes with those of Nasdaq and, ultimately, with the other Affiliated Exchanges,[29] thus providing a uniform criteria across the Affiliated Exchanges for membership qualifications and a uniform process across the Affiliated Exchanges for processing membership applications. The proposal will also provide for full membership reciprocity between Nasdaq and the Exchange—and hopefully, in time, across all of the Affiliated Exchanges—so that a member of one Affiliated Exchange would receive expedited treatment in applying for membership on any other Affiliated Exchange. Harmonizing the membership rules and processes of the Affiliated Exchanges will render administration of the Affiliated Exchanges' responsibilities more efficient in that the Membership Department will only need to administer a single set of criteria and processes, rather than six sets thereof. Similarly, harmonized membership rules and processes will benefit Exchange Applicants and Members by reducing the number of requirements that must be met and the processes that must be followed to apply for membership on the Affiliated Exchanges.

Moreover, as to the Exchange itself, the proposed changes described herein will render the Exchange's membership rules and processes clearer, better organized, simpler, and easier to comply with. Again, such changes will provide benefits both to the Exchange's Membership Department and to Exchange Applicants.

The proposed membership rules and processes are substantially similar to the existing rules and process, and where there are differences between the new and old processes, the Exchange believes that the new process does not disadvantage its Members or Associated Persons. To the contrary, the Exchange believes that the new rules and processes will benefit all parties as it again provides greater clarity, simplicity, and efficiency than the retired rules and processes.

Implementation

To facilitate an orderly transition from the existing Rule 1000 Series to the Proposed Rule 1000 Series, the Exchange is proposing to apply the existing Rules to all applications which have been submitted to the Exchange (including applications that are not yet complete) and are pending approval prior to the operative date. The Exchange also will apply the existing Rules to any appeal of an Exchange membership decision or any request for the Board to direct action on an application pending before the Exchange Review Council, the Board, or the Commission, as applicable. As a consequence of this transition process, the Exchange will retain the existing processes during the transition period until such time that there are no longer any applications or matters proceeding under the existing rules. To facilitate this transition process, the Exchange will retain a transitional Rulebook that will contain the Exchange's membership rules as they are at the time that this proposal is filed with the Commission. This transitional Rulebook will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules website. When the transition is complete, the Exchange will remove the transitional Rulebook from its public rules website.

The Exchange will announce and explain this transition process in a regulatory alert.

The Exchange notes that Nasdaq applied the same process described above to govern its transition to its amended membership rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[30] in general, and furthers the objectives of Section 6(b)(5) and of the Act,[31] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. It is also consistent with Section 6(b)(7) of the Act in that it provides for a fair procedure for denying Exchange membership to any person who seeks it, barring any person from becoming associated with an Exchange Member, and prohibiting or limiting any person with respect to access to services offered by the Exchange or a Member thereof.[32]

As a general matter, the Exchange believes that its proposal to delete its existing membership rules and incorporate by reference the Nasdaq Membership Rules will promote a free and open market, and will benefit investors, the public, and the markets, because the new rules will be clearer, better organized, and simpler.

The proposal is just and equitable because it will render the Exchange's membership rules easier for Applicants and Members to read and understand, including by doing the following:

- Establishing a ''roadmap'' paragraph in proposed Rule 1014(a) that sets forth the basic authority of the Department to approve, approve with conditions, or deny applications for membership before the Rule goes on to enumerate criteria for the Department to apply when taking each of those actions;
- Making the titles of the rules more accurate and descriptive (*e.g.,* Proposed Rule 1014(b) (amending the existing title ''Bases for Denial'' to also include bases for approval and conditional approval to make it more accurate and complete));
- Grouping logically-related provisions together in the Rules (*e.g.,* provisions governing resignation, termination, transfer, and reinstatement of membership (moving them from Rule 1002(d) and 1012(g) and (i) to Proposed Rule 1018); provisions relating to *ex parte* communications (existing Rule 1012(c)) and recusals and disqualifications (existing Rule 1012(d) (moving them into Proposed Rule 1015, which governs reviews of membership decisions));
- Rationalizing and consolidating provisions that presently govern lapses and rejections of applications, including by making clearer conceptual distinctions between lapses (*i.e.,* applications that are not substantially complete and which the Department may deem to be abandoned, such that the Department will refund any application fees paid by the Applicant) and rejections (*i.e.,* applications that the Department deemed to be filed but which it refuses to act upon due to lingering incompleteness, in which case the Department will not refund application fees paid to it), and by consolidating Rules 1012(b) and 1013(a)(3) into Proposed Rule 1013(a)(3)(A) and (B);
- Consolidating overlapping provisions that govern the registration of branch offices and office of supervisory jurisdiction into a single provision (consolidating Rule 1012(j) and IM–1002–4 into Proposed Rule 1002(d));
- Omitting from the Proposed Rule references in existing Rule 1002(c), Rule 1012(j), and Rule 1013(a)(1)(U) to the obligation of Members (and their branch offices) to pay fees, charges, dues, and assessments to the Exchange insofar as those obligations are duplicative of Rule 9553;

[29] *See* n.4, *supra.*

[30] 15 U.S.C. 78f(b).

[31] 15 U.S.C. 78f(b)(5).

[32] 15 U.S.C. 78f(b)(7).

• Converting IM–1002–1 and IM–1002–4 into rule text in the Proposed Rule 1000 Series;

• Clarifying when the Membership Department will deem an application to be filed (when the application is ''substantially complete,'' as set forth in Proposed Rule 1013(a)(2)) and by requiring the Department to notify an Applicant in writing of the filing date;

• Clarifying what the Exchange means when it states that an Applicant may ''waive-in'' to Exchange membership (as set forth in Proposed Rule 1013(b)); and

• Updating obsolete cross-references throughout the Rules from NASD to FINRA.

The proposal will also make compliance with the membership rules simpler and less burdensome for Applicants and Members by doing the following:

• Eliminating obsolete requirements to submit paper copies of Forms U–4 and BD or explain information listed on the forms (Rule 1013(a)(1)(A), (J), (K), and (P) and Rule 1013(a)(2)) where the Department already has electronic access to the Forms and the information contained therein;

• Permitting electronic filing of applications (proposed Rule 1012(a)(1);

• Allowing payment of application fees by means other than paper check (Proposed Rule 1013(a)(1)(C));

• Relaxing deadlines that needlessly rush the process of responding to the Department's questions and concerns about an application [33] or that force the Department to render a decision when the Applicant is not ready for the Department to do so; [34]

• Eliminating formal membership interviews and procedures related thereto, which the Exchange has not utilized historically (Rule 1013(b)); [35]

• Harmonizing disparate procedures under Rules 1013 and 1017 for filing, evaluating, and responding to initial membership applications and applications for approval of business changes, including by streamlining the Rule 1017 procedures;

• Broadening the circumstances in which an Applicant may waive-into Exchange membership to include the Applicant's membership in any of the Affiliated Exchanges [36] and defining procedures for processing and responding to waive-in applications (Proposed Rule 1013(b));

• Narrowing the circumstances in which a Member must obtain prior Department approval before effecting a change in ownership, control, or material business operations by excluding changes for which a Member has obtained prior approval from the Member's DEA, or an Affiliated Exchange (Proposed Rule 1017(a)); [37]

• Eliminating the unused, unnecessary, and potentially disruptive ability of Members, pursuant to Rule 1017(c), to effect ownership changes on an interim basis while an application for Department approval is pending; and

• Eliminating the 30 day waiting period for Members that seek to resign their memberships under proposed Rule 1018(a).

In sum, the foregoing changes will update, rationalize, and streamline the Exchange's membership rules and processes, all to the benefit of Applicants and Members. Moreover, these changes will not adversely impact the rights of Applicants or Members to appeal adverse Departmental decisions under these Rules or to request Board action to compel the Department to render decisions on applications.

Last, the Exchange believes that its proposal to phase-in the implementation of the new membership rules and processes is consistent with Section 6(b)(7) of the Act [38] because both the current and proposed processes provide fair procedures for granting and denying applications for becoming an Exchange Member, becoming an Associated Person, and making material changes to the business operations of a Member. The Exchange is proposing to provide advanced notice of the implementation date of the new processes, and will apply the new processes to new applications, appeals, and requests for Board action that are initiated on or after that implementation date. Any application, appeal, or request for Board action initiated prior to the implementation date will be completed using the current processes. As a consequence, the Exchange will maintain a transitional Rulebook on the Exchange's public rules website which will contain the Exchange Rules as they are at the time of filing this rule change. These transitional rules will apply exclusively to applications, appeals, and requests for Board action initiated prior to the implementation date. Upon conclusion of the last decision on a matter to which the transitional rules apply, the Exchange will remove the defunct transitional rules from its public rules website. Thus, the transition will be conducted in a fair, orderly, and transparent manner. Lastly, the proposed transition process is the same process that Nasdaq implemented during its transition to new membership rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not expect that its proposed changes to the membership rules will have any competitive impact on its existing or prospective membership. The proposed changes will apply equally to all similarly situated Applicants and Members and they will confer no relative advantage or

[33] Rather than require an Applicant to file a response to a supplemental request for documents or information within 15 business days, Proposed Rule 1013(a)(3) states that the Applicant must respond within a ''reasonable period of time'' to be prescribed by the Department. Even then, Rule 1013(a)(3)(B) states that the Department must serve upon the Applicant a notice of incompleteness if it fails to respond to a supplemental request and then afford the Applicant an additional reasonable time period to remedy the failure before it may reject the Applicant's application.

[34] Rather than require the Department to serve a written decision within 15 business days, Proposed Rule 1014(c) states that it must issue a decision within a reasonable period of time, not to exceed 45 calendar days after the application is filed and complete, unless the parties agree to a later date. The Exchange does not intend for this change to result in the Department routinely issuing decisions later than it does presently. The Exchange presently issues decisions, in most instances, well in advance of the current 15 business day deadline and it has a self-interest in continuing to do so whenever possible. However, the Exchange believes that it is in the interest of Applicants for the Department to have discretion to respond at a later time in the event that the Applicant needs to address or resolve outstanding questions or concerns associated with its application.

[35] The elimination of the formal membership interview process will have no practical effect on the membership process insofar as the Department otherwise has authority to request additional information from the Applicant. Under Proposed Rule 1014(a)(4), this authority may include a request for the Applicant to provide information or documents in-person or by telephone. In other words, the Department will retain authority to conduct an informal interview of the Applicant.

[36] As noted above, the Exchange believes that it is reasonable to permit reciprocity in membership among all of the Affiliated Exchanges. The Exchange believes that there is no reasonable basis for it to defer to a prior approval granted by Nasdaq and to not do the same with respect to prior approvals granted by the other Affiliated Exchanges.

[37] As is discussed above, the Exchange believes that deference to prior approvals of a proposed business change made by an Affiliated Exchange or the Exchange's DEA is reasonable because the judgment of these entities on such matters is likely to be the same as that which the Exchange would itself employ. The Exchange assesses that any marginal benefit that might be gained from it applying its own independent judgment outweighs the burden to Applicants of obtaining multiple approvals for the same proposed change. The Exchange notes that it will require a Member to obtain approval for such a change if the nature, terms, or conditions of the proposed change have altered since its DEA or an Affiliated Exchange approved it.

[38] 15 U.S.C. 78f(b)(7).

disadvantage upon any category of Exchange Applicant or Member. Moreover, the Exchange does not expect that its proposal will have an adverse impact on competition among exchanges for members; to the contrary, the Exchange hopes that by clarifying, reorganizing, and streamlining its membership rules, and by making the Exchange's membership process less burdensome for Applicants and Members, the Exchange will improve its competitive standing relative to other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [39] and subparagraph (f)(6) of Rule 19b–4 thereunder.[40]

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–BX–2019–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2019–022. 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–BX–2019–022, and should be submitted on or before August 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Jill M. Peterson,

Assistant Secretary.

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[39] 15 U.S.C. 78s(b)(3)(A)(iii).

[40] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86423; File No. SR–NYSEARCA–2019–50]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a New Rule 9.21–O, Delete Current Rules 9.21–O through 9.25–O, and Amend Rule 10.9551

July 22, 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 July 9, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) adopt a new Rule 9.21–O (Communications with the Public) based on NYSE American Rule 991, (2) delete current Rules 9.21–O through 9.25–O, and (3) amend Rule 10.9551 to add references to proposed Rule 9.21–O. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to (1) adopt a new Rule 9.21–O (Communications with the Public) based on NYSE American Rule 991 (Options Communications), (2) delete Rules 9.21–O through 9.25–O, and (3) amend Rule 10.9551 to add references to proposed Rule 9.21–O.

Background and Proposed Rule Filing

The Exchange recently adopted a new set of rules governing investigations, discipline of ETP Holders, OTP Holders, OTP Firms, and covered persons, sanctions, cease and desist authority, and other procedural rules modeled on the rules of the Exchange's affiliates, New York Stock Exchange LLC (''NYSE'') and NYSE American LLC (''NYSE American''), as well as those of the Financial Industry Regulatory Authority, Inc. (''FINRA'').[4] The new disciplinary rules became effective on May 27, 2019.[5]

In that filing, the Exchange adopted Rule 10.9551 (Failure to Comply with Public Communication Standards), which permits the Exchange's regulatory staff to issue a written notice requiring an ETP Holder, OTP Holder or OTP Firm to file communications with FINRA's Advertising Regulation Department at least 10 days prior to use if the staff determined that the ETP Holder had departed from the standards of Rule 9.21–E (Communications with the Public) and ''any applicable options rule.'' [6] As the filing noted, the Exchange did not have a rule comparable to Rule 9.21–E for the options market and undertook to submit a rule filing to adopt a new Rule 9.21–O based on NYSE American Rule 991 and to amend Rule 10.9551.[7]

The Exchange accordingly proposes to adopt a new Rule 9.21–O titled ''Communications with the Public.'' Except for references to OTP Firm and OTP Holder, proposed Rule 9.21–O is substantially the same as NYSE American Rule 991, which was in turn based on FINRA Rule 2220.[8] The Exchange proposes to delete its current Rules 9.21–O through 9.25–O governing communications with the public as obsolete.

The Exchange proposes non-substantive conforming changes in Rule 10.9551(a) and (d) to replace the phrase ''and any applicable options rule'' following ''Pursuant to Rule 9.21–E(c)(5)(B)'' with ''Rule 9.21–O(c)(2).''

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed changes will provide greater harmonization among SROs resulting in less burdensome and more efficient regulatory compliance for common members of the Exchange, the Exchange's affiliates, and FINRA. As previously noted, the proposed rule text is substantially the same as NYSE American Rule 991, which was in turn modeled on FINRA rules. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange further believes that adopting NYSE American's rule governing options communications with the public will provide its permit holders with a clearer, consistent, and more comprehensive regulatory scheme by harmonizing the Exchange's rule concerning options communications with NYSE American's rule and the FINRA rule in the same subject matter. The proposed rule change would continue to ensure a uniform regulatory approach and would reduce any potential risks or inefficiencies in rules. The Exchange further notes that the changes proposed herein are neither novel nor controversial and are modeled on existing FINRA rules.

The Exchange also believes that the proposal to use the terms ''OTP Firm'' and ''OTP Holder'' instead of ''ATP Holder'' would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because the proposed change would reflect the Exchange's membership and terminology used in the Exchange's rulebook, thereby reducing any potential ambiguity and providing clarify to the Exchange's rules. The proposed use of the terms ''OTP Firm'' and ''OTP Holder'' would be consistent with the NYSE American term ''ATP Holder.''

The Exchange believes that deleting the Exchange's current options communications with the public as obsolete would remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest because it would eliminate rules that are now obsolete or that do not have any substantive content. Eliminating obsolete rules would reduce potential confusion and add transparency and clarity to the Exchange's rules, thereby ensuring that members, regulators, and the public can more easily navigate and understand the Exchange's rulebook.

Finally, the Exchange believes that the proposed conforming changes to Rule 10.9551(a) would remove impediments to and perfect the mechanism of a free and open market and a national market system by ensuring that market participants can more easily navigate, understand and comply with its rules, thereby reducing potential investor or market participant confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues. Rather, the proposed change is designed to further harmonize the Exchange's rule regarding options communications with the comparable rule of the Exchange's affiliate NYSE American and to make conforming changes to the Exchange's disciplinary rules.

[4] *See* Securities Exchange Act Release No. 34–85639 (April 12, 2019), 84 FR 16346 (April 18, 2019) (SR–NYSEARCA–2019–15) (Notice) (''Disciplinary Rules Adoption'').

[5] *See* NYSE Arca Options Regulatory Bulletin 19–02 (April 26, 2019), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/rule-interpretations/2019/Regulatory%20Bulletin%20re%20Arca%20Disciplinary%20Rules.%20revised%2004.25.19%20V2.pdf.*

[6] *See* Disciplinary Rules Adoption, 84 FR at 16370.

[7] *See id.,* at n. 62.

[8] *See* Securities Exchange Act Release No. 61499 (February 4, 2010), 75 FR 6738 (February 10, 2010) (SR–NYSEAmex–2010–04); Securities Exchange Act Release No. 82402 (December 26, 2017), 83 FR 179 (January 2, 2018) (SR–NYSEAmex–2017–39).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] 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.

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) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2019–50 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–2019–50. 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–2019–50 and should be submitted on or before August 16, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–15874 Filed 7–25–19; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86422]

Order Granting Application by: Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, and Nasdaq Phlx LLC for Exemption Pursuant to Section 36(a) of the Exchange Act From the Rule Filing Requirements of Section 19(b) of the Exchange Act With Respect to Certain Rules Incorporated by Reference

July 22, 2019.

Nasdaq BX, Inc. (''BX''), Nasdaq GEMX, LLC (''GEMX''), Nasdaq ISE, LLC (''ISE''), Nasdaq MRX, LLC (''MRX''), and Nasdaq Phlx LLC (''Phlx'') (each the ''Exchange'' and collectively, the ''Exchanges'') have filed with the Securities and Exchange Commission (''Commission'') an application for an exemption under Section 36(a)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] from the rule filing requirements of Section 19(b) of the Exchange Act [2] with respect to certain rules of the Nasdaq Stock Market, LLC (''Nasdaq'') [3] that the Exchanges seek to incorporate by reference.[4] Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors.

The Exchanges each filed a proposed rule change under Section 19(b) of the Exchange Act to delete their existing registration, qualification, and continuing education rules [5] and incorporate by reference Nasdaq's General 4 rules (''Nasdaq Registration and Continuing Education Rules''), as such rules may be in effect from time to time. The proposed rule changes would

[1] 15 U.S.C. 78mm(a)(1).

[2] 15 U.S.C. 78s(b).

[3] Nasdaq is an affiliate of the Exchanges.

[4] *See* Letter from Angela Dunn, Senior Associate General Counsel, Nasdaq Inc., to Vanessa Countryman, Acting Secretary, Commission, dated April 30, 2019 (''Exemptive Request'').

[5] *See* Securities Exchange Act Release Nos. 85726 (April 26, 2019) (SR–BX–2019–010), 85737 (April 26, 2019) (SR–GEMX–2019–05), 85728 (April 26, 2019) (SR–ISE–2019–12), 85730 (April 26, 2019) (SR–MRX–2019–09), and 85761 (May 2, 2019) (SR–Phlx–2019–18). Although the proposed rule changes were filed pursuant to Section 19(b)(3)(A)(iii) of the Exchange Act, and thereby became effective upon filing with the Commission, the Exchanges stipulated in their proposals that the incorporation by reference would not be operative until such time as the Commission grants this exemptive request.

make the Nasdaq Registration and Continuing Education Rules applicable to the Exchanges' members, member organizations (as applicable), associated persons, and other persons subject to their jurisdiction as though such rules were fully set forth within each Exchange's rulebook.

The Exchanges have requested, pursuant to Rule 0–12 under the Exchange Act,[6] that the Commission grant the Exchanges an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to each Exchange's rules that are effected solely by virtue of a change to the Nasdaq Registration and Continuing Education Rules. Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to the Nasdaq Registration and Continuing Education Rules without the need for each Exchange to separately file with the Commission the same proposed rule changes pursuant to Section 19(b) of the Exchange Act.[7]

The Exchanges represent that the Nasdaq Registration and Continuing Education Rules are not trading rules.[8] Moreover, the Exchanges state that they propose to incorporate by reference categories of rules (rather than individual rules within a category) that are regulatory in nature.[9] The Exchanges also represent that, as a condition of this exemption, they would provide written notice to their members whenever Nasdaq proposes a change to the Nasdaq Registration and Continuing Education Rules.[10]

According to the Exchanges, this exemption is necessary and appropriate because it will result in the Exchanges' rules being consistent with the relevant cross-referenced Nasdaq Registration and Continuing Education Rules at all times, thus ensuring that the Exchanges and Nasdaq maintain consistent registration, qualification, and continuing education rules for their respective members, associated persons, and other persons subject to their jurisdiction.[11]

The Commission has issued exemptions similar to the Exchanges' request.[12] The Commission has previously outlined standards for reviewing exemption requests from self-regulatory organizations (''SROs''), provided that:

- An SRO wishing to incorporate rules of another SRO by reference has submitted a written request for an order exempting it from the requirement in Section 19(b) of the Exchange Act to file proposed rule changes relating to the rules incorporated by reference, has identified the applicable originating SRO(s), together with the rules it wants to incorporate by reference, and otherwise has complied with the procedural requirements set forth in the Commission's release governing procedures for requesting exemptive orders pursuant to Rule 0–12 under the Exchange Act; [13]
- The incorporating SRO has requested incorporation of categories of rules (rather than individual rules within a category) that are not trading rules (*e.g.,* the SRO has requested incorporation of rule such as margin, suitability, or arbitration); [14] and
- The incorporating SRO has reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of the other SRO.[15]

The Commission believes that the Exchanges have satisfied each of these conditions. The Commission also believes that granting the Exchanges an exemption from the rule filing requirements under Section 19(b) of the Exchange Act will promote efficient use of the Commission's and the Exchanges' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO. The Commission therefore finds it in the public interest and consistent with the protection of investors to exempt the Exchanges from the rule filing requirements under Section 19(b) of the Exchange Act with respect to the Nasdaq Registration and Continuing Education Rules described above to be incorporated by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their members whenever Nasdaq changes a rule which the Exchanges have incorporated by reference.

Accordingly, *it is ordered*, pursuant to Section 36 of the Exchange Act,[16] that the Exchanges are exempt from the rule filing requirements of Section 19(b) of the Exchange Act solely with respect to changes to the rules identified in their request that incorporate by reference certain Nasdaq rules, provided that the Exchanges promptly provide written notice to their members whenever Nasdaq proposes to change a rule that the Exchanges have incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–15870 Filed 7–25–19; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 240.0–12.

[7] *See* Exemptive Request, *supra* note 4, at 2.

[8] *Id.*

[9] *Id.*

[10] The Exchanges state that they will provide notice on their websites in the same section they use to post their own proposed rule change filings and within the timeframe required by Rule 19b–4(*l*). In addition, the Exchanges state that their websites will include a link to the Nasdaq website where the proposed rule change filings are located. *Id* at 3.

[11] *Id* at 2.

[12] *See, e.g.,* Securities Exchange Act Release Nos. 83887 (August 20, 2018), 83 FR 42722 (August 23, 2018) (order granting exemptive request from Exchanges to incorporate by reference BX's rules for investigatory, disciplinary, and adjudicatory proceedings) (''Nasdaq Investigatory Rules Order''); 80338 (March 29, 2017), 82 FR 16464 (April 4, 2017) (order granting exemptive request from MIAX PEARL, LLC relating to rules of Miami International Securities Exchange, LLC incorporated by reference); 72650 (July 22, 2014), 79 FR 44075 (July 29, 2014) (order granting exemptive requests from NASDAQ OMX BX, Inc. and Nasdaq relating to rules of NASDAQ OMX PHLX LLC incorporated by reference); 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (order approving SR–BX–2012–030 and granting exemptive request relating to rules incorporated by reference by NASDAQ OMX BX, Inc.); 61534 (February 18, 2010), 75 FR 8760 (February 25, 2010) (order granting BATS Exchange, Inc.'s exemptive request relating to rules incorporated by reference by the BATS Exchange Options Market rules); and 57478 (March 12, 2008), 73 FR 14521 (order approving SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080, and granting exemptive request relating to rules incorporated by reference by the Nasdaq Options Market).

[13] *See* 17 CFR 240.0–12 and Nasdaq Investigatory Rules Order, *supra* note 12 at 42723.

[14] *Id.*

[15] *Id.*

[16] 15 U.S.C. 78mm.

[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 10831]

Certification Pursuant to Section 7008 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 With Respect to Thailand

Pursuant to the authority vested in me as Secretary of State, including by section 7008 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019 (Div. F, Pub. L. 116–6), and similar provisions in previous appropriations acts, I hereby certify that subsequent to the termination of assistance to the Government of Thailand a democratically elected government has taken office in Thailand.

This Certification shall be published in the **Federal Register** and, along with the accompanying Memorandum of

Justification, shall be reported to Congress.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2019–15949 Filed 7–25–19; 8:45 am]

BILLING CODE 4710–30–P

DEPARTMENT OF STATE

[Public Notice: 10814]

60-Day Notice of Proposed Information Collection: Evaluation of the Mandela Washington Fellowship for Young African Leaders

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to September 24, 2019.

ADDRESSES: You may submit comments by the following method:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2019–0024'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, may be sent to Natalie Donahue, Chief of Evaluation, Bureau of Educational and Cultural Affairs, *DonahueNR@state.gov* who may be reached at (202) 632–6193.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Evaluation of the Mandela Washington Fellowship for Young African Leaders.
- *OMB Control Number:* None.
- *Type of Request:* New collection.
- *Originating Office:* Educational and Cultural Affairs (ECA/P/V).
- *Form Number:* No form.
- *Respondents:* Mandela Washington Fellowship program implementers and participating private individuals and organizations who interacted with the Fellows (including University staff, internship host organizations, peer collaborators, home stay hosts, and site visit/community service organizations).
- *Estimated Number of Academic and Leadership Institute Survey Respondents:* 100.
- *Estimated Number of Academic and Leadership Institute Survey Responses:* 40.
- *Average Time per Academic and Leadership Institute Survey:* 30 minutes.
- *Total Estimated Academic and Leadership Institute Survey Burden Time:* 20 hours.
- *Estimated Number of Professional Development Experience Host Survey Respondents:* 407.
- *Estimated Number of Professional Development Experience Host Responses:* 122.
- *Average Time per Professional Development Experience Host Survey:* 30 minutes.
- *Total Estimated Professional Development Experience Host Survey Burden Time:* 61 hours.
- *Estimated Number of Reciprocal Exchange Alumni Survey Respondents:* 172.
- *Estimated Number of Reciprocal Exchange Alumni Responses:* 52.
- *Average Time per Reciprocal Exchange Alumni Survey:* 30 minutes.
- *Total Estimated Reciprocal Exchange Alumni Survey Burden Time:* 26 hours.
- *Estimated Number of U.S. Community Members Survey Respondents:* 50.
- *Estimated Number of U.S. Community Members Responses:* 15.
- *Average Time per U.S. Community Members Survey:* 25 minutes.
- *Total Estimated U.S. Community Members Survey Burden Time:* 6.25 hours.
- *Estimated Number of Academic and Leadership Institute Staff Key Informant Interview Participants:* 15.
- *Average Time per Academic and Leadership Institute Staff Key Informant Interviews:* 60 minutes.
- *Total Estimated Academic and Leadership Institute Staff Key Informant Interviews Burden Time:* 15 hours.
- *Estimated Number of Professional Development Experience Host Organization Staff Key Informant Interview Participants:* 15.
- *Average Time per Professional Development Experience Host Organization Staff Key Informant Interviews:* 60 minutes.
- *Total Estimated Professional Development Experience Host Organization Staff Key Informant Interviews Burden Time:* 15 hours.
- *Estimated Number of Reciprocal Exchange Alumni Key Informant Interview Participants:* 15.
- *Average Time per Reciprocal Exchange Alumni Key Informant Interviews:* 60 minutes.
- *Total Estimated Reciprocal Exchange Alumni Key Informant Interviews Burden Time:* 15 hours.
- *Estimated Number of U.S. Community Member Focus Group Participants:* 15.
- *Average Time per U.S. Community Member Focus Group:* 75 minutes.
- *Total Estimated U.S. Community Member Focus Group Burden Time:* 18.75 hours.
- *Estimated Number of Fellowship Experience Map Participants:* 40.
- *Average Time per Fellowship Experience Map Interview:* 60 minutes.
- *Total Estimated U.S. Community Member Focus Group Burden Time:* 40 hours.
- *Total Estimated Burden Time:* 217 annual hours.
- *Frequency:* Once.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Mandela Washington Fellowship for Young African Leaders, begun in 2014, is the flagship program of the Young African Leaders Initiative (YALI) that empowers young people through academic coursework, leadership training, and networking. The Fellows, who are between the ages of 25 and 35, have established records of accomplishment in promoting

innovation and positive impact in their organizations, institutions, communities, and countries. This program is funded pursuant to the Mutual Educational and Cultural Exchanges Act of 1961 (22 U.S.C. 2451–2464).

To evaluate the impacts of the program, the U.S. Department of State's Bureau of Educational and Cultural Affairs (ECA) intends to conduct an evaluation of the program which cover Alumni from the 2014 through the 2018 cohorts, Academic and Leadership Institute staff and representatives, Professional Development Experience representatives, Reciprocal Exchange participants, and other U.S. Community Members. This timeframe covers the first five-year grant period of the Mandela Washington Fellowship, which was implemented by IREX. As the Mandela Washington Fellowship has been implemented for five years, ECA is conducting this evaluation to determine the extent to which the program is achieving its long-term goals. In order to do so, ECA has contracted Guidehouse LLP to conduct surveys, interviews, and focus groups with Fellowship Alumni and relevant stakeholders they engaged with during their time in the U.S.

Methodology

To create an understanding of how the Mandela Washington Fellowship impacts individual stakeholder groups who engage in the program, the evaluation team will segment data collection by identifying the impact of the Fellowship program on Alumni, U.S. participants, home communities in Africa and the United States, and overall progress towards U.S. foreign policy objectives. The evaluation team will also review areas for improvement and/or change within the program's operations based on respondent feedback.

The evaluation will use a mixed methods approach to data collection, utilizing qualitative and quantitative techniques, including: online surveys, stakeholder interviews (remote and in-person), focus group discussions (in-person), and Fellowship Experience Maps of a small sample of Fellowship Alumni and one U.S. representative. The Fellowship Experience Maps are detailed case studies of select Fellows' and Reciprocal Exchange Awardees' experiences during the Fellowship. Data analysis will then be undertaken to illustrate impact and lessons learned, and to draw linkages between program track and outcomes.

Aleisha Woodward,

Deputy Assistant Secretary.

[FR Doc. 2019–15854 Filed 7–25–19; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 10827]

Updating the State Department's List of Entities and Subentities Associated With Cuba (Cuba Restricted List)

ACTION: Updated publication of list of entities and subentities; notice.

SUMMARY: The Department of State is publishing an update to its List of Restricted Entities and Subentities Associated with Cuba (Cuba Restricted List) with which direct financial transactions are generally prohibited under the Cuban Assets Control Regulations (CACR). This Cuba Restricted List is also considered during review of license applications submitted to the Department of Commerce's Bureau of Industry and Security (BIS) pursuant to the Export Administration Regulations (EAR).

DATES: The Cuba Restricted List is updated as of July 26, 2019.

FOR FURTHER INFORMATION CONTACT: Robert Haas, Office of Economic Sanctions Policy and Implementation, 202–647–7489; Office of the Coordinator for Cuban Affairs, tel.: 202–453–8456, Department of State, Washington, DC 20520.

SUPPLEMENTARY INFORMATION:

Background

On June 16, 2017, the President signed National Security Presidential Memorandum-5 on Strengthening the Policy of the United States Toward Cuba (NSPM–5). As directed by NSPM–5, on November 9, 2017, the Department of the Treasury's Office of Foreign Assets Control (OFAC) published a final rule in the **Federal Register** amending the CACR, 31 CFR part 515, and the Department of Commerce's Bureau of Industry and Security (BIS) published a final rule in the **Federal Register** amending, among other sections, the section of the Export Administration Regulations (EAR) regarding Cuba, 15 CFR 746.2. The regulatory amendment to the CACR added § 515.209, which generally prohibits direct financial transactions with certain entities and subentities identified on the State Department's Cuba Restricted List. The regulatory amendment to 15 CFR 746.2, notes BIS will generally deny applications to export or re-export items for use by entities or subentities identified on the Cuba Restricted List. The State Department is now updating the Cuba Restricted list, as published below and available on the State Department's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*).

This update includes four additional subentities. This is the fourth update to the Cuba Restricted List since it was published November 9, 2017 (82 FR 52089). Previous updates were published November 15, 2018 (see 83 FR 57523), March 9, 2019 (see 84 FR 8939), and April 24, 2019 (see 84 FR 17228). The State Department will continue to update the Cuba Restricted List periodically.

The publication of the updated Cuba Restricted List further implements the directive in paragraph 3(a)(i) of NSPM–5 for the Secretary of State to identify the entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel, and publish a list of those identified entities and subentities with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.

Electronic Availability

This document and additional information concerning the Cuba Restricted List are available from the Department of State's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*).

List of Restricted Entities and Subentities Associated With Cuba as of July 26, 2019

Below is the U.S. Department of State's list of entities and subentities under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services or personnel with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba. For information regarding the prohibition on direct financial transactions with these entities, please see 31 CFR 515.209. All entities and subentities were listed effective November 9, 2017, unless otherwise indicated.

* * * *Entities or subentities owned or controlled by another entity or subentity on this list are not treated as restricted unless also specified by name on the list.* * * *

Ministries

MINFAR—Ministerio de las Fuerzas Armadas Revolucionarias
MININT—Ministerio del Interior

Holding Companies

CIMEX—Corporación CIMEX S.A.
Compañía Turística Habaguanex S.A.
GAESA—Grupo de Administración Empresarial S.A.
Gaviota—Grupo de Turismo Gaviota
UIM—Unión de Industria Militar

Hotels in Havana and Old Havana

Aparthotel Montehabana
Gran Hotel Manzana Kempinski
H10 Habana Panorama
Hostal Valencia
Hotel Ambos Mundos
Hotel Armadores de Santander
Hotel Beltrán de Santa Cruz
Hotel Conde de Villanueva
Hotel del Tejadillo
Hotel el Bosque
Hotel el Comendador
Hotel el Mesón de la Flota
Hotel Florida
Hotel Habana 612
Hotel Kohly
Hotel Los Frailes
Hotel Marqués de Prado Ameno
Hotel Palacio Cueto *Effective July 26, 2019*
Hotel Palacio del Marqués de San Felipe y Santiago de Bejucal
Hotel Palacio O'Farrill
Hotel Park View
Hotel Raquel
Hotel San Miguel
Hotel Santa Isabel *Effective April 24, 2019*
Hotel Telégrafo
Hotel Terral
Iberostar Grand Packard Hotel *Effective November 15, 2018*
Memories Miramar Havana
Memories Miramar Montehabana
SO/Havana Paseo del Prado *Effective November 15, 2018*

Hotels in Santiago de Cuba

Villa Gaviota Santiago

Hotels in Varadero

Blau Marina Varadero Resort
also Fiesta Americana Punta Varadero *Effective November 15, 2018*
also Fiesta Club Adults Only *Effective March 12, 2019*
Grand Memories Varadero
Hotel El Caney Varadero *Effective April 24, 2019*
Hotel Las Nubes *Effective November 15, 2018*
Hotel Oasis *Effective November 15, 2018*
Iberostar Bella Vista *Effective November 15, 2018*
Iberostar Laguna Azul
Iberostar Playa Alameda
Meliá Marina Varadero
Meliá Marina Varadero Apartamentos *Effective April 24, 2019*
Meliá Peninsula Varadero
Memories Varadero
Naviti Varadero
Ocean Varadero El Patriarca
Ocean Vista Azul
Paradisus Princesa del Mar
Paradisus Varadero
Sol Sirenas Coral

Hotels in Pinar del Rio

Hotel Villa Cabo de San Antonio
Hotel Villa Maria La Gorda y Centro Internacional de Buceo

Hotels in Baracoa

Hostal 1511
Hostal La Habanera
Hostal La Rusa
Hostal Rio Miel
Hotel El Castillo
Hotel Porto Santo
Villa Maguana

Hotels in Cayos de Villa Clara

Angsana Cayo Santa María *Effective November 15, 2018*
Dhawa Cayo Santa María
Golden Tulip Aguas Claras *Effective November 15, 2018*
Hotel Cayo Santa María
Hotel Playa Cayo Santa María
Iberostar Ensenachos
Las Salinas Plana & Spa *Effective November 15, 2018*
La Salina Noreste *Effective November 15, 2018*
La Salina Suroeste *Effective November 15, 2018*
Meliá Buenavista
Meliá Cayo Santa María
Meliá Las Dunas
Memories Azul
Memories Flamenco
Memories Paraíso
Ocean Casa del Mar
Paradisus Los Cayos *Effective November 15, 2018*
Royalton Cayo Santa María
Sercotel Experience Cayo Santa María *Effective November 15, 2018*
Sol Cayo Santa María
Starfish Cayo Santa María *Effective November 15, 2018*
Valentín Perla Blanca *Effective November 15, 2018*
Villa Las Brujas
Warwick Cayo Santa María
also Labranda Cayo Santa María Hotel *Effective November 15, 2018*

Hotels in Holguín

Blau Costa Verde Beach & Resort
also Fiesta Americana Holguín Costa Verde *Effective November 15, 2018*
Hotel Playa Costa Verde
Hotel Playa Pesquero
Memories Holguín
Paradisus Río de Oro Resort & Spa
Playa Costa Verde
Playa Pesquero Premium Service
Sol Rio de Luna y Mares
Villa Cayo Naranjo
Villa Cayo Saetia
Villa Pinares de Mayari

Hotels in Jardines del Rey

Cayo Guillermo Resort Kempinski *Effective July 26, 2019*
Grand Muthu Cayo Guillermo *Effective November 15, 2018*
Hotel Playa Coco Plus
Iberostar Playa Pilar
Meliá Jardines del Rey
Memories Caribe
Pestana Cayo Coco

Hotels in Topes de Collantes

Hostal Los Helechos
Kurhotel Escambray *Effective November 15, 2018*
Los Helechos
Villa Caburni

Tourist Agencies

Crucero del Sol
Gaviota Tours

Marinas

Marina Gaviota Cabo de San Antonio (Pinar del Rio)
Marina Gaviota Cayo Coco (Jardines del Rey)
Marina Gaviota Las Brujas (Cayos de Villa Clara)
Marina Gaviota Puerto Vita (Holguín)
Marina Gaviota Varadero (Varadero)

Stores in Old Havana

Casa del Abanico
Colección Habana
Florería Jardín Wagner
Joyería Coral Negro—Additional locations throughout Cuba
La Casa del Regalo
San Ignacio 415
Soldadito de Plomo
Tienda El Navegante
Tienda Muñecos de Leyenda
Tienda Museo El Reloj Cuervo y Sobrinos

Entities Directly Serving the Defense and Security Sectors

ACERPROT—Agencia de Certificación y Consultoría de Seguridad y Protección Alias Empresa de Certificación de Sistemas de Seguridad y Protección *Effective November 15, 2018*
AGROMIN—Grupo Empresarial Agropecuario del Ministerio del Interior
APCI—Agencia de Protección Contra Incendios
CAHOMA—Empresa Militar Industrial Comandante Ernesto Che Guevara

Casa Editorial Verde Olivo *Effective July 26, 2019*
CASEG—Empresa Militar Industrial Transporte Occidente
CID NAV—Centro de Investigación y Desarrollo Naval
CIDAI—Centro de Investigación y Desarrollo de Armamento de Infantería
CIDAO—Centro de Investigación y Desarrollo del Armamento de Artillería e Instrumentos Ópticos y Ópticos Electrónicos
CORCEL—Empresa Militar Industrial Emilio Barcenas Pier
CUBAGRO—Empresa Comercializadora y Exportadora de Productos Agropecuarios y Agroindustriales
DATYS—Empresa Para El Desarrollo De Aplicaciones, Tecnologías Y Sistemas
DCM TRANS—Centro de Investigación y Desarrollo del Transporte
DEGOR—Empresa Militar Industrial Desembarco Del Granma
DSE—Departamento de Seguridad del Estado Editorial Capitán San Luis *Effective July 26, 2019*
EMIAT—Empresa Importadora Exportadora de Abastecimientos Técnicos
Empresa Militar Industrial Astilleros Astimar
Empresa Militar Industrial Astilleros Centro
Empresa Militar Industrial Yuri Gagarin
ETASE—Empresa de Transporte y Aseguramiento Ferretería TRASVAL
GELCOM—Centro de Investigación y Desarrollo Grito de Baire Impresos de Seguridad
MECATRONICS—Centro de Investigación y Desarrollo de Electrónica y Mecánica
NAZCA—Empresa Militar Industrial Granma
OIBS—Organización Integración para el Bienestar Social
PLAMEC—Empresa Militar Industrial Ignacio Agramonte
PNR—Policía Nacional Revolucionaria
PROVARI—Empresa de Producciones Varias
SEPSA—Servicios Especializados de Protección
SERTOD—Servicios de Telecomunicaciones a los Órganos de la Defensa *Effective November 15, 2018*
SIMPRO—Centro de Investigación y Desarrollo de Simuladores
TECAL—Empresa de Tecnologías Alternativas
TECNOPRO—Empresa Militar Industrial ''G.B. Francisco Cruz Bourzac''
TECNOTEX—Empresa Cubana Exportadora e Importadora de Servicios, Artículos y Productos Técnicos Especializados
TGF—Tropas de Guardafronteras
UAM—Unión Agropecuaria Militar
ULAEX—Unión Latinoamericana de Explosivos
XETID—Empresa de Tecnologías de la Información Para La Defensa
YABO—Empresa Militar Industrial Coronel Francisco Aguiar Rodríguez

Additional Subentities of CIMEX

ADESA/ASAT—Agencia Servicios Aduanales (Customs Services)
Cachito (Beverage Manufacturer)
Contex (Fashion)
Datacimex
ECUSE—Empresa Cubana de Servicios
Inmobiliaria CIMEX (Real Estate)
Inversiones CIMEX
Jupiña (Beverage Manufacturer)
La Maisón (Fashion)
Najita (Beverage Manufacturer)
Publicitaria Imagen (Advertising)
Residencial Tarara S.A. (Real Estate/ Property Rental) *Effective November 15, 2018*
Ron Caney (Rum Production)
Ron Varadero (Rum Production)
Telecable (Satellite Television)
Tropicola (Beverage Manufacturer)
Zona Especializada de Logística y Comercio (ZELCOM)

Additional Subentities of GAESA

Aerogaviota *Effective April 24, 2019*
Almacenes Universales (AUSA)
ANTEX—Corporación Antillana Exportadora
Compañía Inmobiliaria Aurea S.A. *Effective November 15, 2018*
Dirección Integrada Proyecto Mariel (DIP)
Empresa Inmobiliaria Almest (Real Estate)
GRAFOS (Advertising)
RAFIN S.A. (Financial Services)
Sociedad Mercantin Inmobiliaria Caribe (Real Estate)
TECNOIMPORT
Terminal de Contenedores de la Habana (TCH)
Terminal de Contenedores de Mariel, S.A.
UCM—Unión de Construcciones Militares
Zona Especial de Desarrollo Mariel (ZEDM)
Zona Especial de Desarrollo y Actividades Logísticas (ZEDAL)

Additional Subentities of Gaviota

AT Comercial
Diving Center—Marina Gaviota *Effective April 24, 2019*
Gaviota Hoteles Cuba *Effective March 12, 2019*
Hoteles Habaguanex *Effective March 12, 2019*
Hoteles Playa Gaviota *Effective March 12, 2019*
Manzana de Gomez
Marinas Gaviota Cuba *Effective March 12, 2019*
PhotoService
Plaza La Estrella *Effective November 15, 2018*
Plaza Las Dunas *Effective November 15, 2018*
Plaza Las Morlas *Effective November 15, 2018*
Plaza Las Salinas *Effective November 15, 2018*
Plaza Las Terrazas del Atardecer *Effective November 15, 2018*
Plaza Los Flamencos *Effective November 15, 2018*
Plaza Pesquero *Effective November 15, 2018*
Producciones TRIMAGEN S.A. (Tiendas Trimagen)

Additional Subentities of Habaguanex

Sociedad Mercantil Cubana Inmobiliaria Fenix S.A. (Real Estate)

*** Activities in parentheticals are intended to aid in identification, but are only representative. All activities of listed entities and subentities are subject to the applicable prohibitions.***

Dated: July 18, 2019.

Manisha Singh,

Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2019–15929 Filed 7–25–19; 8:45 am]

BILLING CODE 4710–AE–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36325]

Spokane, Spangle & Palouse Railway, L.L.C.—Lease and Operation Exemption—Washington State Department of Transportation

Spokane, Spangle & Palouse Railway, L.L.C. (SSPR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from the Washington State Department of Transportation (WSDOT) and operate approximately 102.6 miles of rail line (the Lines). SSPR states that the Lines consist of: (1) The Colfax-Moscow Line (a) between milepost 3.0 at Colfax, Wash., and milepost 18.7 at Pullman, Wash., and (b) between milepost 75.9 at Pullman and milepost 84.05 at the Washington-Idaho state line; (2) the Washington, Idaho, and Montana Line between milepost 0.0 at Palouse, Wash., and milepost 3.85 at the Washington state line; and (3) the Palouse and Lewiston Line between milepost 1.0 at Marshall, Wash., and milepost 75.9 at Pullman.[1]

[1] Although SSPR's original submission stated that the Lines are ''located in Washington and Idaho,''

SSPR states that it will shortly enter into an agreement with WSDOT to lease the Lines from WSDOT and SSPR will be the operator of the Lines.

According to SSPR, the lease does not contain any provision that prohibits SSPR from interchanging traffic with a third party or limits SSPR's ability to interchange with a third party.

SSPR certifies that its projected revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier and will not exceed $5 million.

The earliest this transaction may be consummated is August 11, 2019 (30 days after the verified notice of exemption was filed).[2]

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than August 2, 2019 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36325, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on SSPR's representative, Karl Morell, Karl Morell and Associates, 440 1st Street NW, Suite 440, Washington, DC 20001.

According to SSPR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b)(1).

Board decisions and notices are available at *www.stb.gov*.

Decided: July 17, 2019.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2019–15941 Filed 7–25–19; 8:45 am]

BILLING CODE 4915–01–P

(Verified Notice 1), on July 12, 2019, SSPR filed a supplement clarifying that the Lines are located within the State of Washington and none are located in the State of Idaho.

[2] The date of SSPR's supplement (July 12, 2019) will be considered the filing date for the purposes of calculating the effective date of the exemption.

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36326]

Brookfield Asset Management, Inc. and DJP XX, LLC—Control Exemption—Genesee & Wyoming, Inc., et al.

On July 9, 2019, Brookfield Asset Management, Inc. (Brookfield), and DJP XX, LLC (DJP), filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to allow DJP and Brookfield to control Genesee & Wyoming Inc. (GWI) and the 106 rail carriers that are subject to the jurisdiction of the Board and that GWI controls (GWI Railroads). According to the verified notice, Brookfield is an alternative asset manager, and DJP [1] is a limited liability company specially formed to acquire GWI, which is a publicly-traded non-carrier holding company that controls, through direct or indirect equity ownership, the GWI Railroads. As a result of the proposed transaction, GWI would become a privately-held company and a wholly-owned subsidiary of DJP.

Brookfield and DJP state, among other things, that the proposed transaction falls within the class exemption set forth at 49 CFR 1180.2(d)(2), because (i) the GWI Railroads do not connect with any rail line owned or controlled by DJP or Brookfield; [2] (ii) the proposed transaction is not part of a series of anticipated transactions that would connect any railroad owned or controlled by DJP or Brookfield with any GWI Railroad, or that would connect any of the GWI Railroads with each other; and (iii) the proposed transaction does not involve a Class I carrier. (Verified Notice 2–3.)

The Board is considering the issues presented here, including whether the class exemption is appropriate for this transaction. *See* 49 U.S.C. 10502(d). To provide sufficient time for the Board to fully consider the issues presented, the exemption that is the subject of this proceeding will not become effective until further order of the Board. *See, e.g., SJRE–R.R. Series—Exemption Under 49 CFR 1150.31—Rail Line in Harris Cty., Tex.,* FD 36279 (STB served Apr. 5, 2019) (to obtain more information, directing that exemption would not become effective until further order of the Board). To the extent this transaction is subject to review by the Committee on Foreign Investment in the United States, Brookfield and DJP will be directed to provide updates regarding the status and outcome of such review. Brookfield and DJP will be directed to provide these updates periodically as appropriate and to provide an update within seven days after they are notified of the outcome of such review. If Brookfield and DJP wish to file these updates confidentially, they may request a protective order.

The Board welcomes comments from the public, as well as from Brookfield and DJP, regarding these and any other relevant issues. Comments are due by August 21, 2019, and replies are due by September 5, 2019.

It is ordered:

1. The exemption that is the subject of this proceeding will not become effective until further order of the Board.

2. To the extent this transaction is subject to review by the Committee on Foreign Investment in the United States, Brookfield and DJP are directed to provide updates regarding the status and outcome of such review. Brookfield and DJP are directed to provide these updates periodically as appropriate and to provide an update within seven days after they are notified of the outcome of such review.

3. Comments are due by August 21, 2019, and replies are due by September 5, 2019.

4. Notice of this decision will be published in the **Federal Register**.

5. This decision is effective on its service date.

Decided: July 22, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2019–15884 Filed 7–25–19; 8:45 am]

BILLING CODE 4915–01–P

[1] Brookfield controls DJP within the meaning of 49 U.S.C. 10102(3).

[2] Brookfield and DJP state that neither Brookfield nor DJP owns or controls any railroads or rail lines.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Request To Release Airport Property for Land Disposal

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice; request for comments.

SUMMARY: The FAA proposes to rule and invites public comment on the release of land at the Ottumwa Regional Airport, Ottumwa, Iowa.

DATES: Comments must be received on or before August 26, 2019.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Amy J. Walter, Airports Land Specialist, Federal Aviation Administration,

Airports Division, ACE–620G, 901 Locust, Room 364, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: Joni Keith, City Attorney, City of Ottumwa, 105 East Third Street, Ottumwa, IA 52501, (641) 683–0625.

FOR FURTHER INFORMATION CONTACT: Amy J. Walter, Airports Land Specialist, Federal Aviation Administration, Airports Division, ACE–620G, 901 Locust, Room 364, Kansas City, MO 64106, (816) 329–2603, *amy.walter@faa.gov.* The request to release property may be reviewed, by appointment, in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release approximately 2.78 acres consisting of 1 parcel of airport property at the Ottumwa Regional Airport (OTM) under the provisions of 49 U.S.C. 47107(h)(2). On December 6, 2018, the City Attorney of the City of Ottumwa requested a release from the FAA to sell one parcel of land totaling 2.78 acres improved with a warehouse. Buyer, Steven Roquet, will use the land and warehouse for storage of equipment. On July 22, 2019, the FAA determined that the request to release property at the Ottumwa Regional Airport (OTM) submitted by the Sponsor meets the procedural requirements of the Federal Aviation Administration and the release of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this notice.

The Following Is a Brief Overview of the Request

The Ottumwa Regional Airport (OTM) is proposing the release of airport property of 1 parcel totaling 2.78 acres, more or less. The release of land is necessary to comply with Federal Aviation Administration Grant Assurances that do not allow federally acquired airport property to be used for non-aviation purposes. The sale of the subject property will result in the land at the Ottumwa Regional Airport (OTM) being changed from aeronautical to non-aeronautical use and release the lands from the conditions of the Airport Improvement Program Grant Agreement Grant Assurances in order to dispose of the land. In accordance with 49 U.S.C. 47107(c)(2)(B)(i) and (iii), the airport will receive fair market value for the property, which will be subsequently reinvested in another eligible airport improvement project for general aviation use.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon appointment and request, inspect the application, notice and other documents determined by the FAA to be related to the application in person at the Ottumwa City Hall.

Issued in Kansas City, MO on July 22, 2019.

Jim A. Johnson,

Director, FAA Central Region, Airports Division.

[FR Doc. 2019–15931 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Transportation Projects in Florida

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for Judicial Review of actions by the FHWA and other Federal Agencies.

SUMMARY: The FHWA, on behalf of the Florida Department of Transportation (FDOT), is issuing this notice to announce actions taken by FHWA and other Federal Agencies that are final within the meaning of Federal law. These actions relate to the proposed Brooks Bridge replacement project which carries State Road (S.R.) 30/(U.S. 98) from S.R. 145 (Perry Avenue) in the City of Fort Walton Beach over the Santa Rosa Sound and the Gulf Intracoastal Waterway/Gulf Islands National Seashore, and include intersection improvements at S.R. 145 (Perry Avenue) on the west end of the bridge in the City of Fort Walton Beach and in the vicinity of Santa Rosa Boulevard, extending to Pier Road on the east end of Okaloosa Island in Okaloosa County, State of Florida. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, FHWA, on behalf of FDOT, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before December 23, 2019. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FDOT: Jason Watts, Director, Office of Environmental Management, FDOT, 605 Suwannee Street, MS 37, Tallahassee, Florida 32399; telephone (850) 414–4316; email: *Jason.watts@dot.state.fl.us.*

The FDOT Office of Environmental Management's normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern Standard Time), Monday through Friday, except State holidays.

SUPPLEMENTARY INFORMATION: Effective December 14, 2016, the Federal Highway Administration (FHWA) assigned, and the FDOT assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that FHWA and other Federal Agencies have taken final agency action subject to 23 U.S.C. 139 (*l*)(1) by issuing licenses, permits, and approvals for the project listed below. The actions by the Federal Agencies on the project, and the laws under which such actions were taken, are described in the final Environmental Assessment (EA)/Section 4(f) *de minimis* Evaluation and Finding of No Significant Impact (FONSI) in connection with the project, and in other project records for the listed project. The EA/Section 4(f) *de minimis* and FONSI and other documents for the listed project are available by contacting the FDOT at the address provided above. The FDOT EA/Section 4(f) *de minimis* and FONSI can be viewed and downloaded from the project website at *https://nwflroads.com/folders/?Projects%2FOkaloosa%2F415474-2%2Fmtgdocs.* Additional project documents can be found at *https://nwflroads.com/projects/415474–2.*

This notice applies to all Federal Agency decisions by issuing licenses, permits, and approvals as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351; Federal-Aid Highway Act (FAHA) [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act (CAA), 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 (4f) [49 U.S.C. 303 and 23 U.S.C. 138].

4. *Wildlife:* Endangered Species Act (ESA) [16 U.S.C. 1531–1544 and 1536]; Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d); Migratory Bird Treaty Act (MBTA) [16 U.S.C. 703–712]; Magnuson-Stevenson

Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended (106) [16 U.S.C. 470(f) *et seq.*]; Archaeological Resources Protection Act of 1977 (ARPA) [16 U.S.C. 470(aa)-470(II)]; Archaeological and Historic Preservation Act (AHPA) [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 (Civil Rights) [42 U.S.C. 20009(d)-2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377]; Coastal Barriers Resources Act (CBRA) [16 U.S.C. 3501 *et seq.*]; Coastal Zone Management Act (CZMA) [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)-300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Wetlands Mitigation, [23 U.S.C. 103(b)(6)(M) and 103(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

The project subject to this notice is:

Project Location: Okaloosa County, Florida—S.R.30/U.S. 98 in the City of Fort Walton Beach, extending to Pier Road on Okaloosa Island, crossing the Gulf Intracoastal Waterway and the National Park Service Gulf Islands National Seashore, Federal Project No: 4221–085–P. This project involves replacement of the John T. Brooks Bridge which carries S.R. 30/U.S. 98 over the Santa Rosa Sound and Gulf Intracoastal Waterway in Okaloosa County. To accommodate the bridge replacement, intersection improvements are necessary at S.R. 145 (Perry Avenue) on the west end of the bridge in the City of Fort Walton Beach, and in the vicinity of Santa Rosa Boulevard, extending to Pier Road on the east end on Okaloosa Island. Stormwater treatment facilities are proposed. The project will result in a *de minimis* use of the National Park Service Gulf Islands National Seashore under Section 4(f) of the U.S. Department of Transportation Act, 23 CFR 774.3(b).

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: June 24, 2019.

Karen M. Brunelle,

Director, Office of Project Development, Federal Highway Administration, Tallahassee, Florida.

[FR Doc. 2019–15792 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Transportation Projects in Florida; Statue of Limitations on Claims

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for Judicial Review of actions by FHWA and other Federal Agencies.

SUMMARY: The FHWA, on behalf of the Florida Department of Transportation (FDOT), is advising the public of final Federal actions taken by FHWA and other Federal Agencies that are final within the meaning of Federal law. These actions relate to proposed highway improvement project on the United States (U.S.) 90/State Road (S.R.) 10 corridor from Glover Lane in the City of Milton to S.R. 87N/Stewart Street, from S.R. 87N to Ward Basin Road, from Ward Basin Road to S.R. 87S, Federal Project Number: T129–348–R, in Santa Rosa County, State of Florida. These actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of FDOT, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal Agency actions on the listed highway project will be barred unless the claim is filed on or before December 23, 2019. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FDOT: Jason Watts, Director, Office of Environmental Management, FDOT, 605 Suwannee Street, MS 37, Tallahassee, Florida 32399; telephone (850) 414–4316; email: *Jason.Watts@dot.state.fl.us.* The FDOT's normal business hours are 8:00 a.m. to 5:00 p.m. (Eastern Standard Time), Monday through Friday, except State holidays.

SUPPLEMENTARY INFORMATION: Effective December 14, 2016, the FHWA assigned, and the FDOT assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Actions taken by FDOT on FHWA's behalf pursuant to 23 U.S.C. 327 constitute Federal agency actions for purposes of Federal law. Notice is hereby given that FHWA, and other Federal Agencies have taken final agency actions subject to 23 U.S.C. 139 (*l*)(1) by issuing licenses, permits, and approvals for the proposed improvement highway project. The highway project consists of three segments. Segment 1 (FDOT Project Identification (FPID) Number 440915–1), from Glover Lane in the City of Milton to S.R. 87N/Stewart Street, FDOT proposes to widen a 4-lane road to a 6-lane road and construct bicycle lanes and sidewalks. Segment 2 (FPID Number 440915–2), from S.R. 87N to Ward Basin Road, FDOT proposes to widen a 2-lane road to a 4-lane road with bicycle lanes and sidewalks, using the existing bridges and constructing two new bridges to accommodate eastbound traffic over the Blackwater River and Marquis Bayou. Segment 3 (FPID Number 440915–3), from Ward Basin Road to S.R. 87S, FDOT proposes to widen a 2-lane road to a 4-lane road with bicycle lanes and sidewalks. The actions by FHWA and other Federal agencies, and the laws under which such actions were taken, are described in the documented final Environmental Assessment (EA)/final Section 4(f) Individual Evaluation (Section 4(f)) with the Finding of No Significant Impact (FONSI) issued on March 25, 2019, the National Historic Preservation Act (NHPA) Section 106 review, and in other documents in the FDOT project records. The final EA/Section 4(f) and FONSI, and other project records, are available by contacting FDOT at the address provided above, or some can be viewed and downloaded from the project website at *https://nwflroads.com/folders/?Projects%2FSantaRosa%2F416748-4%2Fmtgdocs.*

This notice applies to the EA, the Section 4(f) determination, the FONSI,

the NHPA Section 106 review, and all other Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351; Federal –Aid Highway Act (FAHA) [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act (CAA), 42 U.S.C. 7401–7671(q).

3. Land: Section 4(f) of the Department of Transportation Act of 1966 (4f) [49 U.S.C. 303 and 23 U.S.C. 138].

4. *Wildlife:* Endangered Species Act (ESA) [16 U.S.C. 1531–1544 and 1536]; Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d); Migratory Bird Treaty Act (MBTA) [16 U.S.C. 703–712]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended (106) [16 U.S.C. 470(f) *et seq.*]; Archaeological Resources Protection Act of 1977 (ARPA) [16 U.S.C. 470(aa)-470(II)]; Archaeological and Historic Preservation Act (AHPA) [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 (Civil Rights) [42 U.S.C. 20009(d)-2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377]; Coastal Barriers Resources Act (CBRA) [16 U.S.C. 3501 *et seq.*]; Coastal Zone Management Act (CZMA) [16 U.S.C. 1451–1465]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)-300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; Wetlands Mitigation, [23 U.S.C. 103(b)(6)(M) and 103(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

The project subject to this notice is:

Project Location: Santa Rosa County, Florida—on the U.S. 90/S.R. 10 corridor from Glover Lane in the City of Milton crossing over the Blackwater River and Marquis Bayou to S.R. 87S, Federal Aid Project Number: T129–348–R.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued on: June 24, 2019.

Karen M. Brunelle,

Director, Office of Project Development, Federal Highway Administration, Tallahassee, Florida.

[FR Doc. 2019–15793 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2015–0221]

30-Day Notice of Request for Renewal of a Previously Approved Collection

AGENCY: Office of the Secretary (OST), Department of Transportation (Department) or (DOT).

ACTION: Notice and request for comments.

SUMMARY: The OSDBU invites public comments about our intention to request the Office of Management and Budget's (OMB) approval to renew an information collection. The collection involves ''SBTRC Regional Field Offices Intake Form (DOT F 4500)'' with *OMB Control Number* 2105–0554. A 60-day notice was published on May 23, 2019 (84 FR 23827). No comments were received.

DATES: Please submit comments by August 26, 2019.

ADDRESSES: You may submit comments [identified by Docket No. DOT–OST–2015–0221] through one of the following methods:

- *Office of Management and Budget, Attention: Desk Officer for U.S. Department of Transportation, Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503,*
- *email: oira_submission@omb.eop.gov.*
- *Fax: (202) 395–5806.*

FOR FURTHER INFORMATION CONTACT: Michelle Harris, 202–366–1930 ext. 62253, Office of Small and Disadvantaged Business Utilization, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W56–444, Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: SBTRC Regional Field Offices Intake Form (DOT F 4500).

OMB Control Number: 2105–0554.

Background: In accordance with Public Law 95–507, an amendment to the Small Business Act and the Small Business Investment Act of 1953, OSDBU is responsible for the implementation and execution of DOT activities on behalf of small businesses, in accordance with Section 8, 15 and 31 of the Small Business Act (SBA), as amended. The Office of Small and Disadvantaged Business Utilization also administers the provisions of Title 49, of the United States Cole, Section 332, the Minority Resource Center (MRC) which includes the duties of advocacy, outreach, and financial services on behalf of small and disadvantaged businesses and those certified under CFR 49 parts 23 and or 26 as Disadvantaged Business Enterprises (DBE). SBTRC's Regional Field Offices will collect information on small businesses, which includes Disadvantaged Business Enterprise (DBE), Women-Owned Small Business (WOB), Small Disadvantaged Business (SDB), 8(a), Service Disabled Veteran Owned Business (SDVOB), Veteran Owned Small Business (VOSB), HubZone, and types of services they seek from the Regional Field Offices. Services and responsibilities of the Field Offices include business analysis, general management & technical assistance and training, business counseling, outreach services/conference participation, short-term loan and bond assistance. The cumulative data collected will be analyzed by the OSDBU to determine the effectiveness of services provided, including counseling, outreach, and financial services. Such data will also be analyzed by the OSDBU to determine agency effectiveness in assisting small businesses to enhance their opportunities to participate in government contracts and subcontracts.

We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995, Public Law 104–13.

Title: Small Business Transportation Resource Center Regional Field Office Intake Form (DOT F 4500).

Form Numbers: DOT F 4500.

Type of Review: Renewal of an information collection.

The Regional Field Offices Intake Form, (DOT F 4500) is used to enroll small business clients into the program in order to create a viable database of firms that can participate in government contracts and subcontracts, especially those projects that are transportation related. Each area on the fillable pdf form must be filled in electronically by the Field Offices and submitted every quarter to OSDBU. The Offices will retain a copy of each Intake Form for their records. The completion of the form is used as a tool for making decisions about the needs of the business, such as; referral to technical assistance agencies for help, identifying the type of profession or trade of the business, the type of certification that the business holds, length of time in business, and location of the firm. This data can assist the Field Offices in developing a business plan or adjusting their business plan to increase its ability to market its goods and services to buyers and potential users of their services.

Respondents: SBTRC Regional Field Offices.

Estimated Number of Respondents: 100.

Frequency: The information will be collected quarterly.

Estimated Number of Responses: 100.

Estimated Total Annual Burden on Respondents: 600 hours per year.

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 collection; and d) ways to minimize the burden of the collection of information on respondents, by the use of electronic means, including the use of automated collection techniques or other forms of information technology. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC on July 19, 2019.

Michelle Harris,

Manager, Regional Assistance Division, Office of Small and Disadvantaged Business Utilization.

[FR Doc. 2019–15913 Filed 7–25–19; 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 Renewal; Submission for OMB Review; Lending Limits

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 the opportunity to comment on the renewal of an information collection, as required by the Paperwork Reduction Act of 1995 (PRA).

An agency 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, ''Lending Limits.'' The OCC also is giving notice that the document has been submitted to OMB for review.

DATES: Comments must be submitted on or before August 26, 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, Attention: Comment Processing, 1557–0221, Office of the Comptroller of the Currency, 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 ''1557–0221'' 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, 1557–0221, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to *oira_submission@omb.eop.gov.*

You may review comments and other related materials that pertain to this information collection [1] 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 ''1557–0221'' or ''Lending Limits.'' 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 (44 U.S.C. 3501 *et seq.*), federal agencies must obtain approval from the

[1] On May 6, 2019, the OCC published a 60-day notice for this information collection, 84 FR 19827.

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 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: Lending Limits.

OMB Control No.: 1557–0221.

Affected Public: Businesses or other for-profit.

Type of Review: Extension of a currently approved collection.

Description: 12 CFR 32.7(a) provides that, in addition to the amount that a national bank or savings association may lend to one borrower under 12 CFR 32.3, an eligible national bank or savings association may make:

(1) Residential real estate loans or extensions of credit to one borrower in the lesser of the following two amounts: 10 percent of its capital and surplus; or the percent of its capital and surplus, in excess of 15 percent, that a state bank or savings association is permitted to lend under the state lending limit that is available for residential real estate loans or unsecured loans in the state where the main office of the national bank or savings association is located;

(2) Small business loans or extensions of credit to one borrower in the lesser of the following two amounts: 10 percent of its capital and surplus; or the percent of its capital and surplus, in excess of 15 percent, that a state bank is permitted to lend under the state lending limit that is available for small business loans or unsecured loans in the state where the main office of the national bank or home office of the savings association is located; and

(3) Small farm loans or extensions of credit to one borrower in the lesser of the following two amounts: 10 percent of its capital and surplus; or the percent of its capital and surplus, in excess of 15 percent, that a state bank or savings association is permitted to lend under the state lending limit that is available for small farm loans or unsecured loans in the state where the main office of the national bank or savings association is located.

An eligible national bank or savings association must submit an application to, and receive approval from, its supervisory office before using the supplemental lending limits in § 32.7(a). The supervisory office may approve a completed application if it finds that approval is consistent with safety and soundness. Section 32.7(b) provides that the application must include:

(1) Certification that the national bank or savings association is an eligible bank or eligible savings association;

(2) Citations to relevant state laws or regulations;

(3) A copy of a written resolution by a majority of the bank's or savings association's board of directors approving the use of the limits and confirming the terms and conditions for use of this lending authority; and

(4) A description of how the board will exercise its continuing responsibility to oversee the use of this lending authority.

Twelve CFR 32.9(b) provides national banks and savings associations with three alternative methods for calculating the credit exposure of non-credit derivative transactions (the Internal Model Method, the Conversion Factor Matrix Method, and the Current Exposure Method) and two alternative methods for calculating such exposure for securities financing transactions. The OCC provided these alternative methods to reduce the practical burden of such calculations, particularly for small and mid-size banks and savings associations.

Under 12 CFR 32.9(b)(1)(i)(C)(*1*), the use of a model (other than the model approved for purposes of the Advanced Measurement Approach in the capital rules) must be approved in advance and in writing by the OCC specifically for part 32 purposes. If a national bank or federal savings association proposes to use an internal model that has been approved by the OCC for purposes of the Advanced Measurement Approach, the institution must provide prior written notification to the OCC prior to use of the model for lending limits purposes. OCC approval also is required before any substantive revisions are made to a model that is used for lending limits purposes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 295.

Estimated Annual Burden: 1,958 hours.

On May 6, 2019, the OCC issued a notice for 60 days of comment concerning this collection, 84 FR 19827. No comments were received.

Comments continue to be 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: July 17, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–15861 Filed 7–25–19; 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; Privacy of Consumer Financial Information

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, ''Privacy of Consumer Financial Information.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received on or before August 26, 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, Attention: Comment Processing, 1557–0216, Office of the Comptroller of the Currency, 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 ''1557–0216'' 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, 1557–0216, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to *oira_submission@omb.eop.gov.*

You may review comments and other related materials that pertain to this information collection [1] 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 ''1557–0216'' or ''Privacy of Consumer Financial Information''. 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, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), 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 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 the information collection in this notice.

Title: Privacy of Consumer Financial Information.

OMB Control No.: 1557–0216.

Description: The Gramm-Leach-Bliley Act (Act) (Pub. L. 106–102) requires this information collection. Regulation P (12 CFR part 1016), a regulation promulgated by the Consumer Financial Protection Board (CFPB), implements the Act's notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties.

The information collection requirements in 12 CFR part 1016 are as follows:

§ 1016.4(a) Initial privacy notice to consumers requirement—A national bank or federal savings association must provide a clear and conspicuous notice to customers and consumers that accurately reflects its privacy policies and practices.

§ 1016.5(a)(1) Annual privacy notice to customers requirement—A national bank or federal savings association must provide a clear and conspicuous notice to customers that accurately reflects its privacy policies and practices not less than annually during the continuation of the customer relationship.

§ 1016.8 Revised privacy notices—Before a national bank or federal savings association discloses any nonpublic personal information in a way that is inconsistent with the notices previously given to a consumer, the institution must provide the consumer with a clear and conspicuous revised notice of the institution's policies and practices, provide the consumer with a new opt out notice, give the consumer a reasonable opportunity to opt out of the disclosure, and the consumer must not opt out.

§ 1016.7(a) Form of opt out notice to consumers; opt out methods—Form of opt out notice—If a national bank or federal savings association is required to provide an opt out notice under § 1016.10(a), it must provide to each of its consumers a clear and conspicuous notice that accurately explains the right to opt out under that section. The notice must state:

- That the national bank or federal savings association discloses or reserves the right to disclose nonpublic personal information about its consumer to a nonaffiliated third party;
- That the consumer has the right to opt out of that disclosure; and
- A reasonable means by which the consumer may exercise the opt out right.

A national bank or federal savings association provides a reasonable means to exercise an opt out right if it:

- Designates check-off boxes on the relevant forms with the opt out notice;
- Includes a reply form with the opt out notice;
- Provides an electronic means to opt out; or
- Provides a toll-free number that consumers may call to opt out.

§§ 1016.10(a)(2) and 1016.10(c)—Consumers must take affirmative actions to exercise their rights to prevent financial institutions from sharing their information with nonaffiliated parties—

- Opt out—Consumers may direct that the national bank or federal savings association to not disclose nonpublic personal information about them to a nonaffiliated third party, other than permitted by §§ 1016.13–1016.15.
- Partial opt out—Consumers may exercise partial opt out rights by selecting certain nonpublic personal information or certain nonaffiliated third parties with respect to which the consumer wishes to opt out.

§§ 1016.7(h) and 1016.7(i) Continuing right to opt out and Duration of right to opt out—A consumer may exercise the right to opt out at any time. A consumer's direction to opt out is effective until the consumer revokes it in writing or, if the consumer agrees, electronically. When a customer relationship terminates, the customer's opt out direction continues to apply to the nonpublic personal information collected during or related to that relationship.

Type of Review: Regular.

Affected Public: Businesses or other for-profit; individuals.

Frequency of Response: On occasion.

Estimated Annual Number of Respondents: 2,451,659.

Estimated Total Annual Burden Hours: 626,011.25 hours.

On April 15, 2019, the OCC issued a notice for 60 days of comment

[1] On April 15, 2019, the OCC published a 60-day notice for this information collection, 84 FR 15290.

concerning this collection, 84 FR 15290. No comments were received. Comments continue to be 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 burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection 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: July 18, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2019–15862 Filed 7–25–19; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Multiemployer Pension Plan Application To Reduce Benefits

AGENCY: Department of the Treasury.

ACTION: Notice of availability; Request for comments.

SUMMARY: The Board of Trustees of the Composition Roofers Local 42 Pension Fund, a multiemployer pension plan, has submitted an application to reduce benefits under the plan in accordance with the Multiemployer Pension Reform Act of 2014 (MPRA). The purpose of this notice is to announce that the application submitted by the Board of Trustees of the Composition Roofers Local 42 Pension Fund has been published on the website of the Department of the Treasury (Treasury), and to request public comments on the application from interested parties, including participants and beneficiaries, employee organizations, and contributing employers of the Composition Roofers Local 42 Pension Fund.

DATES: Comments must be received by September 9, 2019.

ADDRESSES: You may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov,* in accordance with the instructions on that site. Electronic submissions through *www.regulations.gov* are encouraged.

Comments may also be mailed to the Department of the Treasury, MPRA Office, 1500 Pennsylvania Avenue NW, Room 1224, Washington, DC 20220, Attn: Danielle Norris. Comments sent via facsimile or email will not be accepted.

Additional Instructions. All comments received, including attachments and other supporting materials, will be made available to the public. Do not include any personally identifiable information (such as your Social Security number, name, address, or other contact information) or any other information in your comment or supporting materials that you do not want publicly disclosed. Treasury will make comments available for public inspection and copying on *www.regulations.gov* or upon request. Comments posted on the internet can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: For information regarding the application from the Composition Roofers Local 42 Pension Fund, please contact Treasury at (202) 622–1534 (not a toll-free number).

SUPPLEMENTARY INFORMATION: MPRA amended the Internal Revenue Code to permit a multiemployer plan that is projected to have insufficient funds to reduce pension benefits payable to participants and beneficiaries if certain conditions are satisfied. In order to reduce benefits, the plan sponsor is required to submit an application to the Secretary of the Treasury, which must be approved or denied in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor.

On June 28, 2019, the Board of Trustees of the Composition Roofers Local 42 Pension Fund submitted an application for approval to reduce benefits under the plan. As required by MPRA, that application has been published on Treasury's website at *https://www.treasury.gov/services/Pages/Plan-Applications.aspx.* Treasury is publishing this notice in the **Federal Register**, in consultation with PBGC and the Department of Labor, to solicit public comments on all aspects of the Composition Roofers Local 42 Pension Fund application.

Comments are requested from interested parties, including participants and beneficiaries, employee organizations, and contributing employers of the Composition Roofers Local 42 Pension Fund. Consideration will be given to any comments that are timely received by Treasury.

Dated: July 22, 2019.

David Kautter,

Assistant Secretary for Tax Policy.

[FR Doc. 2019–15912 Filed 7–25–19; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Multiemployer Pension Plan Application To Reduce Benefits

AGENCY: Department of the Treasury.

ACTION: Notice of availability; Request for comments.

SUMMARY: The Board of Trustees of the IBEW Local 237 Pension Fund, a multiemployer pension plan, has submitted an application to reduce benefits under the plan in accordance with the Multiemployer Pension Reform Act of 2014 (MPRA). The purpose of this notice is to announce that the application submitted by the Board of Trustees of the IBEW Local 237 Pension Fund has been published on the website of the Department of the Treasury (Treasury), and to request public comments on the application from interested parties, including participants and beneficiaries, employee organizations, and contributing employers of the IBEW Local 237 Pension Fund.

DATES: Comments must be received by September 9, 2019.

ADDRESSES: You may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov,* in accordance with the instructions on that site. Electronic submissions through *www.regulations.gov* are encouraged.

Comments may also be mailed to the Department of the Treasury, MPRA Office, 1500 Pennsylvania Avenue NW, Room 1224, Washington, DC 20220, Attn: Danielle Norris. Comments sent via facsimile or email will not be accepted.

Additional Instructions. All comments received, including attachments and other supporting materials, will be made available to the public. Do not include any personally identifiable information (such as your Social Security number, name, address, or other contact information) or any other information in your comment or supporting materials that you do not want publicly disclosed. Treasury will make comments available for public inspection and copying on *www.regulations.gov* or upon request. Comments posted on the internet can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: For information regarding the application from the IBEW Local 237 Pension Fund, please contact Treasury at (202) 622–1534 (not a toll-free number).

SUPPLEMENTARY INFORMATION: MPRA amended the Internal Revenue Code to permit a multiemployer plan that is projected to have insufficient funds to reduce pension benefits payable to participants and beneficiaries if certain conditions are satisfied. In order to reduce benefits, the plan sponsor is required to submit an application to the Secretary of the Treasury, which must be approved or denied in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor.

On June 28, 2019, the Board of Trustees of the IBEW Local 237 Pension Fund submitted an application for approval to reduce benefits under the plan. As required by MPRA, that application has been published on Treasury's website at *https://www.treasury.gov/services/Pages/Plan-Applications.aspx.* Treasury is publishing this notice in the **Federal Register**, in consultation with PBGC and the Department of Labor, to solicit public comments on all aspects of the IBEW Local 237 Pension Fund application.

Comments are requested from interested parties, including participants and beneficiaries, employee organizations, and contributing employers of the IBEW Local 237 Pension Fund. Consideration will be given to any comments that are timely received by Treasury.

Dated: July 22, 2019.

David Kautter,

Assistant Secretary for Tax Policy.

[FR Doc. 2019–15914 Filed 7–25–19; 8:45 am]

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Part II

Department of Labor

Employment and Training Administration
Wage and Hour Division

20 CFR Parts 653 and 655

29 CFR Part 501

Temporary Agricultural Employment of H–2A Nonimmigrants in the United States; Proposed Rules

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 653 and 655

Wage and Hour Division

29 CFR Part 501

[DOL Docket No. ETA–2019–0007]

RIN 1205–AB89

Temporary Agricultural Employment of H–2A Nonimmigrants in the United States

AGENCY: Employment and Training Administration and Wage and Hour Division, Department of Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Labor (Department or DOL) proposes to amend its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. This notice of proposed rulemaking (NPRM or proposed rule) streamlines the process by which the Department reviews employers' applications for temporary agricultural labor certifications to use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2A status. Amendments to the current regulations focus on modernizing the H–2A program and eliminating inefficiencies. The Department also proposes to amend the regulations for enforcement of contractual obligations for temporary foreign agricultural workers and the Wagner-Peyser Act regulations to provide consistency with revisions to H–2A program regulations governing the temporary agricultural labor certification process.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before September 24, 2019.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB89, 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 '1205–AB89' (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's name and the RIN 1205–AB89. 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 background documents or comments, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 653, contact Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue 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/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 20 CFR part 655, contact Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue 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/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 29 CFR part 501, contact Amy DeBisschop, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0578 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655, Subpart B

A. Statutory Framework

The H–2A nonimmigrant worker visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services where the Secretary of Labor (Secretary) certifies that (1) there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1101(a)(15)(H)(ii)(a); section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1). The Secretary has delegated his authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC). Secretary's Order 06–2010 (Oct. 20, 2010). In addition, the Secretary has delegated to the Department's Wage and Hour Division (WHD) the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H–2A program. Secretary's Order 01–2014 (Dec. 19, 2014).

B. Current Regulatory Framework

Since 1987, the Department has operated the H–2A temporary labor certification program under regulations promulgated pursuant to the INA. The Department's current regulations governing the H–2A program were published in 2010.[1] The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655 and 29 CFR part 501. In addition, the Department has issued special procedures for the

[1] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 Final Rule).

employment of foreign workers in the herding and production of livestock on the range as well as animal shearing, commercial beekeeping, and custom combining occupations.[2] The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the regulation, with modifications, in 2015. Those provisions are now codified at §§ 655.200 through 655.235.

C. Need for New Rulemaking

It is the policy of the Department to increase protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of working conditions in the United States. In addition, these agencies make criminal referrals to the Department's Office of Inspector General to combat visa-related fraud schemes.[3]

The proposed rule furthers the goals of Executive Order (E.O.) 13788, Buy American and Hire American. *See* 82 FR 18837 (Apr. 21, 2017). The E.O. articulates the executive branch policy to ''rigorously enforce and administer'' the laws governing entry of nonimmigrant workers into the United States ''[i]n order to create higher wages and employment rates for workers in the United States, and to protect their economic interests.'' *Id.* sec. 2(b). It directs federal agencies, including the Department, to protect U.S. workers by proposing new rules and issuing new guidance to prevent fraud and abuse in nonimmigrant visa programs. *Id.* sec. 5.

The Department proposes to update its H–2A regulations to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. The changes proposed in this NPRM would enhance WHD's enforcement capabilities, thereby removing workforce instability that hinders the growth and productivity of our nation's farms, while allowing for aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers, in accordance with E.O. 13771, Reducing Regulation and Controlling Regulatory Costs. Below is an overview of major proposed changes, followed by a section-by-section discussion of all proposed changes.

1. Mandatory Electronic Filing and Electronic Signatures

a. Mandatory Electronic Filing

The Department proposes to require electronic filing (e-filing) of *Applications for Temporary Employment Certification* and job orders for most employers and, if applicable, their authorized representatives. E-filing will be required for the Form ETA–9142A and appropriate appendices; the Form ETA–790/790A and appropriate addenda; and all applicable documentation required by this subpart to secure a temporary agricultural labor certification from the Department, including the surety bonds required for H–2A Labor Contractors (H–2ALCs). In addition, the Office of Management and Budget's (OMB) approved 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 State Workforce Agency (SWA) and National Processing Center (NPC). The requirement to submit electronic *Applications for Temporary Employment Certification* and job orders would not apply in situations where the employer is unable or limited in its ability to use or access electronic forms as result of a disability or lacks access to e-filing.[4]

This proposal is intended to maximize end-to-end electronic processing of *Applications for Temporary Employment Certification* and job orders, which is an important technological objective of the Department. Although e-filing of applications using OFLC's iCERT Visa Portal System (iCERT System) is not currently mandated, in the Department's experience, employers prefer to use e-filing to request temporary agricultural labor certification in the H–2A program. Based on temporary agricultural labor certification applications processed during fiscal years (FYs) 2016 and 2017, more than 81 percent of employer H–2A applications were submitted electronically to the NPC for processing using the iCERT System. When compared to paper-filed applications, preparing H–2A applications and uploading supporting documentation through the iCERT System resulted in more complete submissions, better quality entries on form fields, and more streamlined processing using email as the primary form of communication with employers and, if applicable, their authorized representatives.[5] Further, the Department's experience indicates that only a handful of H–2A employers did not provide an email address on their H–2A applications.

The Department has determined that mandating e-filing will reduce costs and burdens for most employers and for the Department, reduce the frequency of delays related to filing applications, improve the quality of information collected, and promote administrative efficiency and accountability. For employers and their authorized representatives, the Department's proposal to require e-filing would improve the customer experience by permitting more prompt adjudication of applications and reducing paperwork burdens and mailing costs. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload the missing documentation. This approach reduces processing delays and costs for employers who would otherwise need to pay for expedited mail or private courier services to submit corrected applications.

Paper-based submissions are more costly for the Department to process than electronic submissions because they require manual data entry of information contained in the required documents and manual uploading of scanned copies of the documents into the iCERT System's electronic case documents repository. As noted in a 2012 Government Accountability Office

[2] *See* TEGL, No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041;* TEGL, No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043;* TEGL, No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040.*

[3] *See* News Release, U.S. Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse (June 6, 2017), *https://www.dol.gov/newsroom/releases/opa/opa20170606.*

[4] The lack of a computer may or may not constitute lack of access to e-filing under the proposed regulation. It depends on the circumstances presented by the employer at the time of filing.

[5] Based on an analysis of 18,775 temporary labor certification records processed during FY 2016 and 2017, approximately 66 percent of H–2A applications mailed to the NPC were issued a Notice of Deficiency (NOD), while approximately 47 percent of H–2A applications filed electronically were issued a NOD.

(GAO) report on the H–2A program, paper-based submissions can result in misplaced or lost documentation, unnecessary communication delays between employers and the Government, and missed opportunities to quickly resolve minor deficiencies in the application process.[6] Electronic submissions, on the other hand, do not require manual data entry by DOL and can be instantaneously categorized and assigned for review by the NPC. If an *Application for Temporary Employment Certification* filed electronically requires amendments or other corrections, often those amendments and corrections are automatically entered into the iCERT System. Furthermore, electronic submissions are more likely to include all necessary documentation and information because the Department can require validation of the form entries and supporting documentation prior to its submission.

The Department acknowledges that there may be opportunity costs associated with transitioning to a new way of filing and costs associated with changing familiar processes and learning new systems. The Department believes that the efficiencies gained in processing by the Department from an increase in electronic filing will outweigh these costs. The Department invites comment on this analysis.

Consistent with its adoption of mandatory e-filing, the Department plans to expand the capabilities of the iCERT System to permit the electronic execution and delivery of surety bonds. As explained more fully in § 655.132, accepting electronic surety bonds would further streamline the application process and reduce unnecessary delays, while preserving the Department's ability to enforce such bonds.

The Department anticipates that requiring e-filing will not require a change of practice for the vast majority of employers. Based on FY2019 data, approximately 94.1 percent of H–2A applications were filed electronically. Almost all of the remaining 5.9 percent of H–2A applications filed by mail also disclosed valid email addresses on the application form, thereby suggesting that employers and, if applicable, their authorized attorneys and agents have access to the internet and are likely capable of filing electronically. Employers without means to file electronically represent a small percentage of all filers, and the Department anticipates the very few employers without access to e-filing will continue to decrease with the growth of information technology and access to the internet in rural areas. However, the Department acknowledges that a small number of employers may be unable to take advantage of the more efficient e-filing process. Therefore, the proposal permits these employers to file using a paper-based process if they lack adequate access to e-filing. In addition, the proposal establishes a process for individuals with disabilities to request an accommodation to allow these employers to use or access forms and communications from the Department.

The Department seeks comments on its proposal to require e-filing. For example, the Department would like to know if there are members of the regulated community, aside from those already identified in the proposal, who would be significantly burdened if the Department requires e-filing. The Department also seeks comments on e-filing methodology, such as the convenience or inconvenience of e-filing and other advantages or disadvantages of the e-filing process compared to other filing processes.

b. Acceptance of Electronic Signatures

The Department proposes to promote greater 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 H–2A 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 December 2012, 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 an *Application for Temporary Employment Certification.* Although acceptance of electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete, and the Department and employers can achieve even greater efficiencies using and accepting electronic signature methods. For instance, the use of electronic signature methods is necessary for the Department to implement its proposal to accept electronic surety bonds.

Under this proposed rule, the Department would 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 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, 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 maintain records electronically. The GPEA 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, and 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 proposes to accept an electronic signature on H–2A 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.[7] In addition, OMB

[6] *See* GAO–12–706, H–2A Visa Program: Modernization and Improved Guidance Could Reduce Employer Application Burden (2012), U.S. Government Accountability Office.

[7] 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

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.[8] The Department will rely on best practices for electronic signature safety, such as these five signing requirements. Consistent with the GPEA and E–SIGN Act, the Department proposes to adopt 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 can meet 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 would enable employers, agents, and attorneys to reduce printing, paper, and storage costs. For employers that need to retain and refer to multiple applications for temporary agricultural labor certification, the time and costs savings can be considerable. For the Department, implementing electronic signatures would help reduce operational costs and improve processing efficiency, including through the acceptance of electronic surety bonds.

2. Revisions to the Adverse Effect Wage Rate and Prevailing Wage Methodologies

The Department also proposes to adjust the methodology used to establish the required wage rate for the H–2A program. Section 218(a)(1)(B) of the INA, 8 U.S.C. 1188(a)(1)(B), provides that an H–2A worker is only admissible if the Secretary determines that ''the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the adverse effect wage rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposes to maintain this wage structure with only minor modifications.

Within this structure, the Department proposes to establish separate AEWRs by agricultural occupation to better protect against adverse effect on the wages of similarly employed workers in the United States. In addition, updates to the prevailing wage methodology would set more practical standards that would allow the Department to establish reliable and accurate prevailing wage rates for workers and employers.

The Department currently sets the AEWR for all H–2A job opportunities at the annual average hourly gross wage for field and livestock workers (combined) for the state or region from the Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS). Using this methodology, the Department is currently able to establish an AEWR for every State except for Alaska, which is not covered by the FLS.

The Department proposes to set the AEWR for a particular agricultural occupation at the annual average hourly gross wage for that agricultural occupation in the State or region reported by the FLS when the FLS is able to report such a wage. If the FLS does not report a wage for an agricultural occupation in a State or region, the Department proposes to set the AEWR at the statewide annual average hourly wage for the standard occupational classification (SOC) from the Occupational Employment Statistics (OES) survey conducted by the Department's Bureau of Labor Statistics (BLS). This change to an occupation-based wage is intended to produce more accurate AEWRs than under the current practice of establishing a single rate for all agricultural workers in a state or region. The proposal reflects the Department's concern that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined). This is because the category of field and livestock workers (combined) from the FLS does not include workers who USDA classifies as supervisors; ''other workers,'' such as agricultural inspectors, animal breeders, and pesticide handlers and sprayers; or contract and custom workers. In addition, the use of generalized data for agricultural occupations within the field and livestock (combined) classification could produce a wage rate that is not sufficiently tailored to the wage necessary to protect against adverse effect for those occupations because that category aggregates the wages of workers performing significantly different job duties, such as agricultural equipment operators and crop laborers.

In addition, the Department proposes to modernize the current methodology used to conduct prevailing wage surveys, which applies to both H–2A and other job orders that use the Wagner-Peyser Act agricultural recruitment system. ETA Handbook 385 (Handbook 385 or the Handbook),[9] which pre-dates the creation of the H–2A program and has not been updated since 1981, currently sets the methodology used to establish prevailing wage rates for all agricultural job orders. The Handbook sets standards, including a requirement for in-person interviews, which are inconsistent with available resources at the state and federal levels. Due to the difficulty of implementing these resource-intensive standards, the SWAs are often required to report ''no finding'' from prevailing wage surveys; therefore, the surveys are both costly and fail to meet the aim of producing reliable prevailing wage rates. Accordingly, the Department proposes to update the prevailing wage standards to allow the SWAs and other state agencies to conduct surveys using more practical standards and establish reliable and accurate prevailing wage rates for workers and employers.

3. Incorporation of Certain Training and Employment Guidance Letters Into the H–2A Regulatory Structure

Similar to the Department's approach to incorporate the standards and procedures for sheep herders, goat herders, and the range production of livestock into regulations promulgated in 2015—and following the decision of the United States Court of Appeals for the District of Columbia in *Mendoza* v. *Perez,* 754 F.3d 1002 (D.C. Cir. 2014), explained below—the Department now

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).

[8] Federal Chief Information Council, Use of Electronic Signatures in Federal Organization Transactions, Version 1.0 (Jan. 25, 2013).

[9] *See* ETA Handbook No. 385 (Aug. 1981), *available at https://www.foreignlaborcert.doleta.gov/pdf/et_385_wage_finding_process.pdf.*

proposes to incorporate into the H–2A regulations, with some modifications, the standards and procedures related to animal shearing, commercial beekeeping, and custom combining in this NPRM. These standards and procedures are currently found in *Temporary and Employment Guidance Letters* (TEGL). The proposed standards and procedures, if adopted, would be incorporated at 20 CFR part 655 subpart B, 655.300 through 655.304.

4. The Definition of Agriculture

The Department proposes to expand the definition of ''agriculture'' under the H–2A program to include reforestation and pine straw activities. As further discussed below, although temporary foreign workers engaged in reforestation and pine straw activities are currently admitted under the H–2B program, these workers share many of the same characteristics as traditional agricultural crews.

5. The 30-Day Rule

The Department proposes to replace the 50 percent rule with a 30-day rule requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification,* and a longer recruitment period for those employers who choose to stagger the entry of H–2A workers into the United States, as explained below. Under the current regulation, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed. The obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain they will have a steady, stable, properly trained, and fully coordinated workforce. Since the implementation of the current regulation, the Department has collected a significant amount of data that shows that a very low number of U.S. workers apply for the job opportunity within 30 days after the start date of work, and even fewer after that.

Section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), tasked the Department with determining whether agricultural employers should be required by regulation to hire U.S. workers after H–2A workers have already departed for the place of employment. These provisions suggest that, in making this determination, the Department should weigh the ''benefits to United States workers and costs to employers.'' Based on available data, it appears that the costs of the rule to employers outweigh any benefits the rule may provide to U.S. workers. Replacing the 50 percent rule with a rule requiring employers to hire qualified, eligible U.S. worker applicants for a period of 30 days after the employer's first date of need will balance the needs of workers and employers. Requiring employers to hire workers 30 days into the contract period, while still disruptive to agricultural operations, shortens the period during which such disruptions may occur and restores some stability to employers that depend on the H–2A program. Providing U.S. workers the ability to apply for these job opportunities 30 days into the contract period ensures that U.S. workers still have access to these jobs after the start of the contract period during the period of time they are most likely to apply.

6. Staggered Entry

The Department proposes to permit the staggered entry of H–2A workers into the United States. Under this proposal, any employer that receives a temporary agricultural labor certification and an approved H–2A Petition may bring nonimmigrant workers into the United States at any time up to 120 days after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. If an employer chooses to stagger the entry of its workers, it must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer. This proposal will provide employers with the flexibility to accommodate changing weather and production conditions that are inherent to agricultural work. It will also reduce the need for employers to file multiple *Applications for Temporary Employment Certification* for same occupational classification in which the only difference is the expected start date of work, thus improving efficiencies for both employers and the Department.

II. Discussion of Proposed Revisions to 20 CFR Part 655, Subpart B; 20 CFR 653.501(c)(2)(i); and 29 CFR Part 501

A. Introductory Sections

1. Section 655.100, Scope and Purpose of Subpart B

The proposed revisions to this section clarify the statutory authority for the H–2A temporary agricultural labor certification process, and the scope of the Department's role in receiving, reviewing, and adjudicating applications for temporary agricultural labor certification, and upholding the integrity of *Applications for Temporary Employment Certification.* These revisions also clarify the Department's authority to establish standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, as well as the rights and obligations of H–2A workers and workers in corresponding employment.

2. Section 655.101, Authority of the Agencies, Offices, and Divisions of the Department of Labor; and 29 CFR 501.1, Purpose and Scope

The revisions to this section clarify the delegated authority of, and division of responsibilities between, ETA and WHD under the H–2A program. This section addresses the delegated authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of qualified U.S. workers to perform the temporary agricultural labor or services, and whether the employment of the H–2A workers will adversely affect the wages and working conditions of workers in the United States similarly employed. This provision also discusses the authority delegated to WHD, the agency responsible for investigation and enforcement of the terms and conditions of H–2A temporary agricultural labor certifications. Finally, this provision reminds program users of each agency's concurrent authority to impose a debarment remedy when appropriate under ETA regulations at 20 CFR 655.182 or under WHD regulations at 29 CFR 501.20.

3. Section 655.102, Transition Procedures

a. Proposal To Rescind the Provision That Allows for the Creation of Special Procedures

Special procedures in the H–2A program were based upon a determination that variations from the normal labor certification processes

were necessary to permit the temporary employment of foreign workers in specific industries or occupations when able, willing, and qualified U.S. workers were not available and the employment of foreign workers would not adversely affect the wages or working conditions of workers in the United States similarly employed. The H–2A regulations have, since their creation, provided authority for the Department to ''establish, continue, revise, or revoke special procedures for processing certain H–2A applications.'' 20 CFR 655.102.

In *Mendoza* v. *Perez,* 754 F.3d 1002, 1022 (D.C. Cir. 2014), the D.C. Circuit concluded that 20 CFR 655.102 was ''a grant of unconstrained and undefined authority [, and the] purpose of the [Administrative Procedure Act (APA)] would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret the statute and regulation in binding the public to a strict and specific set of obligations.'' Accordingly, the court in *Mendoza* specifically held that the special procedures pertaining to sheep, goat, and cattle herding issued under § 655.102 were subject to the APA's notice and comment requirements because they possess all the hallmarks of a legislative rule and could not be issued through sub-regulatory guidance. 754 F.3d at 1024 (''The [special procedures] are necessarily legislative rules because they 'effect [ ] a [substantive] change in existing law or policy,' and 'effectively amend[ ] a prior legislative rule.' '') (citations omitted).

In light of *Mendoza,* the Department proposes to rescind from the H–2A regulations the general provision that allows for the creation of special procedures that establish variations for processing certain *Applications for Temporary Employment Certification.* The Department proposes, in this NPRM, procedures for handling applications for each of the occupations that currently have special procedures under this authority: Animal shearing, commercial beekeeping, and custom combining. The Department also proposes procedures for handling applications involving reforestation, which, as discussed in detail below, the Department proposes to include within the H–2A definition of agriculture activities.

b. Proposal To Add a Provision Providing Procedures for Implementing Changes Created by a Final Rule

The Department proposes to rename § 655.102, ''Transition procedures,'' and add a transition period in order to provide an orderly and seamless transition for implementing changes created by these proposed regulatory revisions, if adopted in a final rule. Generally, the Department processes all applications in accordance with the rules in effect on the date the *Application for Temporary Employment Certification* is submitted. However, based on the Department's program experience, a transition period will help provide employers and other stakeholders with time to understand and comply with regulatory revisions affecting the assurances and obligations of the H–2A program to obtain and employ workers under a temporary agricultural labor certification. Similarly, a transition period will allow the Department to implement necessary changes to program operations, application forms, technology systems, and to provide training and technical assistance to OFLC, SWAs, employers, and other stakeholders in order to familiarize them with changes required by this proposed rule.

Accordingly, the Department proposes that any application submitted by an employer prior to the effective date of a final rule must meet regulatory requirements and will be processed by the NPC in accordance with the 2010 Final Rule. The Department also proposes to establish a transition period that will apply to any application for which the first date of need for H–2A workers is no earlier than the effective date of a final rule and not later than the date that is 90 calendar days after the effective date of a final rule. Specifically, an employer submitting an application on or after the effective date of a final rule, where the first date of need for H–2A workers is not later than 90 calendar days after the effective date of a final rule, will continue to meet regulatory requirements and will be processed by the NPC in accordance with the current regulation. Thus, the Department proposes to establish a 90-day transition period in which employers are allowed to continue filing applications and receive temporary agricultural labor certifications under the regulatory requirements set forth in the current regulation. However, all applications submitted by employers on or after the effective date of a final rule, where the first date of need for H–2A workers is later than 90 calendar days after the effective date of a final rule, will be expected to fully comply with all of the requirements of a final rule. The Department invites comments on the length of the transition period, including impact and costs associated with a transition period longer or shorter than 90 days.

4. Section 655.103, Overview of This Subpart and Definition of Terms; 20 CFR 653.501(c)(2)(i) of the Wagner Peyser Act Regulations; and 29 CFR 501.3, Definitions

a. Paragraph (b), Definitions; and 20 CFR 653.501(c)(2)(i)

i. Adverse Effect Wage Rate

The current regulation provides that the AEWR is set at the annual weighted average hourly wage for field and livestock workers (combined) based on the USDA's FLS. To be consistent with the Department's proposal to adjust the current AEWR methodology, the Department proposes conforming changes to the definition of AEWR in this section. The Department discusses the proposed changes to the AEWR methodology in the preamble to § 655.120.

ii. Administrator, OFLC Administrator, WHD Administrator, and Wage and Hour Division

The current regulation defines the OFLC Administrator as the primary official of the OFLC or the OFLC Administrator's designee. The Department proposes to add an equivalent definition of ''WHD Administrator'' to clarify that the OFLC and WHD Administrators have unique roles in the H–2A temporary agricultural labor certification process. Additionally, the Department proposes to add a definition of ''Administrator'' that cross references the definitions of OFLC Administrator and WHD Administrator so that interested parties may be able to locate these definitions more easily. Finally, the Department proposes to add a definition of ''Wage and Hour Division'' to provide a clear definition of a term used throughout the current and proposed regulations.

iii. Area of Intended Employment

The Department proposes a minor amendment to the definition of ''area of intended employment'' that replaces the terms ''place of the job opportunity'' and ''worksite'' with the term ''place(s) of employment,'' consistent with the proposed inclusion and definition of ''place(s) of employment'' in this section. Based on the factual circumstances of each application, the Certifying Officer (CO) will continue using the term ''area of intended employment'' to assess whether each place of employment is within normal commuting distance from the first place of employment or, if designated, the centralized ''pick-up'' point (*e.g.,*

worker housing) to every other place of employment identified in the application and job order. The Department maintains that the recruitment of U.S. workers is most effective when the work performed under the job order is advertised to workers residing in the local or regional area and enables them to return to their permanent places of residence on a daily basis rather than traveling long distances to reach the places of employment. Longer than normal commuting times, transportation issues, geographic barriers, or the need to live away from home are all factors that can discourage U.S. workers from accepting a temporary agricultural job opportunity, making it challenging for the Department to accurately assess whether there are sufficient U.S. workers who are able, willing, and qualified to perform the labor or services involved in the application.

However, the Department acknowledges that the absence of a clear and objective standard for normal commuting distance in the definition of area of intended employment makes it difficult for employers to understand and predict how the Department will review the geographic scope of their job opportunities. Accordingly, the Department invites comments on whether it should further revise the definition of area of intended employment. Specifically, the Department is interested in comments focused on whether there are objective factors, commuting or labor market area designation systems, or other comprehensive commuting studies and data that can be used to more effectively determine normal commuting distances for the purpose of the Department's implementation of the H–2A program. The Department is also interested in comments on whether it should continue making fact-based determinations on a case-by-case basis, or whether it should impose a more uniform standard for all employers, such as maximum commuting distance or time above which will be considered an unreasonable commuting distance or time in all cases. Comments submitted under this proposed rule should address the advantages and disadvantages of each suggested alternative, and how implementation of the alternative will ensure the integrity of the labor market test and provide greater clarity to employers with respect to what constitutes a normal commuting distance to the places of employment identified in their applications and job orders.

iv. Average AEWR

The Department proposes to define a new term ''average adverse effect wage rate'' to complement proposed changes to § 655.132. As discussed more fully later in this preamble, the Department proposes to change the H–2A Labor Contractor (H–2ALC) surety bond requirement such that the required bond amounts adjust annually based on changes to a nationwide average AEWR. The Department will calculate and publish the average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b).[10] The average AEWR will be calculated as a simple average of the published AEWRs applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). This classification was chosen to benchmark the required bond amounts because the majority of workers employed by H–2ALCs perform work in this classification.

v. Employer and Joint Employment

Section 218 of the INA generally recognizes that growers, agricultural associations, and H–2A labor contractors that file applications are employers or joint employers.[11] In conformity with the statute as well as the Department's current policy and practice, the Department proposes to clarify the definitions of employer and joint employment with respect to the H–2A program to include those entities the statute recognizes as employers or joint employers. First, the Department proposes to add language to the definition of joint employment in the H–2A program that clarifies that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. Second, the Department proposes to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer, but only during the period in which the member employs H–2A workers sponsored under the association's joint employer application. Third, the Department proposes a slight change to the joint employment language in the current regulation to more expressly codify that the common law of agency determines joint employer status under the statute. Fourth, the Department proposes to add language to the definition of joint employment with respect to the H–2A program that would clarify that growers who file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and, if applicable, any corresponding workers. Fifth, in addition to the proposed changes to the definition of joint employment, the Department proposes to add language to the definition of employer to clarify that a person who files an application other than as an agent is an employer. Sixth, the Department proposes to add language to the definition of employer to clarify that a person on whose behalf an application is filed is an employer. These proposed revisions reflect the Department's longstanding administrative and enforcement practice that is already familiar to employers.

Controlling judicial and administrative decisions provide that to the extent a federal statute does not define the term employer, the common law of agency governs whether an entity is an employer.[12] Accordingly, the proposal continues to use the common law of agency to define the terms employer and joint employment for associations and growers that have not filed applications. Thus, for example, under the Department's current and continuing enforcement policy—with which employers are already familiar—if an agricultural association files as a joint employer, the association's employer-members are only joint employers with the association when they are jointly employing the H–2A or corresponding worker under the common law of agency.

The Department additionally notes that the current H–2A program definitions of employer and joint

[10] The Department published the 2018 AEWRs for non-range occupations in Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2018 Adverse Effect Wage Rates for Non-Range Occupations,* 82 FR 60628 (Dec. 21, 2017).

[11] *See* 8 U.S.C. 1188(c)(2) (''The employer shall be notified in writing within seven days of the date of filing if the application does not meet the [relevant] standards . . . .''); 8 U.S.C. 1188(c)(3)(A)(i) (''The Secretary of Labor shall make . . . the certification described in subsection (a)(1) if . . . the employer has complied with the criteria for certification . . . .''); 8 U.S.C. 1188(d)(2) (''If an association is a joint or sole employer of temporary agricultural workers . . . [H–2A] workers may be transferred among [employer]-members'').

[12] *See Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–24 (1992); *Garcia-Celestino* v. *Ruiz Harvesting,* 843 F.3d 1276, 1288 (11th Cir. 2016); *Admin.* v. *Seasonal Ag. Services, Inc.,* 2016 WL 5887688, at *6 (ARB, Sept. 30, 2016). The focus of the common law standard is the ''hiring entity's 'right to control the manner and means by which the product is accomplished.' '' *Ruiz Harvesting,* 843 F.3d at 1292–93 (quoting *Darden,* 503 U.S. at 323). Application of the standard typically entails consideration of a variety of factors. *See Ruiz Harvesting,* 843 F.3d at 1293 (citing *Darden,* 503 U.S. at 323–24).

employment, as well as those the Department proposes herein, are different from the definitions of ''employer,'' ''employee,'' ''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 an H–2A employer or joint employer.

Employer-Member Responsibility for Violations Committed Under a Joint Employer Application Filed by an Agricultural Association

Consistent with existing practice, when an agricultural association files a joint employer application, an employer-member of that association is an employer of the H–2A workers during the time when those workers perform work or services for the member. When only one employer-member is employing the H–2A workers at the time of a program violation, only that employer-member and its agricultural association are economically responsible for program violations.

Joint Employer Applications Under Proposed § 655.131(b)

Proposed § 655.131(b) generally codifies the Department's longstanding practice with regard to joint employer applications. Each grower party to a § 655.131(b) joint employer application will be jointly liable for compliance with all H–2A program requirements. Thus, for example, if employer C and employer D file a joint employer application under proposed § 655.131(b) and employer C fails to pay the H–2A workers the required wage, employer D will be jointly liable for employer C's violations. This codification of ongoing administrative and enforcement policy towards employers that have filed as joint employers under the program is designed to maintain consistency with the Department's well-known practices that are already familiar to employers.

The Department's approach to joint employment under § 655.131(b)—which aims to accommodate small growers that do not have full time work for their H–2A employees—is implied by the statute. The statute specifically contemplates that filers (other than agents) are employers and only expressly permits an entity (*i.e.,* an agricultural association) to transfer H–2A workers when the entity agrees to retain program responsibility with respect to the workers it transfers.[13] Therefore, the Department must require entities that jointly apply for H–2A workers, who they intend to transfer among themselves, to retain program responsibility for the transferred workers and, if applicable, any corresponding workers.

This proposed approach provides a flexible application system that harmonizes with the statutory language. Growers who prefer not to assume the shared liability under the proposed joint employer application may file through an agricultural association acting as a joint or sole employer. In addition to conformity with the statute, the Department's proposed approach is also consistent with judicial authority.[14]

Department's Approach to Imposing Liability Among Culpable Joint Employers

The Department will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the factors at 29 CFR 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. For example, if the Department determines an agricultural association achieved no financial gain from an employer-member's failure to pay the required wage to H–2A or corresponding workers, but that the employer-member achieved significant financial gain, the civil money penalty, if any, applicable to the association would likely be less than that applicable to the employer-member for this violation.

Proposal To Move Certain Requirements in the Definition of Employer

The current definition of employer in the H–2A program requires an employer to have a place of business in the United States and a means of contact for employment as well as a Federal Employer Identification Number (FEIN). The Department proposes to move these requirements to §§ 655.121(a)(1) and 655.130(a). The proposal will require a prospective employer to include its FEIN, its place of business in the United States and a means of contact for employment in both its job order submission to the NPC, and its *Application for Temporary Employment Certification.*

vi. First Date of Need and Period of Employment

The Department proposes to define the term ''first date of need'' as the first date on which the employer anticipates requiring the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification. This is the date that appears on the employer's job order and *Application for Temporary Employment Certification* as the start date of work for the job opportunity and will be used in recruitment and for calculating program requirements (*e.g.,* the positive recruitment period under § 655.158). By including the term ''anticipated,'' the Department's proposed definition would provide a limited degree of flexibility for the actual start date of work for some or all of the temporary workers hired, which may vary due to such factors as travel delays or crop conditions at the time work is expected to begin. Provided that the employer complies with all obligations to workers (*e.g.,* providing housing and subsistence at no cost to workers as set forth in § 655.145(b)), the employer's actual start date of work may occur within 14 calendar days after the anticipated first date of need listed on the temporary agricultural labor certification. Additionally, the Department proposes to define the term ''period of employment'' as the time during which the employer requires the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification, as indicated by the first date of need and the last date of need provided on the employer's job order and *Application for Temporary Employment Certification.*

vii. Prevailing Wage

The current H–2A regulation defines ''prevailing wage'' as ''[w]age established pursuant to 20 CFR 653.501(d)(4),'' which is the Wagner-Peyser Act regulation that covers clearance of both H–2A and non-H–2A agricultural job orders. Due to regulatory revisions to part 653 under the Workforce Innovation and Opportunity Act, § 653.501(d)(4) no longer addresses prevailing wages but rather discusses the referral of workers.[15] While § 653.501(c)(2)(i) contains the requirement that the SWA must ensure that job orders provide that the employer has offered not less than the

[13] *See* 8 U.S.C. 1188(d)(2).

[14] *Martinez-Bautista* v. *D&S Produce,* 447 F. Supp. 2d 954, 960–62 (E.D. Ark. 2006) (ruling entities that jointly applied to employ H–2A workers are joint employers of the workers and rejecting application of agricultural association liability principles when the joint employers had not filed through an association).

[15] *See* Final Rule, *Workforce Innovation and Opportunity Act,* 81 FR 56071, 56346–48 (Aug. 19, 2016) (amending § 653.501).

higher of the prevailing wage rate or applicable Federal or State minimum wage, nothing in part 653 addresses how that prevailing wage is established.

As discussed in detail below, the Department proposes to modernize the longstanding sub-regulatory guidance that it uses to establish prevailing wages and replace the existing methodology with a new methodology, as set forth in proposed regulatory text in 20 CFR 655.120 and discussed in the preamble to that section. Accordingly, the Department proposes to conform changes to the regulatory definition of prevailing wage in § 655.103 to cross reference that new proposed methodology at § 655.120(c). The Department proposes to use the same methodology to establish the prevailing wage for both H–2A and non-H–2A agricultural job orders. As a result, the Department proposes to make a corresponding change to the Wagner-Peyser Act regulation at 20 CFR 653.501(c)(2)(i) to define ''prevailing wage'' for the agricultural recruitment system in the same manner as the Department proposes to define ''prevailing wage'' for the H–2A program in 20 CFR 655.103(b).

viii. Temporary Agricultural Labor Certification

The Department also proposes revisions to the definition of ''temporary agricultural labor certification.'' Under the proposal, the definition clarifies that the certification made by OFLC is made based on the information contained in the *Application for Temporary Employment Certification,* the job order, and all supporting documentation submitted to the Department in the course of processing the application and job order. Under the current regulation, the definition does not make it clear that the Department's determination is based on all of these documents, though OFLC can and does consider that information in processing H–2A applications. The proposed revision would codify the Department's long-standing practice to base the certification determination on the information contained in those documents, demonstrating compliance with regulatory requirements.

ix. Additional definitions

The Department proposes to add definitions of other terms for clarity: Act, applicant, *Application for Temporary Employment Certification,* Board of Alien Labor Certification Appeals (BALCA), Chief ALJ, Department of Homeland Security, Employment and Training Administration, H–2A Petition, Metropolitan Statistical Area, piece rate, place of employment, Secretary of Labor, Secretary of Homeland Security, and U.S. Citizenship and Immigration Services.

b. Paragraph (c), Definition of Agricultural Labor or Services

The Department proposes to expand the regulatory definition of agricultural labor or services pursuant to section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), to include reforestation and pine straw activities, which have similar fundamental characteristics to occupations currently defined as agricultural labor or services by statute or by the Secretary. When considering the Department's enforcement experience and reconsidering comments on past proposed rules, the Department has determined that reforestation and pine straw activities are more appropriately included in the H–2A program than in the H–2B program. In view of the changes that have taken place since the last proposal to include these activities in the H–2A program, it is appropriate to again seek comment on this issue. Although the Department cannot immediately anticipate the full impact of shifting these specific activities to the H–2A program, it notes that ''Forest & Conservation Workers'' have been the second leading occupation in DOL's certification of H–2B temporary labor certifications, with upwards of 11,000 certified positions annually in each of the last two fiscal years (FY17 and FY18). However, it is unlikely that all of these certified positions would have been filled with foreign H–2B workers due to the H–2B visa cap.

The proposed rule defines reforestation activities as predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas including, but not limited to, planting tree seedlings in specified patterns using manual tools, and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. This definition encompasses tasks that are normally associated with reforestation work and the cultivation of trees or other forestry products, regardless of whether the result of such cultivation is timber or a forested area for conservation purposes. Reforestation activities may include some forest fire prevention or suppression duties such as constructing fire breaks or performing prescribed burning tasks when such duties are in connection with and incidental to other reforestation activities. Forest fire protection or suppression duties are reforestation activities only when incidental to and performed as part of tree or forest product cultivation. For example, reforestation crews engaged in thinning to accelerate growth of immature trees may also construct a fire break, and reforestation crews engaged in planting may perform a prescribed burn prior to planting seedlings. This definition does not include regular and routine work of a forest firefighting crew and performance of job duties such as rescuing fire victims, administering first aid, locating fires, or monitoring environmental conditions for fire risk.

The proposed rule also states that reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way. As defined here, reforestation activities exclude vegetation management activities that are not associated with the cultivation of trees or other forestry products for timber or conservation purposes. [16] This includes, but is not limited to, right-of-way vegetation management activities such as the removal of vegetation that may interfere with utility lines or lines-of-sight, herbicide application, brush clearing, mowing, cutting, and tree trimming around roads, railroads, transmission lines, and other rights-of-way. Consequently, employers seeking temporary foreign workers for occupations involving these activities will have to file under the H–2B program and meet all applicable program requirements.

The proposed rule defines pine straw activities as ''[o]perations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations.''

As required by the INA, the definition of agricultural labor or services encompasses certain statutory

[16] The definition of reforestation activities in the proposed rule excludes right-of-way vegetation management because this work does not involve the handling or planting of trees or other forestry products as an agricultural or horticultural commodity. Although right-of-way vegetation management involves similar activities as performed in reforestation (*i.e.,* brush clearing and tree trimming), the result of these activities is the destruction of vegetation, not cultivation. Right-of-way vegetation management therefore is more akin to landscaping, which is generally recognized as a non-agricultural industry and would be inappropriate to include within the scope of the H–2A program. The Department has also previously opined that right-of-way vegetation management does not constitute agricultural employment as defined by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), thereby further distinguishing this industry from reforestation activities as defined here, which do constitute MSPA agricultural employment. *See* WHD Opinion Letter, June 11, 2002.

definitions,[17] as well as occupations defined as such by the Secretary in regulations. Prior to the 2008 Final Rule,[18] the Secretary did not use his authority to expand the scope of agricultural labor or services beyond those activities that the statute required to be included, none of which normally included reforestation or pine straw activities. The 2008 Final Rule expanded the definition of agricultural labor or services to include logging employment,[19] which the current regulation maintained and further clarified. *See* 2010 Final Rule, 75 FR 6884, 6981. Although reforestation and pine straw activities are generally recognized as sub-industries of forestry, they do not generally meet the definition of logging employment and therefore were excluded from the definition of agricultural labor or services.

Consequently, nonimmigrant workers engaged in reforestation and pine straw activities as defined in the proposed rule historically have been and are currently admitted under the H–2B program. However, these activities, as defined in the proposed rule, share fundamental similarities with traditional agricultural industries. Specifically, both reforestation and pine straw activities can involve the handling or planting of agricultural and horticultural commodities in their unmanufactured state and include tasks that are substantially similar to traditional agriculture, such as planting, weed control, herbicide application, and other unskilled tasks related to preparing the site and cultivating the soil. *See* 2008 Final Rule, 73 FR 77110, 77118. Additionally, the working conditions have similar characteristics to those encountered in agricultural industries; reforestation activities are commonly performed by migrant crews and overseen by labor contractors, occur in remote locations, and are frequently paid on a piece rate basis.[20] Due to these similarities, work in both the reforestation and pine straw industries, as defined in this proposed rule, often meets the definition of agricultural employment under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) [21] and of agricultural employers under the Occupational Safety and Health (OSH) Act's field sanitation standards.

In past rulemakings, these fundamental similarities prompted the Department to consider similar proposals regarding the inclusion of reforestation and pine straw activities within the scope of the H–2A program. In the 2008 NPRM, the Department sought comments regarding other industries for possible inclusion in the definition of agricultural labor and services.[22] In response, some representatives from the reforestation industry suggested that reforestation activities be included. In the 2008 Final Rule, the Department acknowledged the validity of these comments, but wanted input from a more representative sample of the affected industry.[23] In the 2009 NPRM, the Department proposed the inclusion of reforestation and pine straw activities within the definition of agricultural labor or services. 74 FR 45906, 45910–11. The Department, however, removed this provision in the 2010 Final Rule in response to comments that opposed the inclusion of reforestation. Only one comment specifically addressed pine straw activities. 75 FR 6884, 6889.

The Department, however, believes that many of the comments received in response to the 2009 NPRM are no longer applicable in the current regulatory environment. Specifically, some commenters expressed concern about the additional costs and regulatory burdens that would be imposed by participation in the H–2A program instead of the H–2B program. 2010 Final Rule, 75 FR 6884, 6889. However, this is no longer the case as the protections that currently apply to H–2A workers are generally comparable to the protections afforded to H–2B workers in the reforestation and pine straw industries.[24] For example, the employer's obligation to pay or reimburse the worker for inbound and outbound transportation to and from the place of employment is similar under both H–2A and H–2B programs.[25] Likewise, among other similarities, both programs include similar recordkeeping and disclosure requirements, and require the employer to provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.[26]

There are certain important differences, however, between the programs. For example, while an itinerant H–2B employer must provide housing at no cost to the workers (as is required of all H–2A employers), the H–2A program further requires that all employer-provided housing be inspected and certified, and that rental and/or public accommodations meet certain local, State, or Federal standards. *See* 20 CFR 655.122(d). In addition, the H–2A corresponding employment and three-fourths guarantee requirements differ slightly from these same requirements under the H–2B program.[27] Moreover, the time period during which an employer must recruit and hire U.S. workers differs between the H–2A and the H–2B programs.[28] Similarly, employers in the reforestation and pine straw industries may qualify as H–2ALCs as defined in § 655.103 and, therefore, would be subject to the requirements found in § 655.132, including the requirement to

[17] Specifically, section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), identifies that, in addition to industries defined as such by the Secretary, the definition of agricultural labor or services includes ''agricultural labor defined in section 3121(g) of the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 203(f), and the pressing of apples for cider on a farm.''

[18] *See* Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 77110, 77212 (Dec. 18, 2008) (2008 Final Rule).

[19] *See* Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 77110, 77212 (Dec. 18, 2008) (2008 Final Rule).

[20] For further analysis of the similarities between reforestation activities and traditional agricultural crews, see Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 74 FR 45906, 45910–11 (Sept. 4, 2009) (2009 NPRM).

[21] *See Morante-Navarro* v. *T & Y Pine Straw, Inc.,* 350 F.3d 1163, 1170–72 (11th Cir. 2003); *Bresgal* v. *Brock,* 843 F.2d 1163, 1171–72 (9th Cir. 1987); *Davis Forestry Corp.* v. *Smith,* 707 F.2d 1325, 1328 n.3 (11th Cir. 1983).

[22] *See* Proposed Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 8538, 8555 (Feb. 13, 2008) (2008 NPRM).

[23] ''The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H–2A employer without significant input from that industry. While the Department is willing to further explore whether to include the reforestation industry in the definition of agriculture, it does not believe a decision to do so is warranted at this time.'' 2008 Final Rule, 73 FR 77110, 77118.

[24] *See* Interim Final Rule, *Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 80 FR 24041 (Apr. 29, 2015).

[25] *See* 20 CFR 655.122(h)(1) and (2) for H–2A program requirements and 20 CFR 655.20(j)(1)(i) and (ii) for H–2B program requirements regarding inbound and outbound transportation.

[26] *Compare* 20 CFR 655.122 and 20 CFR 655.20.

[27] *See* 20 CFR 655.103 and 655.122(i) for H–2A program requirements and 20 CFR 655.5 and 655.20(f) for H–2B program requirements.

[28] *See* 20 CFR 655.135(d) for H–2A program requirements and 20 CFR 655.40(c) for H–2B program requirements.

obtain a surety bond.[29] Reforestation and pine straw employers would be required to become familiar, and comply, with these differences in program requirements, among others, to ensure compliance with the H–2A program under the proposed rule. Despite these differences, the Department believes that transitioning these industries from the H–2B to the H–2A program should not represent a significant burden for employers, given the overall similarities between the programs and that (as discussed above) work in both the reforestation and pine straw industries, as defined in the proposed rule, often meets the definition of agricultural employment under the MSPA.

c. Paragraph (d), Definition of a Temporary or Seasonal Nature

The Department seeks comment on the possibility of moving the adjudication of an employer's temporary or seasonal need either exclusively to DHS or exclusively to DOL. It is an administration goal to eliminate duplication wherever feasible and this potential change may or may not streamline the adjudications of temporary or seasonal need for employers. Section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a), requires that only ''agricultural labor or services . . . of a temporary or seasonal nature'' may be performed under the H–2A visa category. Currently, the Department evaluates an employer's temporary or seasonal need in the first instance, using the standards set forth in § 655.103(d), which provides that employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

DHS regulations provide that the Department's finding that employment is of a temporary or seasonal nature as ''normally sufficient'' for the purpose of an H–2A Petition, but also state that notwithstanding this finding, DHS adjudicators will not find employment to be temporary or seasonal in certain situations, such as ''where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate,'' or ''where there is substantial evidence that the employment is not temporary or seasonal.'' 8 CFR 214.2(h)(5)(iv)(B). In making the latter determination, DHS uses the same definitions of temporary and seasonal as the Department. *Compare* 20 CFR 655.103(d) *with* 8 CFR 214.2(h)(5)(iv)(A).

Under the current process, the Department and DHS use separate and distinct experience to adjudicate temporary or seasonal need in the H–2A program. The Department has developed expertise and a process to which H–2A employers have become accustomed. DHS has historically adjudicated this need as part of its review of an H–2A visa petition, and it may have access to independent documentation unavailable to the Department that allows it to assess whether an employer has a temporary or seasonal need.

The Department contemplates that if either the Department or DHS became the sole arbiter of temporary or seasonal need for all H–2A employers, the Department and DHS would take actions, including delegation of authorities as the final arbiter of temporary or seasonal need and amendment of regulations, as needed, to effectuate this change. Accordingly, the Department seeks comment on whether there are benefits or concerns if either the Department exclusively or DHS exclusively became the sole arbiter of temporary or seasonal need.

B. Prefiling Procedures

1. Section 655.120, Offered Wage Rate

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. As discussed below, the Department proposes to maintain this wage-setting structure with only minor revisions and proposes to modify the methodologies by which the Department establishes the AEWRs and prevailing wages.

Specifically, the Department proposes to establish AEWRs for each agricultural occupation, as identified by the FLS and the OES survey, so that each AEWR is based on data more specific to the agricultural occupation of workers in the United States similarly employed and, as a result, better protects against adverse effect on the wages of workers in the United States similarly employed. In addition, the Department proposes to modernize the methodology used by the SWAs to conduct prevailing wage surveys. Finally, the proposed rule sets requirements for updates to wage rates during the work contract and for wage assignments and appeals of those assignments. Currently DOL funds the NASS Farm Labor Survey. USDA is committed to this survey and including $5 million in the President's budget for its modification and expansion to collect more granular data. This expansion will assist in providing the SOC level data DOL is seeking to best capture wage rates from farmerworkers across the country.

The Department currently sets the AEWR at the gross hourly rate for field and livestock workers (combined) from the FLS conducted by the USDA's NASS for each State or region. This produces a single AEWR for all agricultural workers in a given State or region, so that supervisors, agricultural inspectors, graders and sorters of animal products, agricultural equipment operators, construction laborers, and crop laborers are all assigned the same AEWR.

The Department is concerned that the current AEWR methodology may have an adverse effect on the wages of workers in higher-paid agricultural occupations, such as construction laborers and supervisors of farmworkers on farms or ranches, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined) because this is an occupational category from the FLS that does not include construction laborers or supervisors of farmworkers, among other occupations. In addition, the use of generalized data for other agricultural occupations could produce a wage rate that is not sufficiently tailored to the wage necessary to protect against adverse effect on workers in the United States similarly employed.

[29] Additional filing requirements for H–2ALCs include a detailed itinerary of worksites, a copy of the MSPA Farm Labor Contractor Certificate of Registration (if required), copies of fully executed work contracts with each fixed-site agricultural business, and specific details and proof pertaining to worker housing and transportation. *See* 20 CFR 655.132.

Accordingly, the Department proposes to revise its methodology so that the AEWR for a particular agricultural occupation will be based on the annual average hourly gross wage for that agricultural occupation in the State or region reported by the FLS when the FLS is able to report such a wage.[30] If the FLS does not report a wage for an agricultural occupation in a State or region, the Department proposes to set the AEWR at the statewide annual average hourly wage for the SOC from the OES survey conducted by BLS. If both the FLS cannot produce an annual average hourly gross wage for that agricultural occupation in the State or region and the OES cannot produce a statewide annual average hourly wage for the SOC, then the Department proposes to set the AEWR based on the national wage for the occupational classification from these sources.[31] This change to an occupation-based wage is intended to produce more tailored AEWRs that better protect against adverse effect on workers in the United States similarly employed than the Department's current regulation.

The Department also proposes to modernize the methodology used by the SWAs to conduct prevailing wage surveys, which applies to both H–2A and other job orders that use the Wagner-Peyser Act agricultural recruitment system. The Department currently relies on Handbook 385, which pre-dates the creation of the H–2A program and was last updated in 1981, to set the standards that govern the prevailing wage surveys that the SWAs conduct to establish prevailing wage rates for all agricultural job orders. Many of these survey standards, such as a requirement for in-person interviews, are inconsistent with modern survey methods and the level of appropriated funding at the State and Federal levels. Due to the difficulty of implementing these resource-intensive standards, the SWAs are often required to report ''no finding'' from the prevailing wage surveys that they conduct. As a result, the current survey standards are not only resource-intensive but also fail to meet the Department's aim of producing reliable prevailing wage rates. Accordingly, the Department proposes to modernize the prevailing wage standards as set out in proposed § 655.120(c) to: (1) Establish reliable and accurate prevailing wage rates for employers and workers; and (2) allow the SWAs and other State agencies to conduct surveys using standards that are more realistic.

a. The Department's Proposal Maintains the Requirement That the Offered Wage Rate Must Be the Highest of Applicable Wage Sources

The Department proposes to continue to protect against adverse effect on the wages of workers in the United States similarly employed by maintaining the current requirement in § 655.120(a) that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, unless a special procedure wage rate applies, with only three minor changes.

First, the Department proposes to remove the exception in the current regulation for separate wage rates set by ''special procedures'' (*i.e.,* sub-regulatory variances from the regulation). The Department proposes to remove this exception because the only occupation that has a different wage rate structure is the herding and production of livestock on the range, and the wage methodology for that occupation is governed by § 655.211 and is no longer set through a sub-regulatory ''special procedure.'' In addition, as discussed above, the Department proposes to remove the authority in § 655.102 to establish, continue, revise, or revoke special procedures for H–2A occupations. Accordingly, the Department proposes to replace the reference to ''special procedures'' in the current regulation with a reference to the regulatory provisions covering workers primarily engaged in herding and production of livestock on the range as the only exception from the wage methodology set forth in this proposed rule.

Second, the Department proposes to remove the current reference to ''the prevailing hourly wage or piece rate in 20 CFR 655.120(a) and (b).'' [32] Instead, the Department proposes to refer only to the ''prevailing wage'' or ''prevailing wage rate,'' except where a given provision specifically applies only to prevailing piece rates. The Department proposes this change because the Department has issued prevailing wage rates that are not in the form of an hourly or piece rate wage, including monthly prevailing wage rates.

Third, the Department proposes to clarify that the requirement to offer and pay the prevailing wage applies only ''if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c)'' of § 655.120.[33] This revision is intended to clarify that the Department is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every State. As discussed further below, the Department meets its obligation to protect against adverse effect on workers in the United States similarly employed primarily by requiring employers to offer, advertise, and pay the AEWR, which under the current wage methodology is the required wage rate in approximately 92 percent of H–2A applications based on a review of OFLC certification data. In addition, as the Department has previously acknowledged, the AEWR is actually a type of prevailing wage rate because it is the wage rate that is determined from a survey of actual wages paid by employers. Accordingly, the Department is already establishing a prevailing wage in the form of the AEWRs for all agricultural occupations. 2008 Final Rule, 73 FR 77110, 77167.

Nevertheless, the Department recognizes that State-conducted prevailing wage rates can serve as an important additional protection for U.S. workers in crop activities and agricultural activities with piece rates or, in rare instances, higher hourly rates of pay. Accordingly, the Department proposes to make the changes discussed below to modernize the prevailing wage methodology and empower States to produce a greater number of reliable prevailing wage surveys results. However, the Department proposes this new text to clarify that the Department is not required to issue prevailing wage rates for all crop activities and

[30] The Department proposes to remove the word ''weighted'' from the description of the FLS wage rate from the current regulation. This proposed change has no substantive effect. Both the OES and FLS apply weights in determining the average wage in accordance with accepted statistical principals, and the Department's other regulations which refer to OES-based wage rates do not use the term weighted. Therefore, for consistency, the Department proposes to remove the word ''weighted'' from the H–2A regulation governing the AEWR methodology. The Department also proposes to add the term ''gross'' after the term ''hourly'' in describing the wage rate from the FLS because, as discussed further below, USDA is considering making changes to its survey instrument to produce a wage that excludes certain types of incentive pay to report a ''base'' wage separate from the currently reported gross hourly wage. If the Department elects to use this new base wage as a source for the AEWR, the Department would first engage in notice-and-comment rulemaking to adopt that change, consistent with APA requirements. Until that time, the Department proposes to continue to use the ''gross'' hourly wage reported, consistent with the current regulation.

[31] Using a national wage when a State wage cannot be produced is consistent with the OES reporting methodology.

[32] The Department also proposes to make corresponding changes throughout the regulation.

[33] The Department also proposes a corresponding change to 20 CFR 655.122(l).

agricultural activities in every State as such a requirement is both inconsistent with available Federal and State resources and unnecessary to prevent adverse effect. If finalized as proposed, the Department will work with the States through their annual grant plans to focus prevailing wage surveys on those crop activities and agricultural activities where prevailing wage surveys are most useful to protect the wages of U.S. workers, including for activities for which employers commonly pay based on a piece rate and when State agencies know based on past experience that prevailing wage surveys commonly result in hourly wages higher than the AEWR. The Department invites comments on other circumstances in which prevailing wage rates can be most useful as a tool to protect the wages of U.S. workers.

b. The Department Proposes To Base the AEWR on Occupation-Specific Data That Better Reflects the Wages of Workers in the United States Similarly Employed

The Department is retaining the requirement in the current regulation that employers in the H–2A program offer, advertise, and pay at least the AEWR if it is the highest applicable wage. Section 218(a)(1)(B) of the INA, 8 U.S.C. 1188(a)(1)(B), provides that DHS cannot approve an H–2A Petition unless the Department certifies that ''the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' Requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation to certify no adverse effect on workers in the United States similarly employed.

As the Department has explained in previous regulations, the AEWR ''reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers.'' 2010 Final Rule, 75 FR 6884, 6891. The use of an AEWR, separate from a State-conduced prevailing wage for a particular crop activity or agricultural activity, ''is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which the movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible).'' *Id.* at 6892–6893.

The H–2A program is unique among the temporary nonimmigrant programs administered by the Department because the H–2A program is not subject to a statutory cap. Consequently, concerns about wage depression from the importation of foreign workers are particularly acute because access to an unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the prevailing wage of workers in the United States similarly employed to stagnate. In this context, the AEWR acts as ''a prevailing wage concept defined over a broader geographic or occupational field.'' 2010 Final Rule, 75 FR 6884, 6892. In other words, because the AEWR is generally based on data collected in a multi-State agricultural region and an occupation broader than a particular crop activity or agricultural activity, while the prevailing wage is commonly determined based on a particular crop activity or agricultural activity at the State or sub-State level, the AEWR protects against localized wage depression that might occur in prevailing wage rates. For these reasons, the Department proposes to continue to use an AEWR in the H–2A program and to require employers to offer, advertise, and pay at least the AEWR if it is the highest applicable wage.

i. The Department Proposes To Continue to the Use the FLS To Establish the AEWR in Most Geographic Areas for Most H–2A Workers

The Department proposes to use the FLS conducted by USDA's NASS to set the AEWR for the overwhelming majority of H–2A workers. The FLS is the Department's preferred wage source for establishing the AEWR because it is the only comprehensive wage survey that collects data from farm and ranch employers. The Department proposes to use the OES survey conducted by BLS to set the AEWR only for occupations and locations where the Department cannot establish an AEWR based on the FLS because the FLS does not report a wage. Because the OES survey is a reliable and comprehensive wage survey and is widely used in the Department's other foreign labor certification programs, the OES survey provides useful data for setting the AEWR in the limited circumstances where the FLS may not report a wage. The use of the FLS survey, and the OES survey as needed, will allow the Department to establish AEWRs based on occupational classification rather than based on all field and livestock workers (combined) and will better protect against adverse effects on similarly employed U.S. workers, as discussed below.

As the Department has stated in prior rulemakings, the FLS and the OES survey are the two ''leading candidates'' that the Department could use to establish the AEWR. 2009 NPRM, 74 FR 45906, 45912. The Department has always used the FLS to set the H–2A AEWR, with the exception of a brief period under the 2008 Final Rule. Currently, the Department uses the average gross hourly wage rate for the category field and livestock workers (combined) from the FLS as the AEWR for each State in the multi-State or single-State crop region to which the State belongs.

By contrast, under the 2008 Final Rule, the Department set the AEWR based on the OES survey. Under that rule, the Department set the AEWR using the SOC taxonomy and set a different AEWR for each SOC and localized area of intended employment. The Department used four wage levels intended to reflect education and experience under the 2008 Final Rule.

The FLS uses the following methodology: NASS collects wage and employment data for four reference weeks, one each quarter, from all farms with $1,000 or more in annual sales revenue for all in all States except for Alaska. The total sample of the FLS is approximately 10,000 to 13,000 farms and ranches, and data is reported for the United States as a whole and for each of 15 multi-State labor regions and the 3 single States of Florida, California, and Hawaii.[34]

[34] Guide to NASS Surveys: Farm Labor, *available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/index.php* (last modified May 4, 2018).

The USDA regions are as follows:

TABLE 1—USDA REGIONS

Appalachian I	Virginia and North Carolina.
Appalachian II	Kentucky, Tennessee, and West Virginia.
Cornbelt I	Illinois, Indiana, and Ohio.
Cornbelt II	Iowa and Missouri.
Delta	Arkansas, Louisiana, and Mississippi.
Lake	Michigan, Minnesota, and Wisconsin.
Mountain I	Idaho, Montana, and Wyoming.
Mountain II	Colorado, Utah, and Nevada.
Mountain III	Arizona and New Mexico.
Northeast I	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.
Northeast II	Delaware, Maryland, New Jersey, and Pennsylvania.
Northern Plains	Kansas, Nebraska, North Dakota, and South Dakota.
Pacific	Oregon and Washington.
Southeast	Alabama, Georgia, and South Carolina.
Southern Plains	Oklahoma and Texas.

Appendix A, Table 1 shows the AEWRs by region or State established by the Department for 2016 to 2018 based on FLS data for field and livestock workers (combined) under the current regulation.

Most data for the FLS is collected by mail and computer-assisted phone interviews, with personal interviews used for some large operations and those with special handling arrangements. NASS reports FLS data semiannually based on four quarterly reference weeks; in November, NASS reports annual data. In California, NASS collects data in cooperation with the California Employment Development Department and reports the data monthly. The FLS generally has a response rate of greater than 50 percent. The FLS reports hourly wage rates based on employers' reports of gross wages paid and total hours worked for all hired workers during the survey reference week for each quarter it conducts the survey.

Since 2014, the FLS has collected data by SOC—the same taxonomy that is used for the OES survey. It does not currently report wage data by SOC. Instead, the FLS aggregates and reports data in the major FLS occupational categories of field workers, livestock workers, field and livestock workers (combined), and all hired workers. In collaboration with the Department and the OMB, USDA established and implemented a crosswalk from the major FLS categories to the SOC categories.[35] Within the major FLS field worker category is the SOC category Farmworkers and Laborers, Crop, Nursery and Greenhouse (SOC 45–2092). Within the FLS livestock worker category is the SOC category Farmworkers, Farm, Ranch, and Aquacultural Animals (SOC 45–2093). Agricultural Equipment Operators (SOC 45–2091), Packers and Packagers, Hand (SOC 53–7064), Graders and Sorters, Agricultural Products (SOC 45–2041), and All Other Field Workers and All Other Livestock Workers (SOC 45–2099) are assigned to either the livestock worker or field worker major category of the FLS depending upon the agricultural product. Although the FLS collects data on the wages of supervisors, the FLS has not been able to report a statistically valid wage result for the major FLS category of supervisors. As a result, the wages of supervisors are currently only reported in the all hired workers category and are not included in the field and livestock workers (combined) category that the Department uses to establish the AEWR. Included within the major FLS category of supervisors are Farmers, Ranchers, and Other Agricultural Managers (SOC 11–9013); and First Line Supervisors of Farm Workers (SOC 45–1011). Finally, the FLS collects data on ''other workers.'' The FLS has not been able to report a statistically valid wage result for this FLS category, and, as a result, wages for ''other workers'' are reported only in the all hired workers category and are not included in the wages reported in the field and livestock workers (combined) category. Included in the ''other workers'' category are Agricultural Inspectors (SOC 45–2011), Animal Breeders (45–2021), Pest Control Workers (37–2021), and any other agricultural worker not fitting into the categories above, including mechanics, shop workers, truck drivers, accountants, bookkeepers, and office workers who fall within a variety of SOCs and have a wide variety of job duties. Contract and custom workers are excluded from the FLS sample population.

The OES survey is among the largest ongoing statistical survey programs of the Federal Government and produces wage estimates for over 800 occupations. It is used as the primary wage source for all of the nonimmigrant and immigrant prevailing wage determinations issued by the Department, except for those in the H–2A program. The OES program surveys approximately 200,000 establishments every 6 months and over a 3-year period collects the full sample of 1.2 million establishments, accounting for approximately 57 percent of employment in the United States.[36] Every 6 months, the oldest data from the 3-year cycle is removed from the sample, and new data is added. The wages reported in the older data are adjusted by the ECI, which is a BLS index that measures the change in labor costs for businesses. The OES survey is primarily conducted by mail, with follow up by phone to non-respondents or if needed to clarify data.[37] The OES average [38] hourly wage reported includes all straight-time, gross pay, exclusive of premium pay, but including piece rate pay.

The primary advantage of using a wage derived from the FLS is that the FLS surveys farm and ranch employers. The OES survey, on the other hand, surveys establishments that support farm production. While establishments

[35] *See* Crosswalk from the National Agricultural Statistics Service (NASS) Farm Labor Survey (FLS) Occupations to the 2010 Standard Occupational Classification (SOC) System, *available at https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/Farm-Labor-Survey-(FLS)-to-SOC-Crosswalk.pdf.*

[36] *See* OES Frequently Asked Questions, available at *https://www.bls.gov/oes/oes_ques.htm.*

[37] *Id.*

[38] The OES uses the term ''mean.'' However, for purposes of this regulation the Department uses the term ''average'' because the two terms are synonymous, and the Department has traditionally used the term ''average'' in setting the AEWR from the FLS.

that support farm production participate in the H–2A program, they constitute a minority of agricultural labor or services, and so data reported by these establishments is generally useful for purposes of calculating the AEWR applicable to an agricultural occupation only in the limited circumstances where FLS data is unavailable for the occupation.[39] Another positive feature of the FLS is that the statewide and regional wages issued provide protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers. The OES survey also produces statewide wage rates in addition to wage rates based on metropolitan statistical areas (MSAs).[40] Similarly, both the FLS and the OES surveys report a wage that covers activities above a crop activity level, which, as discussed above, is where wage depression from an influx of foreign workers could be most acute.

The Department favors the FLS as a source for the AEWR, and the Department proposes to use an occupation-based wage from that survey due to concerns that the current AEWR based solely on the field and livestock worker (combined) wage aggregates data at a level that combines wages of agricultural occupations that are dissimilar and that this may have the effect of inappropriately raising wages for lower-paid agricultural jobs while depressing wages in higher-paid occupations. For example, a worker performing construction labor on a farm under the H–2A program in Ohio must currently be paid at least the AEWR of $12.93 per hour because the worker's wage is determined based on the field and livestock (combined) wage, which contains many dissimilar jobs, including agricultural equipment operators; graders and sorters of agricultural products; hand packers and packagers of agricultural products; and farmworkers who tend to farm, ranch, and aquacultural animals, as well as farmworkers who perform manual labor to harvest crop, nursery, and greenhouse products. This is the case even though the FLS sample does not include workers who perform contract work, and workers performing construction labor on farms are likely to be employed as contract workers. In contrast, if the same construction worker performed identical job duties at a location other than a farm and, therefore, fell under the H–2B program, the required prevailing wage rate based on the OES SOC would be approximately $20.27 per hour.[41] This aspect of the current methodology appears to cause an adverse effect on the wages of workers in the United States similarly employed, contrary to the Department's statutory mandate.

An AEWR based on an occupational classification that accounts for significantly different job duties but remains broader than a particular crop activity or agricultural activity in a local area may better protect U.S. workers.[42] Accordingly, the Department proposes to amend its current AEWR methodology to issue an occupation-specific AEWR. The Department proposes to establish the AEWR using the FLS where the FLS reports a statewide or regional annual average gross hourly wage result for a particular agricultural occupation.

Based on data collected by NASS from 2015 to 2017, the Department expects it will be able to establish AEWRs for most States and regions in SOCs 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals). These occupations would represent approximately 89 percent of workers in the H–2A program if Forest and Conservation Workers (SOC 45–4011) are added to the H–2A program as proposed, and so the FLS will continue to be the basis for the AEWRs covering the vast majority of H–2A workers. In addition, the Department anticipates that it will be able to use the FLS to establish AEWRs for some States and regions for SOCs 45–2041 (Graders and Sorters, Agricultural Products), 45–2091 (Agricultural Equipment Operators), 45–2099 (Agricultural Workers, All Other),[43] 53–7064 (Packers and Packagers, Hand), 11–9013 (Farmers, Ranchers and Other Agricultural Managers), and 45–1011 (First Line Supervisors of Farm Workers) based on NASS data. The FLS will never be able to report a statewide or regional wage for Alaska because the survey is not conducted there.

In a circumstance where the FLS cannot produce a wage for the occupational classification, the Department proposes to establish the AEWRs for all SOCs and States or regions at the statewide average hourly wage for that occupation using data from the OES survey, as discussed below, unless such a wage is not reported by BLS. Under this methodology, the OES statewide average hourly wage would also be used to establish the AEWR if USDA ceased to conduct the FLS for budgetary or other reasons.

To the extent the FLS may not consistently report data in each SOC for a State or region, the wage source used to establish the AEWR may vary from year to year, which could result in a much higher degree of variation in the AEWR applicable to an occupation from year to year than exists under the current methodology. The Department requests comments on whether there are alternate methods or sources that it should use to set the AEWR in the event that the FLS does not produce a wage in an SOC and State or region, including, but not limited to: (1) Whether the Department should use the separate field worker and livestock worker classifications from the FLS to set AEWRs for workers in occupations included in those classifications if a wage based on the SOC from the FLS is not available; (2) whether the Department should index past wage rates for a given SOC using the Consumer Price Index (CPI) or Employment Cost Index (ECI) if a wage cannot be reported for an SOC in a State or region in a given year based on the FLS but a wage was available in a previous year; (3) whether the Department should use the FLS national wage rate to set the AEWR for an SOC if the FLS cannot produce a wage at the State or regional level; and (4) whether the Department should consider any other methodology that would promote consistency and reliability in wage rates from year to year.

As an alternative, the Department invites comments on whether to set AEWRs based on the current FLS occupational classifications of field

[39] Indeed, BLS refers the public to USDA and NASS for statistics on U.S. agriculture employment and wages. *See* OES Frequently Asked Questions, *https://www.bls.gov/oes/oes_ques.htm.*

[40] The Department uses MSA-based wage estimates from the OES survey to set prevailing wage rates for the H–2B program and used OES MSA-based wage rates to set AEWRs under the 2008 H–2A Rule.

[41] This is the current statewide OES wage for the category of Construction Laborer, SOC 47–2061, in Ohio. Under the H–2B program, a local wage for that occupation would be used if available. As discussed below, the Department proposes to use the statewide OES mean hourly wage to establish the AEWR if the FLS cannot report a wage for the occupational classification in a given State or region.

[42] For example, an AEWR under this proposal would be established for SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), while particular crop activities within that category might include the hand harvesting of strawberries or onion packing shed duties.

[43] The Department would not use the ''all other'' category from the FLS to set a wage if a more specific SOC applies. For example, under this proposal, the AEWRs for Forest and Conservation Workers (SOC 45–4011), Logging Workers (SOC 45–4020), and Construction Laborers (SOC 47–2061) would all be based on those specific SOCs, not the ''all other'' category.

workers and livestock workers for each State or region. Under this alternative, any occupational classifications not surveyed by NASS under either the field worker or livestock worker category would be assigned an AEWR based on the OES SOC. The disadvantage of this alternative is that it produces an AEWR at a broader occupational level than the SOC taxonomy. As a result, this option would provide a single AEWR covering a broader group of occupations, such as Graders and Sorters, Agricultural Products (SOC 45–2041) and Agricultural Equipment Operators (SOC 45–2091), in which workers perform dissimilar job duties. In contrast, the advantage of this alternative is that the FLS is currently able to produce a statewide or regional wage for both the field worker and livestock worker categories in every year, except in Alaska. As a result, this alternative would significantly reduce the likelihood that wage sources will change from year to year. For the same reasons, this methodology would also likely result in the Department using the FLS to set wages more often if the Department were to adopt a methodology that set AEWRs based on the SOC. As discussed above, the Department generally prefers to establish AEWRs based on the FLS rather than the OES survey because the FLS surveys farmers and ranchers, whereas the OES surveys establishments that support farm production, as discussed below.

In proposing to continue use of the FLS to set the AEWR for most H–2A workers, the Department notes that it does not have direct control over the FLS, and that USDA could elect to terminate the survey at some point. Indeed, USDA did briefly terminate the survey in 2007 due to budget constraints. The Department has addressed such a possibility in this proposal by providing that the OES statewide average hourly wage for the SOC will be used if the FLS does not produce an annual gross hourly wage for the occupational classification for a State or region.

The Department understands that USDA may make future adjustments to the FLS methodology, including that USDA may exclude certain types of incentive pay so that a base wage can be separately reported from the hourly wage rate. However, even after these modifications are complete, USDA also plans to continue to release data using its current methods. Under this proposed rule, the Department would continue to use USDA's existing methodology to set AEWRs based on SOC codes as discussed above. If the Department decides to later adjust the AEWR calculation based on methodological changes by USDA, the Department will provide the public with notice and the opportunity to provide comment before adopting any changes.

ii. If the OES Produces a Statewide Average Hourly Wage for the SOC, the Department Proposes To Use That Wage To Set the AEWR for Any Occupation Classification Where the FLS Does Not Report a Wage for the Occupational Classification and State or Region

The OES survey can be very useful in limited circumstances where the FLS cannot produce statistically reliable data for an occupation and state or region, and the OES survey is able to do so. The Department expects that the OES will be particularly useful in those occupations that constitute a small percentage of agricultural labor or services and a larger subset of non-agricultural labor or services (*e.g.,* construction workers), or where work is generally not performed on farms, so wages are not generally sampled by the FLS (*e.g.,* logging occupations). For these types of occupations, the FLS cannot produce a wage for the applicable SOCs. Similarly, the OES will be useful for the proposed addition of forest and conservation workers to the H–2A program. Like logging, forest and conservation work is not generally performed on farms or ranches, so it is generally excluded from the FLS, and the FLS cannot produce a wage for the applicable SOC. Accordingly, in the Department's view, the OES survey provides the most accurate source for determining the AEWR for these occupations. Indeed, because the OES survey is the primary wage source in the H–2B program, employers bringing in forest and conservation workers for temporary work are already required to pay at least an average hourly wage based on the OES survey.

Accordingly, the Department proposes to use the statewide OES average hourly wage for the SOC where the FLS cannot produce a wage for the agricultural occupation and State or region. In the H–2B program, the Department generally establishes prevailing wages based on the OES survey for the SOC in a metropolitan or non-metropolitan area. For the H–2A program, however, the Department proposes to use a statewide wage both to more closely align with the geographic areas from the FLS and to protect against wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level. As explained in prior rulemakings, the concern about localized wage depression is more pronounced in the H–2A program than in the H–2B program due to both the vulnerable nature of agricultural workers and the fact that the H–2A program is not subject to a statutory cap, which allows an unlimited number of nonimmigrant workers to enter a given local area.[44]

When the OES survey is used to establish the AEWR, the Department proposes to use the average hourly wage for the SOC, which is the methodology used under the H–2B program.[45] The average is proposed rather than the four-tiered wage level structure that the Department used to set the AEWR under the 2008 H–2A Final Rule. As explained in the preamble to the Department's current H–2A regulation: ''OES wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. These are arbitrary percent cut-offs of the distribution of earnings within the occupations. Therefore, the associated occupational skill levels are not well defined, and H–2A wage differences [imposed by a four tier system] do not accurately reflect meaningful differences in skills or job complexity.'' 2010 Final Rule, 75 FR 6884, 6900. As the Department further noted, ''[m]ost of the occupations and activities relevant to the H–2A program involve skills that are readily learned in a very short time on the job, skills peak quickly, rather than increasing with long-term experience.'' *Id.* To the extent that there are some agricultural activities that require a higher amount of expertise than others, such as agricultural inspectors or animal breeders, such differences are accounted for in the Department's proposal to issue AEWRs at the occupational classification level without regard to artificial ''tiers.''

In proposing to use the OES survey to establish the AEWR for a small percentage of H–2A workers, the Department acknowledges that the Department concluded in the 2010 Final Rule that use of the OES survey under the 2008 Final Rule depressed the wages of workers in the United States similarly employed. That finding does not apply to the current proposal for three primary reasons.

First, the Department proposes to use the OES survey only when the FLS cannot produce a wage for an occupation at the State or regional level. As discussed above, using the generalized field and livestock workers

[44] *See, e.g.,* 2010 Final Rule, 75 FR 6884, 6895.

[45] The H–2B regulation uses the term ''mean'' rather than ''average,'' but the meaning is the same.

(combined) wage from the FLS to establish the AEWR may have a depressive effect on wages of workers in the United States similarly employed for some agricultural occupations. As a result, if the FLS cannot produce a State or regional wage for an agricultural occupation, it is the Department's preliminary view, for the reasons discussed above, that the statewide OES survey provides a more accurate and appropriate source for the AEWR. Second, much of the wage reduction under the 2008 Final Rule was due to the fact that the 2008 Final Rule used a four-tiered wage level system, in contrast to this NPRM's proposal to use the average. As the Department has noted, under the 2008 Final Rule, ''73 percent of applicants for H–2A workers specified the lowest available skill level—corresponding to the wage earned by the lowest paid 16 percent of observations in the OES data. Only 8 percent of applicants specified a skill level that translated into a wage above the OES median.'' 2010 Final Rule, 75 FR 6884, 6898. Third, the use of the statewide wage rather than the wage at the metropolitan or non-metropolitan area is intended to prevent the OES wage from reflecting any wage depression in a particular local geographic area. Accordingly, the proposal to use the OES survey in this manner does not raise the same concerns as the 2008 Final Rule did.

The Department recognizes that the proposed methodology results in some AEWR increases and some AEWR decreases depending upon geographic location and agricultural occupation. Because any wage reductions are the result of the use more accurate occupational data, the reductions are consistent with the Department's obligation to protect against adverse effect on workers in the United States similarly employed. The use of more accurate occupational data means that lower AEWRs that better reflect the wage needed to protect against adverse effect for those agricultural occupations are generally offset by higher AEWRs in other occupations.

Appendix A, Table 2 provides average hourly wages by SOC and State under the proposed rule. The estimates in Appendix A, Table 2 are based on historic data.

iii. The Department Proposes To Use National Occupational Data If Neither the OES Survey Nor the FLS Reports a State or Regional Wage for the Occupation

In the rare event that both the FLS does not report an annual average hourly gross wage for the occupational classification in the State or region and the OES survey does not report a statewide annual average hourly wage for the SOC, the Department proposes to use national data for the occupation to set the wage for that geographic area. If both wage sources report a national wage rate for the occupational classification, the Department proposes to set the AEWR at the national annual average hourly gross wage for the occupational classification from the FLS because, for the reasons discussed above, the Department generally prefers to use the FLS, which is based on wages paid by farmers and ranchers. If the FLS does not report a national wage for the occupation, the Department proposes to use the national average hourly OES wage for that SOC and geographic area.

iv. The Department Requests Comments on All Aspects of Its Proposed Methodology for Establishing the AEWR

The Department invites comments on all aspects of the proposed AEWR methodology. In particular, the Department is interested in comments on the use of the FLS and OES survey, the conditions under which each survey should be used to establish the AEWR, and the proposal to depart from relying on the field and livestock workers (combined) wage from the FLS to instead establish AEWRs based on occupational classifications. The Department also invites comments on any alternate wage sources the Department might use to establish the AEWRs in the H–2A program.

c. The Department Proposes To Modernize the Methodology Used To Establish the Prevailing Wage Rate

i. The Current Prevailing Wage Methodology is Outdated and Does Not Meet the Policy Goal of Producing Reliable Prevailing Wage Rates

Current 20 CFR 655.120(a) requires that an employer seeking a temporary agricultural labor certification to employ an H–2A worker must offer, advertise in its recruitment, and pay a wage that is at least the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage.[46] In addition, the Wagner-Peyser regulation at 20 CFR 653.501(c)(2)(i) requires the SWA to ensure for all agricultural job orders, H–2A and non-H–2A, that ''wages . . . offered are not less than the prevailing wages . . . among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher.'' Currently, the SWAs are required to conduct prevailing wage surveys using standards set forth in Handbook 385, which pre-dates the creation of the H–2A program and has not been updated since 1981. The Handbook is used for both H–2A and non-H–2A agricultural job orders. Notable aspects of the guidance are discussed below.

Handbook 385 requires the SWAs to conduct prevailing wage surveys to determine the wage rates paid to domestic workers. Handbook 385 at I–116. These surveys are conducted based on ''crop activity,'' with ''crop activity'' defined as follows:

> the job actually being performed in a specific crop at time of survey. A single job title, such as 'harvest', may apply to the entire crop activity. On the other hand, different stages of the harvest, such as 'cotton, 1st pick, 2nd pick, and strip', may be involved; or, a different use of the commodity such as 'tomatoes, fresh' or 'tomatoes, canning.' In such cases, the important consideration is whether the work is different. . . . For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately.

Handbook 385 at I–113. In addition, the Handbook establishes separate prevailing wage rates for in-State workers, interstate workers, and all workers. Handbook 385 at I–118. Generally, job orders placed in the interstate clearance system are required to use the highest of these three rates. Handbook 385 at I–118.

Among the guidelines provided, the Handbook lists sample sizes that the SWA ''should'' follow, which vary depending upon the number of workers. Handbook 385 at I–114. The Handbook provides that for some crops with a small number of domestic workers, samples of the wages of all workers in the crop activity should be conducted, as follows:

TABLE 2—SAMPLE SIZES FROM HANDBOOK 385

Number of workers in the crop activity in area	Sample size (percent of workers)
100–349	100
350–499	60
500–799	50
800–999	40
1000–1249	35
1250–1599	30
1600–2099	25
2100–2999	20
3000 or more	15

[46] Under the current regulations and survey methodology, the AEWR most often sets the minimum hourly requirement.

Handbook 385 at I–114. The Handbook does not provide any further information on whether the sample size guidelines are intended to be mandatory in all circumstances and, if the standards are not intended to be mandatory in all circumstances, what factors the Department must consider in determining whether to issue a prevailing wage if the sample size guidelines are not met. The Handbook further suggests that the State should conduct at least 1 survey per season in each of the following circumstances: (1) At least 100 workers were employed in the crop activity in the previous season or are expected to be employed in the current season; (2) regardless of the number of workers employed, foreign workers were employed in the previous season, or employers have requested or may be expected to request foreign workers in the current season, regardless of the number of workers involved; (3) the crop activity has an unusually complex wage structure; or (4) the crop or crop activity has been designated by the ETA national office as a major crop or crop activity. Handbook 385 at I–115. In addition, the Handbook recommends that surveys should normally be completed within 3 days. Handbook 385 at I–115.

The Handbook provides that prevailing wages are produced based on a ''40 percent rule'' and a ''51 percent rule.'' Handbook 385 at I–116–17. Under the 40 percent rule, a single rate or schedule that ''accounts for the wages paid to 40 percent or more of the domestic seasonal workers in a single crop activity is the prevailing rate.'' Handbook 385 at I–116. There are additional special rules if there is more than one rate or schedule accounting for 40 percent of the domestic seasonal workers. Handbook 385 at I–116. If no single rate or schedule accounts for 40 percent or more of the domestic workers, the prevailing rate is set at the 51 percentile. Handbook 385 at I–117. If there is more than one unit of payment, the SWA is instructed to determine which unit of payment is prevailing and base the prevailing wage finding on that unit of payment. Handbook 385 at I–117.

Most burdensome, the Handbook methodology requires in-person interviews to conduct the prevailing wage survey. Specifically, the wage survey must include ''a substantial number of personal employer interviews,'' which can only be supplemented by telephone or mail contacts ''to a limited extent.'' Handbook 385 at I–116. Further, the Handbook requires that 10 percent of the workers included in the sample for the wage survey must be interviewed and suggests that the worker sample ''should be drawn from workers of as many as possible of the employers interviewed.'' Handbook 385 at I–116. Neither the FLS nor the OES survey requires in-person interviews of employers as the primary collection method. Both the FLS and OES survey rely solely on employer-reported data and do not canvass workers directly.

The methodology in the Handbook 385 is outdated and needs to be modernized in a manner that produces reliable and accurate prevailing wage rates, while still being manageable given the limited available resources at the State and Federal levels. The Handbook methodology dates from 1981, before the creation of the modern H–2A program. Before the IRCA, the Department established AEWRs in only 14 ''traditional user'' States, leaving the prevailing wage and Federal and State minimum wages as the only wage protections available in other states. *See* 1989 Final Rule, 54 FR 28037, 28038. After the passage of the IRCA, the Department dramatically expanded the use of the AEWR as a wage protection in the H–2A program in 49 States (excluding Alaska) and first began using the FLS to set the AEWR. *See id.* In contrast, no updates were made to the Handbook 385 after the passage of the IRCA or at any time since. Requirements in the Handbook, such as the requirement for in-person interviews, are now unrealistic given current SWA limitations. Due to the continued use of these standards, the SWAs are often required to report that the State cannot produce a finding for a given crop activity or agricultural activity because the completed survey cannot meet methodological standards. Accordingly, the current wage methodology both wastes State and Federal resources and fails to produce reliable and accurate prevailing wage rates for employers and workers.

For all of these reasons, the Department proposes to make changes to modernize the prevailing wage methodology. The proposal is intended to meet the Department's goals of establishing requirements that allow the SWAs and other State agencies to conduct surveys using standards that are realistic in a modern budget environment, while also establishing reliable and accurate prevailing wage rates for employers and workers. By modernizing the prevailing wage survey standards, the Department hopes to focus States on producing surveys in the circumstances in which the surveys can be most useful for protecting the wages of U.S. workers, and hopes to encourage a greater number of reliable prevailing wage survey results. The proposal recognizes that under the proposed wage methodology, which requires the offered wage rate to be set at the highest of all applicable wage rates, prevailing wage determinations will continue to be relevant only to a small percentage of job orders.

ii. The Department Proposes To Modernize the Methodology Used To Establish the Prevailing Wage Rate

For the reasons discussed above, the Department proposes to modernize the standards in Handbook 385 and replace the existing prevailing wage methodology with a new methodology at § 655.120(c) under which the Department would establish prevailing wages for crop activities or agricultural activities. The Department proposes to use the term ''crop activity or agricultural activity'' rather than the term ''crop activity'' from Handbook 385 because prevailing wage rates may exist for a single agricultural activity conducted across multiple agricultural commodities. Establishing wage rates by both crop activities and agricultural activities is consistent with the Department's current policy. For example, the Department's existing sub-regulatory guidance covering custom combine workers explains that prevailing wage rates for custom combine operators are established in accordance with Handbook 385.[47] This is because custom combine operators may be engaged in an agricultural activity, such as operating harvesting equipment, with a single wage structure across multiple crops.

Under the new proposed methodology, the OFLC Administrator would establish a prevailing wage for a given crop activity or agricultural activity only if all of the requirements in proposed § 655.120(c)(1) are met. Requiring that all surveys meet statistical standards is necessary to establish reliable and accurate prevailing wage rates for employers and workers. The Department proposes the following standards: (1) The SWA must submit a standardized form providing the methodology of the survey, which must be independently conducted by

[47] *See* TEGL 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program,* Attachment A at p. 1, available at *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf* (last updated June 14, 2011). As discussed further in the preamble related to proposed §§ 655.300 through 655.304, the Department proposes to codify in regulations the existing sub-regulatory guidance for certain H–2A itinerant occupations, including guidance applicable to custom combine operators.

the SWA or another state entity; (2) the survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity; (3) the survey must be based on either a random sample or a survey of all employers in the geographic area surveyed who employ workers in the crop activity or agricultural activity; (4) the survey must be limited to the wages of U.S. workers; (5) a single unit of pay must be used to compensate at least 50 percent of the U.S. workers included in the survey; (6) the survey must report an average wage; (7) the survey must cover an appropriate geographic area based on several factors; and (8) the survey must report the wages of at least 30 U.S. workers and 5 employers and the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey. In addition to these methodological standards, the Department proposes to establish a validity period of prevailing wage surveys.

First, the Department proposes to maintain the current requirement that the SWA submit a Form ETA–232 providing the methodology for the survey. If finalized as proposed, the Department would update the Form ETA–232 to align with the new proposed prevailing wage methodology. While the SWA would continue to submit the Form ETA–232 to OFLC, the Department proposes to allow the survey to be independently conducted by State entities other than the SWA, including any State agency, State college, or State university.[48] The Department proposes to broaden the universe of State entities that may conduct a prevailing wage survey because the SWAs have limited capacity to conduct surveys given other legal requirements, including the statutory requirement to conduct housing inspections. However, some other State agencies, State colleges, or State universities may have resources and expertise to conduct reliable prevailing wage surveys for the H–2A program. The Department proposes to broaden the categories of State entities that may conduct prevailing wage surveys to encourage more prevailing wage surveys to be conducted by reliable sources, independent of employer or worker influence. Under this proposal, a State entity other than the SWA could choose to conduct a prevailing wage survey using State resources without any foreign labor certification program funding, or the SWA could elect to wholly or partially fund a survey conducted by another State entity using funds provided by the Department for foreign labor certification programs. However, the Department proposes to continue to require the SWA to submit the Form ETA–232 for any prevailing wage survey, even if the survey was conducted by another State entity, to provide a single avenue through which States submit surveys, and so it is clear that all surveys sent to the Department are submitted on behalf of the State as a whole. The SWA is the appropriate entity to submit any survey to the Department because the SWA receives grant funding from the Department for the H–2A program. Without this requirement, the Department is concerned that more than one agency in a State might conduct a survey for the same crop activity or agricultural activity, which would require the Department to adjudicate conflicting prevailing wage surveys. The Department requests comments on alternate methods of dealing with the issue of possible conflicting surveys. The Department also requests comments on whether there are additional neutral sources of prevailing wage information that the Department should use in the H–2A program.

Second, the Department proposes that the survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity. The concept of distinct work tasks is continued from the Handbook 385, which provides:

> Some crop activities involve a number of separate and distinct operations. Thus, in harvesting tomatoes, some workers *pick* the tomatoes and place them in containers while others *load the* containers into trucks or other conveyances. Separate wage rates are usually paid for individual operations or combinations of operations. For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately.

Handbook 385 at I–113 (emphasis in original). The distinct task requirement means that even within a single crop, distinct work tasks that are compensated differently (*e.g.,* picking and packing) would be required to be surveyed in a manner that produces separate wage results.

Third, the Department proposes that the survey must be based on either a random sample or a survey of all employers in the surveyed geographic area who employ workers in the crop activity or agricultural activity. This requirement is based on general statistical principals and is consistent with the recommendation in Handbook 385, which provides: ''[w]ithout regard to whether employers do or do not utilize the facilities of the Job Service, the wage survey sample should include workers of small, medium and large employers of domestic workers from all sectors of the area being surveyed, and should be selected by probability sampling methods.'' Handbook 385 at I–114. Probability and random sampling are synonymous, and random sampling includes both simple random sample and stratified random sample methods. The Department proposes to maintain this existing requirement to conduct a random/probability sample and clarify that random sampling (or surveying the entire universe) is a requirement, not a recommendation. The requirement that a prevailing wage survey be established based on a sampling of the entire universe or a random sample is also consistent with the H–2B prevailing wage regulation at § 655.10, as well as current H–2B prevailing wage guidance interpreting the H–2B appropriations riders.[49] To make a reasonable, good faith effort to contact all employers in the surveyed geographic area who employ workers in the crop activity or agricultural activity, the surveyor might send the survey through the mail or other appropriate means to all employers in the geographic area and then follow up by telephone with all non-respondents.

Fourth, to protect against possible adverse effect on the wages of workers in the United States similarly employed, the Department proposes to limit the survey to the wages of U.S. workers. This limitation applies to both determining the universe of workers' wages to be sampled and the universe of workers' wages reported. Limiting the survey to U.S. workers is consistent with the Department's current policy and reflects the Department's longstanding concern that including the wages of non-U.S. workers may depress wages.[50] The Department recognizes that in the H–2B program, prevailing wage surveys must be conducted

[48] The H–2B regulation generally uses the OES average wage for the SOC to set the prevailing wage rate and allows employers to submit non-OES wage surveys as an alternative to the OES only if the survey is independently conducted and issued by a State, including any State Agency, State college or State university; where the OES does not provide data in the geographic area; or if the OES does not accurately represent the relevant job classification. 20 CFR 655.10.

[49] *See Effects of the 2016 Department of Labor Appropriations Act* (Dec. 29, 2015) at p. 4, *available at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.*

[50] The Handbook 385 uses the terms ''domestic workers'' and ''U.S. workers'' in describing the sample to be conducted, and the current Form ETA–232 similarly limits the survey to U.S. workers.

without regard to the immigration status of the workers whose wages are included in the survey. However, the Department proposes to continue to require prevailing wage surveys in H–2A to include only the wages of U.S. workers due to concerns that the presence of the wages of undocumented workers in the sample may depress the wages of workers in the United States similarly employed are particularly acute in agriculture, because nearly half of farmworkers lack work authorization.[51] The Department invites comments on this policy, including whether the Department should instead adopt the H–2B standard.

Fifth, the Department proposes that a prevailing wage be issued only if a single unit of pay is used to compensate at least 50 percent of the U.S. workers included in the survey. For example, an hourly prevailing wage rate would only be issued if at least 50 percent of the U.S. workers included in the survey are paid by the hour (and the survey also meets all other requirements provided in the proposed rule). For a wage rate based on a piece rate to be issued under this proposal, at least 50 percent of the U.S. workers whose wages are included in the survey must be both paid by the piece and also must be paid based on the same unit of measurement (*e.g.,* bushel, bin, etc.). This is similar to the requirement in the Handbook 385 that if a survey includes more than one unit of payment, a prevailing wage rate is issued based on the unit of pay that represents the largest number of workers. Handbook 385 at I–117. The Department proposes this requirement both to verify that the rate structure reflected in the survey is actually prevailing and to provide that the wages included in the survey can be averaged, as discussed in the next paragraph of the preamble, because it would not be possible to average wages using different units of measurement.

Sixth, the Department proposes that a prevailing wage survey must report an average wage for the unit of pay that represents at least 50 percent of the wages of U.S. workers included in the survey. This proposal departs from the requirement in Handbook 385 to use a ''40 percent rule'' and a ''51 percent rule,'' discussed above. The Department proposes to use an average wage to establish the prevailing wage because it is consistent with both how the Department proposes to set the AEWR under the FLS and OES methodologies and with the current H–2B wage methodology for prevailing wage rates. The Department invites comments on this methodology as well as possible alternatives, including whether the ''40 percent rule'' and a ''51 percent rule'' from the Handbook should be maintained or whether the Department should instead establish the prevailing wage at the median wage based on the unit of pay.

Seventh, the Department proposes that a prevailing wage survey must cover an appropriate geographic area based on available resources, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State. With this proposal, the Department intends to codify existing practice whereby the Department receives prevailing wage surveys based on State, sub-state, and—in the case of logging activities in Maine, New Hampshire, and Vermont—regional geographic areas based on the factors listed above. The Department requests comments on whether any other factors should be considered in determining the appropriate geographic area for prevailing wage surveys.

Eighth, and most significantly, the Department proposes to replace the statistical guidelines from Handbook 385 with standards that are more effective in producing a prevailing wage and more appropriate to a modern budget environment. As discussed above, existing standards often result in ''no finding'' from a prevailing wage survey; therefore, the current standards are both a waste of government resources and fail to meet the goal of producing reliable and accurate prevailing wage rates. The Department is also concerned that employers may be incentivized not to respond to a survey under the existing methodology because the OFLC Administrator does not issue a prevailing wage if the sample is too small. As a result, requiring smaller sample sizes than those suggested in Handbook 385 may actually increase survey response rates because employers may be more likely to respond to a survey if it is more likely that the OFLC Administrator will issue a prevailing wage than under the current methodology.

The Department proposes that the survey must report the wages of at least 30 U.S. workers and 5 employers and that the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey. The 30-worker standard is consistent with the requirements for H–2B prevailing wage rates as well as minimum reporting numbers for the OES. *See* 20 CFR 655.10(f)(4)(ii) (employer-provided surveys for the H–2B program must include wage data from at least 30 workers and three employers); *see also* 80 FR 24146, 24173 (Apr. 29, 2015). BLS requires wage information from a minimum of 30 workers (after raw OES survey data is appropriately scrubbed and weighted) before it deems data of sufficient quality to publish on its website. In addition, the Department proposes that a survey must include wages paid by at least five employers. This is a change from Handbook 385, which does not have a minimum number of employers who must be included in the survey. The Department recognizes that by proposing to require that a survey must include wages paid by at least five employers, the proposal exceeds the number of employers (*e.g.,* three) required to establish prevailing wage rates under the H–2B program; however, while prevailing wages in the H–2B program are generally set based on local area of intended employment, H–2A prevailing wage rates are generally set based on a larger geographic area. In the Department's preliminary view, this makes a higher number of employer responses appropriate for the H–2A program. Finally, the Department proposes that the wages paid by a single employer must represent no more than 25 percent of the sampled wages. The Department proposes this 25 percent standard so that the wage is not unduly impacted by the wages of a single dominant employer. The Department would issue a prevailing wage from a survey only if all of the sample size requirements—30 workers, 5 employers, and the 25 percent single employer standards—are met.

Both the five employer and 25 percent dominance standards are consistent with the ''safety zone'' standards for exchanges of employer wage information established by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the antitrust context.[52] Under the safety zone

[51] According to the most recent U.S. Department of Labor's National Agricultural Workers Survey, between October 1, 2012, and September 30, 2014, 47 percent of farmworkers in the United States lacked work authorization. Findings from the National Agricultural Workers Survey (NAWS) 2013–2014: A Demographic and Employment Profile of United States Farmworkers, Research Report No. 12 (Dec. 2016), pp. 4–5, *available at https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf.*

[52] *See* Statement 6 of the Antitrust Enforcement Policy in Health Care (''enforcement policy''), August 1996, *available at http://www.justice.gov/atr/public/guidelines/0000.htm.* While the enforcement policy was developed for exchanges of information in the health care industry, the policy has been recognized to ''offer significant insights that go beyond health care, including a very useful framework for analyzing information exchanges,'' David H. Evans & Benjamin D. Bleiberg, *Trade*

Continued

standards, absent extraordinary circumstances, the exchange of information about employer wages meeting the requirements for the safety zone will not be challenged by the DOJ or the FTC as a violation of antitrust law. Although created for a different purpose than these proposed H–2A regulatory standards, the safety zone standards establish levels at which the DOJ and FTC have established that an exchange of wage information is sufficiently anonymized to prevent the wages of a single employer from being identified because the wage results reported too closely track the wages paid by a single employer. It is the Department's preliminary conclusion that the safety zone standards are consistent with the Department's aim of requiring that the wages reported from a prevailing wage survey are sufficiently representative, and the wages of a single employer do not drive the wage result.

The Department requests comments on these statistical standards and any alternate standards that might be used to meet the Department's goals of establishing reliable and accurate prevailing wage rates consistent with a modern budget environment. For example, the Department requests comments on whether to require the Handbook's suggested sample size of 15 percent for crop activities or agricultural activities with at least 3,000 U.S. workers but require a smaller sample than those set in the Handbook for smaller crop activities and agricultural activities. Additionally, the Department requests comments on whether the proposed sample size requirements, and any recommended alternative requirements, should apply to the survey overall or to the prevailing unit of pay. For example, the Department invites comments on whether, if a survey includes both hourly pay and piece rate pay based on a bushel unit, the 30 worker, 5 employer, and 25 percent dominance standards should apply to the survey overall, or to the unit of pay that represents the wages paid to at least 50 percent of the workers in the survey.

In addition to the standards governing the methodology in the survey, in § 655.120(c)(2), the Department proposes that a prevailing wage rate would remain valid for 1 year after OFLC posts the wage rate or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed in the employer's *Application for Temporary Employment Certification* expires during the contract period, the employer must continue to guarantee a wage that is at least equal to the expired prevailing wage rate. This proposal is consistent with OFLC's current policy. The Department proposes that if an employer guaranteed a prevailing wage rate in the *Application for Temporary Employment Certification,* it must continue to guarantee that rate if it is the highest applicable wage, even if the prevailing wage rate ''expires'' during the contract period. This is because the employer may not pay a wage lower than the wage it offered to U.S. or H–2A workers.

The 1-year validity period for prevailing wage rates is generally consistent with OFLC's current practice. The Department proposes to maintain the current validity period with the goals of both basing prevailing wage rates on the most recent and accurate data and making prevailing wage rate findings available where the prevailing wage rate would be higher than the AEWR. The Department invites comments on whether an alternate duration for the validity of prevailing wage surveys would better meet these goals. For example, the Department invites comments on whether to use the 2-year period that is used for the H–2B program. For the H–2B program, an employer may submit a prevailing wage survey if it is the most recent edition of a survey and is based on data collected no more than 24 months before submission. The Deparment also invites comments on whether it should index prevailing wage rates based on either the CPI or ECI when the OFLC Administrator issued a prevailing wage rate in 1 year for a crop activity or agricultural activity but a prevailing wage finding is not available in a subsequent year. The Department also invites comments on whether it should set any limits on the age of the data reported by a survey.

The Department requests comments on each of the methodological changes discussed above, as well as any alternate prevailing wage survey requirements. This includes comments on whether and why any of the elements of Handbook 385 should be maintained and incorporated in to the regulation as well as whether and why any aspects of the Department's H–2B prevailing wage methodology for employer-provided surveys should be adopted for the H–2A program. The Department is particularly interested in comments that address how the recommended standard will meet the Department's objective to produce reliable and accurate prevailing wage rates for employers and workers in a manner consistent with available resources at the State and Federal levels.

d. The Department Proposes That the Employer Must Pay Any Higher AEWR or Prevailing Wage Rate Not Later Than 14 Days After Notification of the New Wage Rate

Paragraph (c) of current § 655.120 provides that the Department would update the AEWR at least annually by publication in the **Federal Register**.[53] In addition, the current regulation at § 655.122(l) requires employers to pay the highest wage ''in effect at the time the work is performed,'' which means employers must begin paying the AEWR upon its effective date. The current regulation is silent on when a published AEWR becomes effective. For many years, the Department published AEWRs with an immediate effective date. However, starting with the AEWRs for 2018, the Department gave employers up to 14 days to start paying a newly issued higher AEWR.[54] The Department proposes to provide text in § 655.120(c) that clarifies that if a higher AEWR is published in the **Federal Register** during the labor certification period, the employer must begin paying the new wage rate within 14 days, consistent with the current regulation and policy. This policy prevents adverse effect on the wages of U.S. workers by quickly implementing any newly-required higher wage rate, while giving employers a brief window to update their payroll systems to implement a newly-issued wage. The 14-day effective date is based on the current regulation at § 655.122(m), which requires the employer to pay the worker at least twice a month or according to the prevailing practice in the area of intended employment, whichever is more frequent. No changes are proposed to § 655.122(m). Given this existing requirement, the 14-day window provides that an employer is not required to adjust a worker's pay in the middle of a pay period.

In addition, the Department proposes to make minor edits to the existing language because the AEWRs will no longer be announced in a single **Federal**

Associations: Collaboration, Conspiracy and Invitations to Collude, Antitrust Rev. of the Americas, at 40 (2011); *see also* Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review,* 17 Marq. Sports L. Rev. 109, at n. 428 (Fall 2006) (''Officials from the FTC have stated that the principles, while nominally focused on the health care industry, are broadly applicable to other industries and professions.'').

[53] Under 44 U.S.C. 1507, publication in the **Federal Register** provides legal notice of the new wage rates.

[54] *See* Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2018 Adverse Effect Wage Rates for Non- Range Occupations,* 82 FR 60628 (Dec. 21, 2017).

Register announcement. Instead, each AEWR will be updated at least annually, but the Department plans to make the updates through two announcements, one for the AEWRs based on the FLS, and another one for the AEWRs based on the OES survey. This is due to the different time periods for release of these two surveys.

Similar to the current regulation on AEWR updates, the current regulation at § 655.120(b) requires the employer to pay a higher prevailing wage upon notification to the employer by the Department. The Department's current practice is to publish prevailing wage rates on its website and to directly contact employers who are covered by a higher prevailing wage rate. The proposed regulation maintains this current practice for notifying employers directly, rather than through the **Federal Register**, because the administrative burden of contacting employers directly is less than publishing multiple prevailing wage rates in the **Federal Register** given that prevailing wage rate surveys are not provided for all crops, activities, and locations in a single cycle. As with the AEWR, the Department proposes to make the new prevailing wage rates effective 14 days after notification so that employers do not need to update the wage rate in the middle of a pay period.

For both the AEWR and prevailing wage rate, the Department proposes that the employer must pay a higher wage rate if the wage is adjusted during the contract period, but may not lower the wage rate if OFLC issues an AEWR or prevailing wage that is lower than the offered wage rate. Because the employer advertised and offered the higher rate through its recruitment of U.S. and H–2A workers, the wage cannot be reduced below the wage already offered and agreed to in the work contract. Under this proposal, an employer would not be permitted to put a clause in the job order stating that it may reduce the offered wage rate if a lower AEWR or prevailing wage is issued. The Department also proposes to remove current regulatory language that requires an employer to pay the wage ''in effect at the time work is performed'' from §§ 655.120(b) and 655.122(l) because that language may create confusion about the existing requirement to continue to pay a previously offered wage if the new ''effective'' wage is lower.

e. Wage Assignments and Appeals

Under this proposal, an employer would select the appropriate SOC code for the job opportunity and guarantee in its *Application for Temporary Employment Certification* a wage that is at least the highest of the AEWR for that SOC, a prevailing wage where the OFLC Administration has issued such a wage rate, an agreed-upon collective bargaining wage, or the applicable Federal or State minimum wage. The CO would then review the employer's wage selection as part of the review of the *Application for Temporary Employment Certification* to verify that the employer guarantees at least the required wage.

Under paragraph (b)(5) of this proposal, if the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the CO would determine the applicable AEWR at the highest AEWR for all applicable occupational classifications. Determining the appropriate SOC is an important component of the Department's proposal to move to an occupation-specific wage. The proposal to use the highest applicable wage would reduce the potential for employers to misclassify workers and would impose a lower recordkeeping burden than if the Department permitted employers to pay different AEWRs for job duties falling within different occupational classifications on a single *Application for Temporary Employment Certification.* This proposal is also consistent with how the Department assigns prevailing wage rates for jobs that cover multiple SOCs in the H–2B program.

Under this proposal, employers who currently file a single *Application for Temporary Employment Certification* covering multiple workers and a wide variety of duties might choose to file separate *Applications for Temporary Employment Certification* and limit the duties of the workers covered by each *Application for Temporary Employment Certification* to a single occupational classification. The employer would then pay a separate wage rate based on the duties of each *Application for Temporary Employment Certification.*

The Department invites comments on the proposal to determine the applicable AEWR at the highest AEWR for all applicable occupational classifications, including any alternate methods the Department should use to determine the AEWR if the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification. For example, the Department invites comments on whether it should establish the AEWR to be guaranteed on the *Application for Temporary Employment Certification* based on the primary duties of the job as reported on the *Application for Temporary Employment Certification.* Any proposals to use a methodology other than the highest AEWR for all applicable occupational classifications should explain how the Department would protect against misclassification.

All *Applications for Temporary Employment Certification* are currently assigned an SOC by the SWA, but these assignments have no impact on the required wage rate in the H–2A program, because the required wage rate is not currently based on the SOC system. Based on past SOC assignments by the SWA, approximately 95 percent of H–2A workers will fall within one of the following SOC codes: 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), 45–2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals), 45–2091 (Agricultural Equipment Operators), and 45–4011 (Forest and Conservation Workers) if reforestation workers are added to the H–2A program as proposed. Given the very small number of SOCs applicable to most H–2A jobs, the Department expects that employers will be able to select the correct SOC code and accompanying AEWR in most cases.

In a small number of cases, the employer may select the incorrect SOC on its *Application for Temporary Employment Certification.* If the employer offers a wage that does not meet the requirements of § 655.120(a), proposed paragraph (d)(1) explains that the CO would issue a NOD and require the employer to correct the wage rate. This would include recruiting for the job opportunity at the correct wage rate. Proposed paragraph (d)(2) further provides that if the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171. This proposal is consistent with the proposal to eliminate appeals of NODs discussed in the preamble related to § 655.141 of this proposed rule and would promote efficiency by providing that all possible grounds for denial are appealed at once, rather than allowing for separate appeals of multiple issues.

2. Section 655.121, Job Order Filing Requirements

a. Submission of the Job Order

The statute requires employers to engage in the recruitment of U.S. workers through the employment service job clearance system administered by the SWAs. *See* section

218(b)(4) of the INA, 8 U.S.C. 1188(b)(4); *see also* 29 U.S.C. 49 *et seq.,* and 20 CFR part 653, subpart F. The Department proposes to modernize and streamline the process by which employers submit job orders to the SWA for review and for intrastate and interstate clearance in order to test the local labor market and determine the availability of U.S. workers before filing an *Application for Temporary Employment Certification.*

Employers have described the current process of preparing and submitting job orders to the SWAs as cumbersome, complicated, and requiring the expenditure of considerable time and money. An employer must prepare the job order, *Agricultural and Food Processing Clearance Order* (Form ETA–790), in paper form, scan it, and submit it, along with any other paper attachments, to the SWA using email, U.S. mail, or private courier. Mistakes often must be corrected by hand, initialed and dated, then emailed or mailed to appropriate parties. Failure to complete these manual exchanges of corrections can lead to active job orders with outdated and/or inaccurate terms and conditions. Furthermore, the SWAs generally do not have adequate capacity to provide for the e-filing and management of job orders, which may create uncertainty for employers that need to submit job orders within regulatory timeframes. Given that an employer must provide a copy of the same job order to the NPC at the time of filing the *Application for Temporary Employment Certification,* the current job order filing process requires duplication of effort for employers, especially those with business operations covering large geographic areas that need to coordinate job order submissions with multiple SWAs.

Therefore, the Department proposes that an employer submit a newly designed job order, *H–2A Agricultural Clearance Order* (Form ETA–790/790A), directly to the NPC designated by the OFLC Administrator. This proposal also requires an employer to submit the job order using the electronic method(s) designated by the OFLC Administrator, and adopts the use of electronic signatures. Employers permitted to file by mail or who request a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c) would be permitted to file using those other means. Unless the employer has a disability or lacks adequate access to e-filing, the NPC will return without review any job order submitted using a method other than the electronic method(s) designated by the OFLC Administrator.

Where the job order is submitted in connection with a future master application, an agricultural association will continue to submit a single job order in the name of the agricultural association as a joint employer on behalf of all employer-members that will be identified on the *Application for Temporary Employment Certification.* The Department proposes edits to clarify that the employer-members will also be listed on the job order. Similarly, the Department proposes that where two or more employers are seeking to jointly employ a worker or workers, as permitted by proposed § 655.131(b), any one of the employers may submit the job order as long as all joint employers are named on the job order and the future *Application for Temporary Employment Certification.*

Upon receipt of the job order, the NPC will transmit, on behalf of the employer, an electronic copy of the job order to the SWA serving the area of intended employment for review. If the job opportunity is located in more than one State within the same area of intended employment, the NPC will transmit a copy of the electronic job order, on behalf of the employer, to any one of the SWAs having jurisdiction over the place(s) of employment for review. The job order must continue to satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and § 655.122.

As explained above, the Department believes this proposal will modernize and streamline the job order filing process and create significant savings and efficiencies for employers, SWAs, and the Department. Many employers and their authorized representatives are highly automated in their business operations and familiar with e-filing the Form ETA–9142A, required appendices, and supporting documentation with the NPC. Based on applications filed during FYs 2016 and 2017, more than 81 percent of employer applications were submitted electronically to the NPC for processing. Expanding OFLC's technology system to include the electronic submission of the new Form ETA–790/790A, prior to the filing of an *Application for Temporary Employment Certification,* will save employers time and money preparing, scanning, and mailing the job order to the SWA, and streamline the filing process by providing a single point-of-access to H–2A program services.

To implement this proposal, OFLC's technology system will allow an employer to initiate the new Form ETA–790/790A online, pre-populate all business contact information from their account, and save a partially completed form as a ''draft'' that the employer can access and complete later. As the Form ETA–790/790A is prepared online, the system will provide the employer with a series of electronic data checks and prompts to ensure each required field is completed and values entered on the form are valid and consistent with regulatory requirements. An online glossary and ''help'' function will allow the employer to refer to explanations of key terms along with access to frequently asked questions designed to clarify instructions on completing the form. For an employer that has recurring seasonal job opportunities, the system will allow the preparation of multiple Forms ETA–790/790A and ''reuse'' previously filed job orders. This ''reuse'' capability is similar to the one currently available for preparing the Form ETA–9142A, and will save the employer significant time and expense by pre-populating key sections into the draft Form ETA–790/790A, including information related to the job opportunity, crops or agricultural activities, wage offers, place of employment and housing locations, and other worker guarantees (*e.g.,* meals and transportation).

The newly designed Form ETA–790/790A will also contain a standardized set of terms and conditions of employment, as required by §§ 653.501(c) and 655.122, that the employer will review, sign, and date online prior to submission. The Department proposes to standardize these required terms and conditions of employment to ensure greater consistency in disclosure to prospective U.S. worker applicants and reduce the frequency of inadvertent errors or omissions that lead to processing delays. After agreeing to these standard, required terms and conditions of employment, the employer will affix its electronic signature in order to submit the job order for processing. Once submitted, the OFLC technology system will automatically transmit the electronic Form ETA–790/790A to the SWA serving the area of intended employment, thereby eliminating the need for the employer to send the job order to the SWA.

For the Department and SWAs, electronic submission of job orders will decrease data entry, improve the speed with which job order information can be retrieved and shared with the SWAs, reduce staff time and storage costs, and improve storage security. Since the new Form ETA–790/790A will be stored electronically, it also eliminates the need for manual corrections of errors and other deficiencies and improves the efficiency of posting and maintaining

approved job orders on the Department's electronic job registry. This may result in more efficient use of Department and SWA staff time. Further, the Department already provides the SWAs with access to OFLC's technology system for purposes of communicating any deficiencies with job orders associated with employer-filed H–2A and H–2B applications and uploading inspection reports of employer housing. Incorporating a capability for the SWAs to access and retrieve the Form ETA–790/790A assigned by the NPC, virtually in real time after submission by employers, is a logical next step in enhancing OFLC's technology system and creating a seamless delivery of program services for employers.

b. SWA Review of the Job Order

The Department proposes minor revisions to the timeframes and procedures under which the SWA performs a review of the employer's job order. The SWA will continue to provide written notification to the employer of any deficiencies within 7 calendar days from the date the SWA received the job order from the NPC. The Department proposes editorial changes to clarify that the notification issued by the SWA must state the reasons the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. The employer will continue to have an opportunity to respond to the deficiencies within 5 calendar days from the date the notification is issued by the SWA, and the SWA will issue a final notification to accept or deny the job order within 3 calendar days from the date the employer's response is received.

To ensure a timely disposition is issued on all job orders, the Department proposes the job order be deemed abandoned if the employer's response to the notification is not received within 12 calendar days after the SWA issues the notification. In this situation, the SWA will provide written notification and direct the employer to submit a new job order to the NPC that satisfies all the requirements of this section. The 12-calendar-day period provides an employer with a reasonable maximum period within which to respond, given the Department's concern for timely processing of the employer's job order. The Department is also clarifying that any notice sent by the SWA to an employer that requires a response must be sent using a method that assures next day delivery, including email or other electronic methods, and must include a copy to the employer's representative, if applicable.

If the employer is not able to resolve the deficiencies with the SWA or the SWA does not respond within the stated timelines, the Department will continue to permit the employer to file its *Application for Temporary Employment Certification* and job order to the NPC using the emergency filing procedures contained in § 655.134. With the newly designed Form ETA–790/790A, the Department anticipates fewer discrepancies and inconsistencies between SWA determinations in various States. The Department continues to encourage employers to work with the SWAs early in the process to ensure that their job orders meet applicable state-specific laws and regulations and are accepted timely for intrastate and interstate clearance.

c. Intrastate and Interstate Clearance of Approved Job Orders

The Department proposes minor changes to the process by which the SWA circulates the approved job order for intrastate clearance and posts a copy of the job order for interstate clearance to other designated SWAs.

Under the current regulation, once the SWA accepts the job order, it must place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order covers an area of intended employment that falls within the jurisdiction of more than one SWA, the originating SWA initiates limited interstate clearance by circulating a copy of the job order to the other SWAs serving the area of intended employment. The Department proposes changes to this process to accommodate the new requirement that employers file job orders directly with the NPC. Upon its acceptance of the job order, the SWA will continue to place the job order in its intrastate job clearance system. However, rather than circulating the job order to other SWAs covering the area of intended employment or waiting for instructions from the CO in the NOA, the Department proposes that the SWA notify the NPC that the job order is approved and must be placed into interstate clearance. Upon receipt of the SWA notification, the NPC is responsible for promptly transmitting an electronic copy of the approved job order for interstate clearance to all SWAs with jurisdiction over the area of intended employment and the States designated by the OFLC Administrator as potential sources of traditional or expected labor supply, in accordance with § 655.150.

The Department has concluded that these proposed changes will provide U.S. worker applicants with greater exposure to the job opportunity and facilitate a more efficient process for circulating the employer's job order through the interstate clearance system. Circulation of the approved job order for interstate clearance prior to the filing of the *Application for Temporary Employment Certification* will significantly increase the amount of time that job orders are initially available to prospective U.S. worker applicants, including in labor supply States designated by the OFLC Administrator. Additionally, the SWAs will save time and resources because the proposed changes will eliminate the need to prepare, scan, and transmit copies of approved job orders to other SWAs. Since the job order is electronically available to the NPC, the NPC can transmit a copy of the approved job order to other SWAs with minimal effort and expense.

Where modifications to the job order are required under this section, the NPC can serve as a single source of authority for all modifications to ensure greater accuracy and consistency in disclosing the modified terms and conditions of employment. Once the modifications are complete, the NPC will promptly re-circulate an electronic copy of the job order to all affected SWAs, as well as the employer. Consequently, the SWAs will be able to focus their resources on recruiting U.S. workers and conducting timely inspections of employer housing.

d. Other Proposed Changes

To clarify procedures and as a result of other proposed changes, the Department is retaining but reorganizing several components of § 655.121. For example, the Department proposes to move the timeliness requirement for submitting a job order from paragraph (a)(1) to a new paragraph (b) that focuses solely on the timeliness requirements. The change in the location of this timeliness language, combined with new paragraphs (c) and (d) to accommodate the e-filing of job orders and *Applications for Temporary Employment Certification* with the designated NPC, required renumbering of subsequent paragraphs. The Department also proposes procedures to allow employers that lack adequate access to e-filing to file the job order by mail and for employers that are unable or limited in their ability to use or access the electronic application due to a disability to request an accommodation to allow them to access and/or file the job order through other means.

The Department also proposes minor changes to paragraph (a)(2) and new

paragraph (a)(3) to clarify procedures for an agricultural association's submission of a job order in connection with a future master application, as permitted by proposed § 655.131(a), and for two or more employers seeking to submit a job order in connection with a future joint employment application, as permitted by proposed § 655.131(b). While only one joint employer will submit the job order to the NPC, the job order must identify names of all employers included in that job order. Proposed paragraph (a)(4) retains former paragraph (a)(3), with technical changes, and continues to require the employer's job order to satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and § 655.122.

Finally, the Department has made a technical correction in proposed paragraph (g), changing *Application for Temporary Employment Certification* to ''application'' to accurately reflect that the term ''application'' refers to a U.S. worker's application for the employer's job opportunity during recruitment, and has made similar conforming edits throughout this subpart.

3. Section 655.122, Contents of Job Offers

a. Paragraph (d), Housing

The Department proposes several revisions to its regulations at § 655.122(d) governing housing inspections and certifications. Pursuant to the statute and the Department's regulations, an employer must provide housing at no cost to all H–2A workers. The employer must also provide housing at no cost to those non-H–2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. *See* section 218(c)(4) of the INA, 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1). Generally, an employer may meet its housing obligations in one of two ways: (1) It may provide its own housing that meets the applicable federal standards; or (2) it may provide rental and/or public accommodations that meet the applicable local, state, or federal standards.[55] The statute further requires that the determination whether the housing meets the applicable standards must be made not later than 30 days before the first date of need. *See* section 218(c)(3)(A), (4) of the INA, 8 U.S.C. 1188(c)(3)(A), (4).

[55] Housing for workers principally engaged in the range production of livestock must meet the minimum standards required by § 655.122(d)(2).

i. Employer-Provided Housing

Preoccupancy inspections of employer-provided housing are critical to ensure that sufficient and safe housing is available prior to the workers arriving for the work contract period. The Department is aware, however, that the current requirement of preoccupancy inspections of employer-provided housing for every temporary agricultural labor certification (regardless of the condition of the housing or how recently it may have been inspected) may result in delays in the labor certification process. These delays are often due to insufficient SWA capacity to conduct timely inspections of employer-provided housing. These delays—which are often beyond an employer's control regardless of how early it might request an inspection—may have a significant detrimental impact on the employer's operations.

To address these concerns, the Department proposes the following changes to its current regulations. First, the Department proposes to reiterate in its regulations the statutory requirement that determinations with respect to housing must be made not later than 30 days prior to the first date of need. Second, the Department proposes to clarify that other appropriate local, state, or federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. Third, the Department proposes to authorize the SWAs (or other appropriate authorities [56]) to inspect and certify employer-provided housing for a period of up to 24 months. Twenty-four month certification would be subject to appropriate criteria and prior notice to the Department by the certifying authority. In light of the SWAs' longstanding expertise in conducting housing inspections, the Department proposes to authorize each SWA to develop its own criteria to determine, at its sole discretion, whether to certify specific employer-provided housing for a time period longer than the immediate work contract period, but in no case longer than 24 months. The Department invites comment on whether it should establish specific criteria that the SWAs must consider when determining the validity period of a housing certification (*e.g.,* history of housing compliance or age of the housing), and if so, what those criteria should be.

Under the proposal, an employer must self-certify that the employer-provided housing remains in compliance for any subsequent *Application for Temporary Employment Certification* filed during the validity period of the official housing certification previously received from the SWA (or other appropriate authority). To self-certify, an employer must re-inspect the employer-provided housing, which was previously inspected by the SWA or other authority. The employer must then submit to the SWA and the CO a copy of the valid certification for the housing previously issued by the SWA or other authority, and a written statement, signed and dated, attesting that the employer has inspected the housing, and that the housing is available and sufficient to accommodate the number of workers being requested and continues to meet all applicable standards.

[56] *See* 20 CFR 653.501(b)(3).

ii. Rental and/or Public Accommodations

In its experience administering and enforcing the H–2A program, the Department increasingly encounters H–2A employers that provide rental and/or public accommodations to meet their H–2A housing obligations. Under the Department's current regulations at § 655.122(d)(1)(ii), such housing must meet the applicable local standards for such housing. In the absence of applicable local standards, state standards apply. In the absence of applicable local or state standards, DOL OSHA standards at 29 CFR 1910.142 apply. In addition, an employer that elects to provide such housing must document to the satisfaction of the CO that the housing complies with the local, state, or federal housing standards. Through guidance, the Department has explained that such documentation might include, but is not limited to: A SWA inspection report (where required); a certificate from the local or state health department or building department (where required); or a signed, written statement from the employer.[57]

Despite these requirements, in WHD's enforcement experience, H–2A employers often fail to secure sufficient rooms and/or beds for workers. This results in unsafe and unsanitary conditions for workers. Overcrowding, which is among one of the most common issues the Department encounters in rental and/or public accommodations, may result in unsanitary conditions, pest infestations, and outbreaks of communicable

[57] *See* OFLC FAQ, *What do I need to submit to demonstrate the [rental and/or public accommodations] complies with applicable housing standards?* (June 2017), *available at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!917.*

diseases. In some cases, for example, employers required workers to share a bed, required workers to sleep on the floor in a sleeping bag, or converted laundry or living spaces into sleeping facilities by putting mattresses on the ground. In other situations, as many as eight workers have been housed in a single room. Moreover, in rooms where workers also cook, the failure to provide sufficient space for workers to cook and sleep and/or to provide sanitary facilities for preparing and cooking can lead to health issues from improperly cooked food and/or pest and rodent issues. WHD also often encounters employers that do not provide sufficient access to laundry facilities when housing workers in rental and/or public accommodations. Sufficient access to laundry is critical to ensure the health of workers, as workers often perform work in fields sprayed with pesticides, which comes in contact with workers' clothing. Further, WHD has encountered numerous instances of faulty or improperly installed heating, water heating, and cooking equipment in rental and/or public accommodations, posing serious safety risks to workers. In some instances, for example, electrical currents have run through water faucets. In other instances, workers have used hot plates that were not plugged into a grounded electrical line, causing the hot plates to catch fire.

Where there are no local or state standards for rental and/or public accommodations, the DOL OSHA standards at 29 CFR 1910.142 apply, and these standards include specific requirements addressing these safety and health concerns. However, even where local and state standards for rental and/or public accommodations exist, these standards often do not include requirements addressing overcrowding and other basic safety and health concerns. The Department, therefore, is concerned that its current regulations may be interpreted to mean that where any local or state standards for rental and/or public accommodations exist, only those standards will apply, even where those standards do not address basic safety and health concerns applicable to rental and/or public accommodations.

To address these concerns, the Department proposes the following revisions to its regulations. First, the Department proposes that, in the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the OSHA temporary labor camp standards at 29 CFR 1910.142(b)(2) (''each room used for sleeping purposes shall contain at least 50 square feet for each occupant''), § 1910.142(b)(3) (''beds . . . shall be provided in every room used for sleeping purposes''); § 1910.142(b)(9) (''In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.''); § 1910.142(c) (water supply); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), the relevant state standards will apply; in the absence of applicable state standards addressing such concerns, the relevant OSHA temporary labor camp standards will apply. For example, under this proposal, where local standards for rental and/or public accommodations exist, but do not include a standard that requires a certain minimum square footage per person, all of the existing local standards will apply in addition to any state standard that addresses square footage. If there is no state standard addressing minimum square footage, then the DOL OSHA standard at 29 CFR 1910.142(b)(2) (or, where cooking facilities are present, § 1910.142(b)(9)) will apply, in addition to the existing local standards. The Department welcomes comment on this proposal, specifically on whether the applicable standards should address any additional safety and health concerns relevant to housing temporary workers in rental and/or public accommodations that are otherwise addressed in the DOL OSHA standards at 29 CFR 1910.142, such as screens on exterior openings (see § 1910.142(b)(8)).

Second, the Department proposes to specify in the regulations that an employer must submit to the CO a signed, dated, written statement, attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). Where the applicable local or state standards under § 655.122(d)(1)(ii) require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. Where no inspection is required, the employer's written statement must confirm that no inspection is required.

iii. Housing for Workers Covered by 20 CFR 655.200 Through 655.235

The Department proposes clarifying edits to paragraph (d)(2) to reflect that §§ 655.230 and 655.235 establish the housing requirements for workers primarily engaged in the herding and production of livestock on the range. The Department has established separate requirements for these workers for the entirety the H–2A program due to the unique nature of the work performed.

b. Paragraph (g), Meals

The Department is retaining the current regulation at § 655.122(g) that requires an employer to provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals. Where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. Although the Department does not propose any changes to § 655.122(g), the Department frequently encounters violations of this provision and thus provides the following information to clarify the provision's requirements.

Should an employer elect to provide kitchen and cooking facilities—in lieu of providing meals—the facilities must be free, convenient, and adequate for workers to prepare three meals a day. These facilities must include clean space intended for food preparation as well as necessary equipment, including working cooking appliances, refrigeration appliances, and dishwashing facilities (*e.g.,* sinks designed for this purpose). The types of cooking appliances may vary but must allow workers to sufficiently prepare three meals a day. For example, an employer has not met its obligation to provide kitchen and cooking facilities by merely providing an electric hot plate, a microwave, or an outdoor community grill. Similarly, an employer has not met its obligation if the workers are required to purchase cooking appliances or accessories, such as portable burners, charcoal, propane, or lighter fluid.

In the Department's enforcement experience, it has found that public accommodations (*e.g.,* hotels or motels) frequently do not have adequate cooking facilities that allow workers to prepare three meals a day. Specifically, public accommodations frequently lack stoves, dishwashing facilities, and clean space for workers to safely prepare and store food apart from their sleeping facilities. Should such public accommodations lack adequate cooking and kitchen facilities for workers to prepare and store their own meals, the employer must provide three meals a day to each worker in order to satisfy the employer's obligations under § 655.122(g).

Where an employer elects to provide meals, the employer may deduct any

previously disclosed allowable meal charges from the worker's pay; however, it must either obtain prepared meals or prepare the meals itself.[58] An employer may not pass on to the worker any costs that the employer has incurred for the provision of the meal that exceeds the allowable meal charge. Where a worker elects to purchase food in excess of the meal provided (*e.g.,* additional servings or premium items), the worker may bear the additional cost (assuming the provided meal was adequate, as discussed below).

Providing access to third-party vendors and requiring workers to purchase meals from the third-party vendor does not constitute compliance with the requirement to provide meals or facilities, even if the employer provides a meal stipend.[59] An employer may arrange for a third party vendor and pay for the workers' meals, or use a voucher or ticket system where the employer initially purchases the meals and distributes vouchers or tickets to workers to obtain the meals from the third-party vendor. With such an arrangement, the employer may deduct the corresponding allowable meal charge if previously disclosed and in compliance with the procedures described under proposed § 655.173.

Should an employer elect to house workers in public accommodations, the employer may receive the appropriate pro-rated credit for a meal provided by the public accommodation (*e.g.,* continental breakfasts, buffets, etc.) towards its daily meal obligation as long as the workers can readily access the meal. Such credit shall not be allowed if the daily start time for the work day prohibits the worker from accessing the meal prior to departure to the place of employment. Similarly, when prepared meals are delivered, the delivery must occur in a timely and sanitary fashion. For example, food requiring refrigeration cannot be delivered hours before an anticipated mealtime. If meals are not delivered in a timely or sanitary fashion, the employer has not satisfied its meal obligation.

c. Paragraph (h), Transportation; Daily Subsistence

i. Paragraph (h)(1), Transportation to Place of Employment

The Department proposes to revise the beginning and end points from and to which an employer must provide or pay for transportation and subsistence costs for certain H–2A workers. The Department's current regulation at § 655.122(h)(1) requires, in part, that an employer pay a worker for the reasonable transportation and subsistence costs incurred when traveling to the employer's place of employment, provided that the worker completes at least 50 percent of the work contract period and the employer has not previously advanced or otherwise provided such transportation and subsistence.[60] Specifically, an employer must provide or pay for transportation and subsistence costs from ''the place from which the worker has come to work for the employer.'' The Department currently interprets the ''place from which the worker has come to work for the employer'' to mean the ''place of recruitment,'' which sometimes is the worker's home.[61] Additionally, for a worker who completes the work contract period or is terminated without cause, and who does not have immediate subsequent H–2A employment, § 655.122(h)(2) requires the employer to provide or pay for return transportation and subsistence costs to the place from which the worker ''departed to work for the employer,'' disregarding intervening employment.[62]

The proposed rule largely retains the current requirements of § 655.122(h)(1) and (2) without change. However, in the Department's experience administering and enforcing the current H–2A regulations, it is often challenging to ascertain the place of recruitment and calculate travel expenses for H–2A workers departing to work for the employer from a location outside of the U.S.[63] In many cases, foreign recruitment is not an official process but an informal network of former H–2A workers, their friends, families, and neighbors. Some H–2A workers may not actually speak with the employer or the employer's representative until arriving at the U.S. Consulate or Embassy for visa processing or arriving at the appropriate port of entry to seek admission to the United States.[64]

In light of these challenges, the Department proposes to revise § 655.122(h)(1) to require an employer to provide or pay for inbound and return transportation and subsistence costs (where otherwise required by the regulation) from and to the place from which the worker departed to the employer's place of employment. For an H–2A worker departing from a location outside of the United States, the place from which the worker departed will mean the appropriate U.S. Consulate or Embassy. For those H–2A workers who must obtain a visa, the Department will consider the ''appropriate'' U.S. Consulate or Embassy to be the U.S. Consulate or Embassy that issued the visa. The Department recognizes, however, that the specific procedures for processing visas may differ among U.S. Consulates and Embassies and seeks comment on whether a different designation of the ''appropriate'' U.S. Consulate or Embassy is warranted.

Additionally, the Department recognizes that certain H–2A workers do not require a visa to obtain H–2A status, and so will not need to visa a consulate or embassy prior to entering the United States. *See* 8 CFR 212.1(a). Accordingly, the Department seeks comment on what the ''place from which the worker department'' should mean for those workers who do not require a visa to

[58] The maximum allowable meal charge to workers is governed by the daily subsistence rate as defined in § 655.173.

[59] *See Wickstrum Harvesting, LLC,* 2018–TLC–00018 (May 3, 2018). The ALJ affirmed an ETA determination denying certifications based on the employer's practice of providing workers with a stipend for meals instead of providing meals or furnishing free and convenient cooking facilities.

[60] Section 655.122(h)(1) further requires that, when it is in the prevailing practice among non-H–2A employers in the area to do so, or when offered to H–2A workers, the employer must advance transportation and subsistence costs to workers in corresponding employment. Section 655.122(h)(1) also places employers on notice that they may be subject to the FLSA, which operates independently of the H–2A program and imposes independent requirements relating to deductions from wages. *See also* 20 CFR 655.122(p). The proposed rule does not affect an FLSA-covered employer's obligations under the FLSA.

[61] *See, e.g.,* Preamble to 2009 NPRM, 74 FR 45906, 45915 (''this Proposed Rule requires the employer to pay for the costs of transportation and subsistence from the worker's home to and from the place of employment''); OFLC FAQ Sept. 15, 2010 (subsistence costs must be paid for costs incurred ''during the worker's inbound trip from the point of recruitment to the employer's worksite . . . and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment'').

[62] Section 655.122(h)(2) further provides that, for those workers who do have immediate subsequent H–2A employment, the initial or subsequent employer must cover the transportation and subsistence fees for the travel between the initial and subsequent worksites. The obligation to pay for such costs remains with the initial H–2A employer if the subsequent H–2A employer has not contractually agreed to pay the travel expenses. This section also places employers on notice that they are not relieved of their obligation to provide or pay for return transportation and subsistence if an H–2A worker is displaced as a result of an employer's compliance with the recruitment period described in § 655.135(d).

[63] Unless the location outside the United States is the consulate or embassy that issued the visa.

[64] Citizens or nationals of certain localities may directly seek admission to the United States in H–2A classification with Customs and Border Protection at a U.S. port of entry. *See* 8 CFR 212.1(a).

obtain H–2A status. For workers in corresponding employment and those H–2A workers who depart to the employer's place of employment from a location within the United States, the place from which the worker departed will continue to mean the place of recruitment. The Department also proposes conforming revisions throughout the NPRM to refer to the place from which a worker departs rather than the place from which the worker has come to work for the employer.

This proposal will provide the Department with a more consistent place from and to which to calculate travel costs and obligations for H–2A workers departing from a location outside of the United States. It will also provide H–2A workers and employers more precision when estimating the costs associated with H–2A employment. This proposal is also consistent with the 2008 Final Rule, wherein the Department defined the place of departure for H–2A workers coming from outside of the United States as the ''place of recruitment,'' which meant the appropriate U.S. Consulate or port of entry. 73 FR 77110, 77151–52, 77217–18. As the Department explained then, the consulate or port of entry provides the Department with an ''administratively consistent place from which to calculate charges and obligations.'' *Id.* at 77151–52. In the current regulation, the Department required reimbursement of travel costs from and to the place of recruitment. *See* 75 FR 6884, 6912. However, when promulgating the current regulation, the Department did not fully anticipate the difficulties of determining transportation costs on a basis that is unique to the facts of each individual worker's place of recruitment. Based on the Department's enforcement of the current regulation, a single gathering point from which transportation costs can be anticipated, measured, and paid, is necessary to the efficient administration of the H–2A program, simplifies the process for employers, and provides a reasonable transportation reimbursement to workers.

Finally, the Department recognizes that before continuing on to the employer's place of employment, a prospective H–2A worker requiring a visa often must complete several steps (such as medical exam or fingerprinting appointments) over the course of several days between applying for and receiving a visa at the U.S. Consulate or Embassy. Some workers make multiple, distinct trips to the U.S. consulate or Embassy to complete these steps, though most workers complete these steps over one longer stay immediately prior to departing to the employer's place of employment. In either case, under the proposed rule, the employer must provide or pay for all reasonable subsistence costs (including lodging) that arise from the time at which the worker first arrives in the consular/embassy city for visa processing until the time the worker arrives at the employer's place of employment, regardless of whether the worker completes these activities over the course of one or multiple trips. This requirement is consistent with § 655.135(j) of these regulations which prohibits an employer or its agent from seeking or receiving payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification. As noted above, however, the employer is only required to provide or pay for the worker's reasonable transportation costs from the appropriate U.S. Consulate or Embassy to the place of employment.

ii. Paragraph (h)(4), Employer-Provided Transportation

The Department proposes to clarify the minimum safety standards required for employer-provided transportation in the H–2A program. The Department's current regulation at § 655.122(h)(4) provides that employer-provided transportation must comply with applicable federal, state, or local laws and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance required under MSPA at 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128. 20 CFR 655.122(h)(4). Employers seeking to employ H–2A workers must also recruit and hire any available U.S. workers. Because many H–2A employers also employ U.S. workers who may be covered by MSPA, it would not be a burden for these employers to adhere to the MSPA transportation safety standards when transporting H–2A workers. Section 1841 of MSPA provides that employers must comply with transportation safety regulations promulgated by the Secretary, including 29 CFR 500.104 and 500.105. In order to clarify the H–2A requirement to comply with § 500.104, the Department's proposal adds a citation specifically to § 500.104.

The Department also seeks comments concerning how its H–2A regulations can be modified to improve transportation safety. Currently, § 500.104 applies to automobiles, station wagons, and all vehicles that are used for trips of no more than 75 miles. It contains minimum safety standards for mechanisms such as operable brakes, lights, tires, steering, windshield wipers, and securely-fastened seats, but lacks protections against driver fatigue. The regulation at § 500.105 provides transportation safety standards, including measures to prevent driver fatigue, which are applicable to drivers and vehicles, other than passenger automobiles and station wagons, that transport agricultural workers pursuant to a day-haul operation or for any trip covering a distance greater than 75 miles. Despite these transportation safeguards, vehicle accidents involving H–2A and other agricultural workers continue to be a recurring problem, and are often attributable to unsafe vehicles and driver fatigue.[65] In the agricultural industry, it is common for drivers to be agricultural workers themselves, who after a long day or season of arduous agricultural work, transport other agricultural workers from one worksite to another or to the workers' home country after completing their work contracts in the United States. In a recent accident, a tractor-trailer hit a bus carrying 34 agricultural workers when the bus driver, an agricultural worker, failed to stop at a traffic signal apparently no more than 75 miles from the point of origin. The tractor-trailer driver and three bus passengers died. The bus driver, 28 bus passengers, and a passenger on the truck sustained injuries. The National Transportation Safety Board found that the accident was likely caused by driver fatigue.[66]

In light of this finding, the Department invites comments about additional protections that may be considered to help ensure against driver fatigue and other unsafe driving conditions in order to improve safety in the transportation of H–2A and corresponding U.S. workers.

d. Paragraph (j), Earning Records

The lack of permanent addresses makes it difficult to contact H–2A workers after they return to their home country should the Department need to contact a worker to distribute back wages, conduct an employee interview as part of an investigation, or to secure

[65] The measures that address driver fatigue under § 500.105 include the requirement that drivers of vehicles covered by this section make meal stops once every 6 hours and at least one rest stop between meals. 29 CFR 500.105(b)(2)(viii). Additionally, § 500.105 requires that drivers and passengers of trucks traveling more than 600 miles stop and rest for a period of at least 8 consecutive hours either before or upon completion of 600 miles. 29 CFR 500.105(b)(2)(x).

[66] National Transportation Safety Board Public Meeting Report, pg. 4, *available at https://www.ntsb.gov/news/events/Documents/2017-HWY16MH019-BMG-abstract.pdf.*

employee testimony during litigation. The Department, therefore, proposes to clarify that an employer must collect and maintain a worker's permanent address in the worker's home country. The Department's current regulation at § 655.122(j)(1) requires an employer to maintain a worker's home address, among other information. The regulation, however, does not define ''home address.'' Consequently, in administering and enforcing the H–2A program, the Department often encounters employers who maintain only the worker's temporary address at the worker's place of employment in the United States. Employers must maintain the worker's actual permanent home address—which is usually in the worker's country of origin. Accordingly, the Department proposes to clarify that an employer must collect and maintain a worker's permanent address in the worker's home country.

As part of its efforts to modernize and enhance its administration and enforcement of the H–2A program, the Department is also considering whether to require an employer to maintain a worker's email address and phone number(s) in the worker's home country when available. This information would greatly assist the Department in contacting an H–2A worker in the worker's home country, should the Department need to do so for the reasons outlined above. However, the Department understands that not all workers possess an email address or a private phone number or may not want to disclose such information to the employer for personal reasons. This, in turn, could make it difficult for an employer to demonstrate that it requested but did not receive such information from a worker. The Department, therefore, requests comments on potential benefits and implications of these additional recordkeeping requirements on H–2A employers. Finally, the Department proposes minor, nonsubstantive revisions to this section.

e. Paragraph (l), Rates of Pay

The Department proposes several changes to paragraph (l). First, the Department proposes to remove the statement ''[i]f the worker is paid by the hour'' and replace it with ''[e]xcept for occupations covered by §§ 655.200 through 655.235.'' This change is proposed consistent with the explanation provided above for § 655.120(a) because the only occupations with a different wage methodology are those covered by the regulatory provisions for workers primarily engaged in the herding or production of livestock on the range as discussed in §§ 655.200 through 655.235. The Department is concerned that the existing language ''[i]f the worker is paid by the hour,'' might create confusion about the fact that all other employers, including those who pay a monthly salary and those who pay based on a piece rate, must pay the highest applicable wage as set forth in § 655.120(a). This revision also clarifies that if the employer is certified for a monthly salary because, for example, the prevailing wage rate is a monthly rate, the employer must still pay the highest applicable wage rate. The requirement to pay the highest applicable wage means that if paying the AEWR for all hours worked in a given month would result in a higher wage than the certified monthly salary, the employer must pay the AEWR for all hours worked in that month.

Due to the requirement that the employer pay the highest applicable wage, regardless of the unit of pay, all employers except those employing workers covered by §§ 655.200 through 655.235 are required to keep a record of all hours worked. Consistent with FLSA principles, which provide a longstanding and generally recognized definition of ''hours worked,'' the term includes, but is not limited to, travel time between places of employment; driving vehicles to transport equipment or workers between housing and the place of employment, other than a bona fide carpool arrangement; time spent engaged to wait, such as waiting for the fields to dry or necessary equipment to arrive; and preparing tools for work. In addition, if the Department certifies the employer with a monthly wage rate that specifies that food will be provided (*e.g.,* $2,000 per month plus room and board), the employer must provide food in addition to wages, and the employer cannot take a credit for the cost of food if the credit would bring the worker below the wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. Further, because all H–2A employers are required to provide housing without charge to the worker, an employer also cannot not take a credit for the cost of housing.

The Department also proposes to make corresponding changes to align this paragraph with the proposed changes to § 655.120. Those changes are discussed in the preamble to § 655.120.

f. Paragraph (n), Abandonment of Employment or Termination for Cause

The Department's current regulation at § 655.122(n) provides relief from the requirements relating to return transportation and subsistence costs [67] as well as the three-fourths guarantee [68] when an employer notifies the NPC, and DHS in the case of an H–2A worker, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause.[69] It should be noted that the employer's timely notification to DHS of H–2A workers who voluntarily abandon employment or are terminated for cause is vital to ensuring program integrity and identifying workers who had been, but may no longer be, in the United States lawfully.

This provision also protects employers from disrupting their farming operations and incurring other costs and obligations to workers who voluntarily abandon employment, such as the obligations to provide housing and meals, and to solicit the return of U.S. workers to the job next season.

The Department's current regulation at § 655.153 requires an employer to contact the U.S. workers it employed in the previous year to solicit their return to the job unless the workers abandoned employment or were dismissed for cause during the previous year. The Department's proposal related to § 655.153 would require an employer to provide timely notice to the NPC of such abandonment or termination in the manner described in § 655.122(n) to receive relief from its otherwise applicable contact obligation. The employer may email the notification or send it by facsimile or U.S. mail to the contact information provided on OFLC's website at *www.foreignlaborcert.doleta.gov.* The Department proposes to revise § 655.122(n) to require an employer to maintain records of the notification detailed in the same section, including records related to U.S. workers' abandonment of employment or termination for cause during the previous year, for not less than 3 years from the date of the certification. *See* 20 CFR 655.153.

In its experience administering and enforcing the H–2A program, the Department encounters H–2A employers that claim that they have made proper notification in a timely manner in regard to workers who have abandoned employment or have been terminated for cause. Employers, however, frequently cannot produce records of such notification when requested. In order to promote its enforcement policy of appropriately

[67] *See* 20 CFR 655.122(h).

[68] *See* 20 CFR 655.122(i).

[69] *See* 20 CFR 655.122(n).

investigating claims of abandonment or termination because of the potential for abuse in an effort to evade transportation, subsistence, three-fourths guarantee, or U.S. worker contact obligations,[70] the Department proposes to require each employer to maintain records of the notification to the NPC, and DHS in the case of a worker in H–2A visa status, for not less than 3 years from the date of the certification. The requirement to maintain records of the notification assists in protecting the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA and E.O. 13788. In addition, these records could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by proposed § 655.153.

The Department additionally notes that abandonment of employment, which can occur at any time during the contract period, will sometimes be apparent. For example, a worker may simply fail to report for work without the employer's consent, in which case the regulations deem the worker to have abandoned employment upon a failure to report to work for 5 consecutive working days. *See* 20 CFR 655.122(n). In order for an employer to avail itself of the abandonment exception to the typical requirement to contact a U.S. worker, however, the U.S. worker's abandonment of employment must have been voluntary. Thus, if a U.S. worker discontinues employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute an involuntary constructive discharge. Specific factual circumstances dictate whether a constructive discharge has occurred. Although the constructive discharge inquiry is inherently fact-specific, the Department has previously identified circumstances which likely support, and circumstances which likely do not support, a finding of constructive discharge rather than job abandonment.[71]

g. Paragraph (p), Deductions

The Department's current regulation at § 655.122(p) prohibits unauthorized deductions. An employer must disclose any deductions not required by law in the job offer. The Department, however, routinely encounters employers who fail to disclose deductions; improperly withhold FICA taxes; or properly disclose and withhold federal income tax at the worker's request, but fail to remit the withholding to the proper agencies. These actions, although sometimes inadvertent, constitute violations of the H–2A statute and regulations.

The Department does not propose any change to the regulation at § 655.122(p), but seeks to clarify that according to the Internal Revenue Service (IRS), an employer may not withhold Federal Insurance Contributions Act (FICA) taxes from an H–2A worker's paycheck; and that an employer generally is not required to withhold federal income tax from an H–2A worker's paycheck. In some situations, employers may be prohibited from withholding federal income tax under the H–2A program.

i. FICA Taxes

The Department follows IRS rulings with respect to taxes and withholdings. IRS guidelines provide that H–2A workers are exempt from FICA taxes, which include social security and Medicare taxes.[72] An employer, therefore, may not withhold FICA taxes from an H–2A worker's paycheck.

ii. Federal Income Tax Withholding

Compensation paid to an H–2A worker for agricultural labor performed in connection with an H–2A visa is not subject to mandatory federal income tax withholding if the worker provides the employer a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN).[73] The employer may voluntarily withhold federal income tax when it is disclosed in the job order, provided the withholding is requested by the H–2A worker. The employer, however, is required to make ''backup withholding'' if an H–2A worker fails to provide an SSN or ITIN and receives aggregate annual compensation of $600 or more.[74]

Employers should continue to consult with the IRS or their tax consultants regarding federal withholding requirements and consult with applicable local and state tax authorities for compliance with their standards. Additionally, employers are encouraged to review WHD Field Assistance Bulletin No. 2012–3 [75] for further information on compliance with the requirements for deductions under the H–2A program.

h. Paragraph (q), Disclosure of Work Contract.

The Department's current regulation at § 655.122(q) requires an employer to disclose a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. The time by which the work contract must be provided depends on whether the worker is entering the U.S. to commence employment or is already present in the U.S.; however, for most H–2A workers, this must occur by the time the worker applies for a visa. The Department is retaining the current disclosure requirements with one minor revision. The Department proposes to specify that the work contract must be disclosed to those H–2A workers who do not require a visa to enter the United States under 8 CFR 212.1(a)(1) not later than the time of an offer of employment. This is the same point at which H–2A workers who are already in the United States because they are moving between H–2A employers receive the work contract.

4. Section 655.123, Positive Recruitment of U.S. Workers

The Department proposes a new section describing employers' positive recruitment obligations. The statute requires the Secretary to deny the temporary agricultural labor certification if the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The requirement for employers to engage in positive recruitment is in addition to, and occurs within the same time period as, the circulation of the job order through the

[70] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–1, H–2A ''Abandonment or Termination for Cause'' Enforcement of 20 CFR 655.122(n) (Feb. 28, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.*

[71] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–1, H–2A ''Abandonment or Termination for Cause'' Enforcement of 20 CFR 655.122(n) (Feb. 28, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.*

[72] *See* IRS, Publication 51 (Circular A), Agricultural Employer's Tax Guide 2018 11 (Jan. 25, 2018), *http://www.irs.gov/pub/irs-pdf/p51.pdf.*

[73] *See* IRS, Publication 5144, Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H–2A Visa (June 2014), *https://www.irs.gov/pub/irs-pdf/p5144.pdf.*

[74] *See* Internal Revenue Service, Foreign Agricultural Workers on H–2A Visas (June 5, 2018), *http://www.irs.gov/individuals/international-taxpayers/foreign-agricultural-workers.*

[75] *See* Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2012–3, General Guidance on Voluntary Assignments of Wages under the H–2A Program (May 17, 2012), *https://www.dol.gov/whd/FieldBulletins/fab2012_3.pdf.*

interstate clearance system maintained by the SWAs. *Id.* Proposed paragraph (a) reiterates these statutory requirements.

Proposed paragraph (b) permits employers to conduct their positive recruitment efforts after the SWA serving the area of intended employment has reviewed and accepted the employer's job order for intrastate clearance and before the employer files an *Application for Temporary Employment Certification.* Specifically, upon acceptance of the job order by the SWA under § 655.121, the NPC will transmit the accepted job order to other appropriate SWAs, thereby initiating the interstate clearance of the job order as set forth in § 655.150. The employer then may commence the required positive recruitment, as set forth in §§ 655.151 through 655.154.

Under proposed paragraph (c), if the employer chooses to engage in prefiling positive recruitment, the employer must begin its positive recruitment efforts within 7 calendar days of the date on which the SWA accepted the job order and must continue recruiting until the date specified in § 655.158. This timeframe will ensure that the employer begins its prefiling positive recruitment in a timely manner, and that such efforts are conducted within the same time period as the interstate clearance of the approved job order, as required by the statute.

Permitting positive recruitment to commence prior to the filing an *Application for Temporary Employment Certification* will clearly benefit those employers that consistently file job orders in compliance with program requirements because they may be able to obtain certification more quickly without the need for the Department to first issue a NOA or a NOD. The proposal will also provide the Department with better information with which to make its certification determinations.

To ensure recruitment of U.S. workers continues for an adequate period of time, proposed paragraph (f) prohibits the employer from preparing a recruitment report for submission with the *Application for Temporary Employment Certification* more than 50 calendar days before the first date of need. The initial recruitment report assures the Department that the employer is actively making efforts to conduct positive recruitment of U.S. workers, as required by the statute and this subpart.

Proposed paragraph (e) requires the employer to accept and hire all qualified, available U.S. worker applicants through the end of the recruitment period set forth in § 655.135(d), clarifying that this requirement applies to employers who engage in pre-filing recruitment. In addition, proposed paragraph (d) ensures U.S. workers have a fair opportunity to apply for these jobs by prohibiting preferential treatment of potential H–2A workers through interview requirements.

5. Section 655.124, Withdrawal of a Job Order

The Department proposes to reorganize the current withdrawal provisions at § 655.172 by moving the job order withdrawal provision from § 655.172(a) to proposed § 655.124, ''Withdrawal of a job order,'' in the sections of the regulation governing ''Prefiling Procedures,'' which address job orders filed in anticipation of future *Applications for Temporary Employment Certification.* The Department proposes placing the job order withdrawal procedures and the job order filing and review procedures together in ''Prefiling Procedures'' to make the rule better organized and more user-friendly.

In addition to relocating the job order withdrawal provision, the Department proposes minor edits to the job order withdrawal provision for both clarity and consistency with other proposed changes. For example, removing ''from intrastate posting'' is necessary because both intrastate and interstate posting may have begun under proposed § 655.121(f). Consistent with the proposal that employers submit their job orders to the NPC, proposed § 655.124(b) would establish the NPC as the recipient of job order withdrawal requests. An employer would submit its request to the NPC in writing, identifying the job order and stating its reason(s) for requesting withdrawal.

The Department proposes no change to an employer's continuing obligations to workers recruited in connection with the job order; these obligations attach at recruitment and continue after withdrawal.

C. Application for Temporary Employment Certification Filing Procedures

1. Section 655.130, Application Filing Requirements

a. Paragraph (a), What To File

The Department proposes to modernize and clarify the procedures by which an employer files an *Application for Temporary Employment Certification* for H–2A workers under this subpart. Based on the Department's experience administering the H–2A program under the current regulation, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. Under the current regulation, the NPC must issue non-substantive NODs to obtain information or documentation from the employer that the regulation expressly requires the employer to submit at the time of filing. This use of NPC staff resources increases processing times for all employers, including employers that consistently file complete and accurate applications.

To address these concerns and create an incentive for employers to file complete applications, § 655.130(a) would continue to require employers to file a completed *Application for Temporary Employment Certification.* For applications submitted electronically, OFLC's technology system will not permit an employer to submit an *Application for Temporary Employment Certification* until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all documentation and information required at the time of filing, including a copy of the job order submitted in accordance with § 655.121. For applications permitted to be filed by mail pursuant to the procedures discussed below, if an employer submits an application that is incomplete or contains errors, completing the application would require the Department to issue a NOD identifying any deficiencies, and for the employer to mail back a revised application, thus requiring a timely back-and-forth.

b. Paragraphs (c) and (d), Location and Method of Filing

In paragraph (c), the Department proposes to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator. The Department also proposes procedures to allow employers that lack adequate access to e-filing to file by mail and, for employers who are unable or limited in their ability to use or access the electronic application due to a disability, to request an accommodation to allow them to access and/or file the application through other means. Employers who are limited in their ability or unable to access electronic forms or communication due to a disability may use the procedures in § 655.130(c)(2) to request an accommodation. Proposed paragraph (d)

adopts the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney agent or surety.

Unless the employer requests an accommodation due to a disability or adequate access to e-filing, the NPC will return, without review, any *Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator. For reasons discussed earlier in this preamble, the Department believes this proposal will modernize and streamline the application filing process, will not require a change in practice for the overwhelming majority of employers and their authorized attorneys or agents, and will create significant administrative efficiencies for employers and the Department.

c. Paragraph (e), Scope of Applications

The Department proposes a new paragraph (e) to clarify the scope of all *Applications for Temporary Employment Certification* submitted by employers to the NPC. First, proposed paragraph (e) clarifies that each *Application for Temporary Employment Certification* must be limited to places of employment within a single area of intended employment, except where otherwise permitted by the subpart (*e.g.,* under § 655.131(a)(2), a master application may include places of employment within two contiguous States). This proposal addresses the lack of clarity in the 2010 Final Rule regarding whether an application could include places of employment that span more than one area of intended employment. The 2010 Final Rule also introduced some ambiguity by its revisions to § 655.132(a), which specifically limited H–2ALC applications to places of employment within a single area of intended employment.

In both the temporary and permanent labor certification programs, the Department has historically used the area of intended employment for the purpose of determining recruitment requirements employers must follow to locate qualified and available U.S. workers, and to aid the Department in assessing whether the wages, job requirements, and terms and conditions of the job opportunity will adversely affect workers in the United States similarly employed in that same local or regional area.

Whether an employer is a fixed-site employer or H–2ALC, the area of intended employment is an essential component of the labor market test necessary to determine availability of U.S. workers for the job opportunity and to ensure that U.S. workers in the local or regional area have an opportunity to apply for those job opportunities located within normal commuting distance of their permanent residences. Qualified U.S. workers may be discouraged from applying for these job opportunities if the employer's offer of employment is conditioned on workers being available to perform the labor or services at places of employment both within and outside the normal commuting area or assignment to places of employment outside normal commuting distance from their residences, despite the availability of closer work. In addition, monitoring program compliance becomes more difficult and the potential for violations increases when workers employed under a single *Application for Temporary Employment Certification* are dispersed across multiple areas of intended employment. For those reasons, applications in the H–2A program, unless a specific exception applies, must generally be limited to one area of intended employment, based on which other regulatory requirements attach (such as recruitment, housing, and wages). The Department therefore proposes to make this requirement clearer in § 655.130(e).

Second, paragraph (e) clarifies that an employer may file only one *Application for Temporary Employment Certification* for place(s) of employment covering the same geographic scope, period of employment, and occupation or comparable work. This provision will prevent the Department from receiving and processing duplicate applications. This provision will also reduce duplicative efforts by preventing an employer from filing a new application for the same job opportunity while an appeal is pending. In addition, it clarifies that filing more than one *Application for Temporary Employment Certification* is necessary when an employer needs workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or workers to perform the same full-time work, but in different areas of intended employment or with different starting and ending dates (*e.g.,* ramping up or winding down operations).

d. Paragraph (f), Staggered Entry of H–2A Workers

The Department proposes to add a new paragraph (f) to § 655.130, which permits the staggered entry of H–2A workers into the United States. Under this proposal, any employer that receives a temporary agricultural labor certification and an approved H–2A Petition may bring nonimmigrant workers into the United States at any time during the 120-day period after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. If an employer chooses to stagger the entry of its workers, it must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer, as described in more detail in the preamble discussing § 655.135(d). Additionally, the employer must comply with the requirement to update its recruitment report as described in § 655.156.

The Department preliminarily concludes that due to the uncertain nature of agricultural work, permitting the option to stagger the entry of workers under a single *Application for Temporary Employment Certification* is necessary to provide employers with the flexibility to accommodate changing weather and production conditions. Agriculture, especially in more labor-intensive crops and commodities, is different from other economic sectors and has unique implications for the availability of labor. The agricultural production process is highly dependent on changing climatic and biological conditions that create seasonal cycles for planting, cultivating, and harvesting crops. Although farmers have some degree of control over when they plant their crops each year, there is great uncertainty regarding when and how much of the crop will be harvestable and, depending on its commercial value, how quickly the crop needs to get to the marketplace. Because agricultural production is highly seasonal and generally dispersed over a broad geographic area, timely access to the right amount of labor at the right places becomes essential to the success of farming operations. This situation becomes even more critical for small farms that grow a wide array of diversified crops where the planting, cultivating, and harvesting periods are not the same, but may occur sequentially or in close proximity to one another.

Currently, employers whose needs for agricultural workers occur at different points of a season must file separate *Applications for Temporary Employment Certification* containing a new start date of work for each group of job opportunities. This means employers must repeat each step of the

labor certification process with the Department and the visa petition process with DHS, even though the agricultural labor or services to be performed is in the same occupational classification and the only difference is the expected start date of work. For agricultural associations filing as joint employers with a number of its employer-members, the master applications are more complex and burdensome to prepare and file, because the agricultural association must coordinate the amount and timing of labor needed across numerous employer-members growing a wide array of different crops under the same start date of work. Consequently, the Department receives and processes numerous master applications filed by the same agricultural association, often one every calendar month, covering substantially the same employer-members who need workers to perform work in the same occupational classification based on a different start date of work. For these reasons, the Department proposes to permit H–2A employers to stagger the entry of nonimmigrant workers into the United States.

Furthermore, requiring those employers that choose to stagger to accept referrals of U.S. workers through the period of staggering or the first 30 days of the contract period, whichever is longer, sufficiently ensures that the job opportunity will remain available to qualified U.S. workers and that the employment of H–2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. Under this proposal, for as long as there is a job opportunity that has not yet been filled by an H–2A worker, the job opportunity remains open, and qualified, eligible U.S. workers must be hired. The Department has chosen 120 days as the maximum period of staggering because enough has changed in the available labor market pool after a 4-month period that it needs to be retested. Limiting the staggering period to 120 days or fewer ensures that DOL satisfies its statutory mandate to certify that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition.'' 8 U.S.C. 1188(a)(1)(A).

Employers that wish to stagger the entry of their H–2A workers into the United States, including a joint employer filing an *Application for Temporary Employment Certification* under § 655.131(b), must notify the NPC in writing of their intent to stagger and identify the period of time, up to 120 days, during which the staggering will take place. This notice must be filed electronically, unless the employer was permitted to file by mail as set forth in § 655.130(c). An agricultural association filing as a joint employer with its members (that may have different staggered entry needs) must make a single request on behalf of all its members duly named on the *Application for Temporary Employment Certification* and provide the NPC with the maximum staggered entry timeframe (*i.e.,* the longest period of time any one member plans to stagger the entry of its H–2A workers). Since agricultural associations have a unique statutory ability to transfer H–2A workers among any of their certified job opportunities, the Department proposes that associations must accept qualified, eligible U.S. workers at any time during the provided staggered entry timeframe.

Under this proposal, employers may submit notice of their intent to use the staggering provisions at any time after the *Application for Temporary Employment Certification* is filed through 14 days after the first date of need certified by the NPC, including any modifications approved by the CO. This timeframe balances employers' need for flexibility with prospective workers' need for certainty in the terms of employment offered. Thus, the Department proposes that an employer who does not submit notice of intent to use the staggering provisions during the requirement timeframe (*i.e.,* no later than 14 days after the first date of need listed on the temporary agricultural labor certification issued) is not permitted to stagger entry of its workers and must submit a separate *Applications for Temporary Employment Certification* containing a new first date of need for those job opportunities with a later start date. Upon receipt of the employer's notice of intent to stagger, the NPC will inform all SWAs that received a copy of the employer's job order to extend the period of recruitment by the provided staggered entry timeframe, if applicable. In accordance with § 655.121(g), the SWA(s) will keep the employer's job order in its active file and refer any U.S. worker who applies for the job opportunity through the end of the new recruitment period. In addition, the NPC will update the electronic job registry to ensure that the job order remains active through the new recruitment period, in accordance with § 655.144(b).

The Department modeled this new proposed paragraph on the staggered entry provision available to seafood employers in the H–2B program. *See* 20 CFR 655.15(f)(2). That provision was added to the Interim Final Rule pursuant to section 108 of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, 128 Stat. 2130, 2464, and differs from the provision proposed in this NPRM in several respects. *See* 80 FR 24041, 24060. First, in the H–2B program, staggered entry is available only to employers in the seafood industry, while in this proposal, it is available to all H–2A employers that receive a temporary agricultural labor certification and an approved H–2A Petition. Because all H–2A employers may require flexibility to accommodate changing weather and production conditions, the staggered entry procedures are available to any employer participating in the program.

Second, H–2B employers who stagger the entry of their nonimmigrant workers into the United States between 90 and 120 days after the start date of need must complete a new assessment of the local labor market during the period that begins at least 45 days after the start date of need and ends before 90 days after the start date of need, which includes listing the job in local newspapers, placing new job orders with the SWA, posting the job opportunity at the place of employment for at least 10 days, and offering the job to any qualified, available U.S. worker who applies. *See* 20 CFR 655.15(f)(2). Here, the Department has proposed that the approved job order being circulated for recruitment by the SWA remain open and that employers must hire all qualified, eligible U.S. workers who apply through the period of staggering, but the Department has not proposed employers to conduct a new assessment of the local labor market for staggering periods that exceed 90 days. For purposes of this NPRM, the Department determined that its proposal sufficiently protects U.S. workers and fulfills its statutory obligations. The Department, however, welcomes comments on whether additional recruitment for employers that stagger the entry of workers beyond 90 days should be required and what form that recruitment should take.

Third, H–2B employers must sign and date an attestation form stating the employer's compliance with the regulatory requirements for staggered entry and provide a copy of the attestation to the H–2B worker seeking entry to the United States with instructions that the workers present the documentation upon request to the Department of State's (DOS's) consular officers when they apply for a visa and/or DHS's U.S. Customs and Border Protection officers when seeking

admission to the United States. *See* 20 CFR 655.15(f)(3). Here, in order to streamline the process and avoid additional paperwork, the Department plans to update Appendix A to the Form ETA–9142A to make clear that recruitment obligations and assurances are extended for those employers who stagger the entry of their H–2A workers. Furthermore, the Department does not propose to require H–2A workers to present documentation to DOS or DHS, but invites the public to comment on this or other aspects of the proposed procedures.

e. Paragraph (g), Information Dissemination

Finally, the Department proposes minor editorial changes to newly designated paragraph (g) that permits OFLC to provide information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures not only to the WHD, but to any other Federal agency, as appropriate, for investigative and/or enforcement purposes. The Department proposes this change to promote greater collaboration among Federal agencies with authority to enforce compliance with program requirements and combat fraud and abuse.

2. Section 655.131, Agricultural Association and Joint Employer Filing Requirements

The Department proposes to revise this section to include provisions that govern the filing of *Applications for Temporary Employment Certification* by joint employers other than agricultural associations that file master applications. To reflect these new provisions, the Department proposes to rename this section, ''Agricultural association and joint employer filing requirements.'' The Department is otherwise retaining the provisions at § 655.131 that govern the filing of an *Application for Temporary Employment Certification* by an agricultural association on behalf of its employer-members, with minor revisions to the procedures for applications by agricultural associations. The INA requires that agricultural associations be permitted to file H–2A applications, including master applications, and that they be permitted to do so either as employers or agents. Section 218(c)(3)(B)(iv), (d) of the INA; 8 U.S.C. 1188(c)(3)(B)(iv), (d). Therefore, the Department is continuing its longstanding practice of permitting an agricultural association to file an application as an employer or agent on behalf of its employer-members, including the option to file a master application as a joint employer.

a. Agricultural Association Filing Requirements

The Department's proposed rule makes no substantive changes to agricultural associations' filing requirements. Accordingly, the proposed rule permits an agricultural association to file an application as a sole employer, joint employer, or agent, as contemplated in the INA. *See* section 218(c)(3)(B)(iv), (d) of the INA; 8 U.S.C. 1188(c)(3)(B)(iv), (d). The proposed rule renumbers the introductory paragraph as paragraph (a), and the current paragraph (a) would become paragraph (a)(1). The Department proposes to add a new paragraph (a)(3) codifying the Department's longstanding practice that an agricultural association that files a master application as a joint employer with its employer-members may sign the application on behalf of the employer-members, but an agricultural association that files as an agent may not and must obtain each member's signature on the application. Finally, the Department proposes to divide the current paragraph (b) into a new paragraph (a)(2), which addresses master application filing requirements, and a new paragraph (a)(4), which addresses the procedure for issuing a final determination to the association that approves the application, consistent with the proposed revisions to § 655.162.

b. Master Applications

Master applications are contemplated by section 218(d) of the INA, 8 U.S.C. 1188(d), and the Department has permitted the filing of master applications as a matter of practice. The proposed rule retains the master application filing requirements currently described in paragraph (b), but will describe these requirements in paragraphs (a)(2) and (4), with minor amendments necessary to ensure the provisions are consistent with proposed revisions to the definition of master application in § 655.103 and the modernization proposals that revise the § 655.162 procedures for issuance of certifications. Under the current regulation, the Department only certifies a master application if all employer-members have the same first dates of need. The Department proposes to permit a master application if the employer-members have different first dates of need, provided no first date of need listed in the application differs by more than 14 calendar days from any other listed first date of need, consistent with the proposed revision to the definition of master application in § 655.103, as explained further above. The Department also proposes to delete the phrase ''just as though all of the covered employers were in fact a single employer'' because this phrase was open to the misinterpretation that the provisions of the regulation that govern the geographic scope of a master application apply to single employer filers as well. Removal of this phrase clarifies that this paragraph applies only to agricultural associations and their employer-members.

The Department also proposes to revise the procedures for issuing certified applications to an agricultural association. Paragraph (b) of the current regulation requires the CO to send the certified *Application for Temporary Employment Certification* to the association and contemplates that the association will send copies of the certified application to its employer-members for inclusion in petitions to USCIS. Consistent with the proposed revisions to § 655.162 below, proposed paragraph (a)(4) states that the CO will send the agricultural association a Final Determination using electronic method(s).

c. Joint Employer Filing Requirements

The Department proposes a new paragraph (b) to codify the Department's longstanding practice of permitting two or more individual employers to file a single *Application for Temporary Employment Certification* as joint employers. This situation arises when two or more individual employers operating in the same area of intended employment have a shared need for the workers to perform the same agricultural labor or services during the same period of employment, but each employer cannot guarantee full-time employment for the workers during each workweek. This allows smaller employers that do not have full time work for an H–2A worker and lack access to an association, to utilize the H–2A program. Typically, there is an arrangement among the employers to share or interchange the services of the workers to provide full-time employment during each workweek and guarantee all the terms and conditions of employment under the job order or work contract.

This proposal establishes the procedures and requirements under which two or more individual employers may continue to participate in the H–2A program as joint employers. Under proposed paragraph (b)(1)(i), any one of the employers may file the *Application for Temporary Employment*

Certification with the NPC, so long as the names, addresses, and the crops and agricultural labor or services to be performed are identified for each employer seeking to jointly employ the workers. Consistent with longstanding practice, any applications filed by two or more employers will continue to be limited to places of employment within a single area of intended employment covering the same occupation or comparable work during the same period of employment for all joint employers, as required by § 655.130(e). Typically, this allows neighboring farmers with similar needs to use the program, though they do not, by themselves, have a need for a full time worker.

The proposed application filing procedures for two or more employers under proposed § 655.131(b) are different from the procedures for a master application filed by an agricultural association as a joint employer in several ways. First, unlike the master application provision, the employers filing a single *Application for Temporary Employment Certification* under proposed paragraph (b) would not be in joint employment with an agricultural association of which they may be members. Thus, if an agricultural association assists one or more of its employer-members in filing an *Application for Temporary Employment Certification* under proposed paragraph (b), the agricultural association would be filing as an agent for its employer-members. Second, all employers filing an *Application for Temporary Employment Certification* under proposed paragraph (b) would have to have the same first date of need and require the agricultural labor or services of the workers requested during the same period of employment in order to offer and provide full-time employment during each workweek. In contrast, in a master application filed by an agricultural association, each employer-member would offer and provide full-time employment to a distinct number of workers during a period of employment that may have first dates of need differing by up to 14 calendar days. Finally, unlike a master application where the places of employment for the employer-members could cover multiple areas of intended employment within no more than two contiguous States, the employers filing a single application as joint employers under proposed paragraph (b) would have to identify places of employment within a single area of intended employment.

Proposed paragraph (b)(1)(ii) provides that each joint employer must employ each H–2A worker the equivalent of 1 workday (*e.g.,* a 7-hour day) each workweek. This requirement is in keeping with the purpose of this filing model, which is to allow smaller employers in the same area and in need of part-time workers performing the same work under the job order, to join together on a single application, making the H–2A program accessible to these employers. This requirement provides a limiting principle that is intended to assure that individual employers with full time needs use the established application process for individual employers, that association members use the statutory process provided for associations, and that joint applications are restricted to employers with a simultaneous need for workers that cannot support the full time employment of an H–2A worker. In this way, the Department can carry out the statutory requirements applicable to individual employers and to associations. The Department invites comments on this requirement, and how to best effectuate the purposes of joint employer applications.

Each employer seeking to jointly employ the workers under the *Application for Temporary Employment Certification* would have to comply with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of the chapter. Therefore, proposed § 655.131(b)(1)(iii) would require each joint employer to sign and date the *Application for Temporary Employment Certification.* By signing the application, each joint employer attests to the conditions of employment required of an employer participating in the H–2A program, and assumes full responsibility for the accuracy of the representations made in the application and job order, and for all of the assurances, guarantees, and requirements of an employer in the H–2A program. In the event the Department determines any employer named in the *Application for Temporary Employment Certification* has committed a violation, either one or all of the employers named in the *Application for Temporary Employment Certification* can be found responsible for remedying the violation(s) and for attendant penalties.

Where the CO grants temporary agricultural labor certification to joint employers, proposed § 655.131(b)(2) provides that the joint employer that filed the *Application for Temporary Employment Certification* would receive the Final Determination correspondence on behalf of the other joint employers in accordance with the procedures proposed in § 655.162.

3. Section 655.132, H–2A Labor Contractor Filing Requirements; and 29 CFR 501.9, Enforcement of Surety Bond

The Department proposes to revise the additional filing requirements for H–2ALCs at § 655.132. First, the Department proposes to move language addressing the scope of H–2ALC applications in current paragraph (a) to proposed paragraph (e) in § 655.130 to clarify that the geographic scope of an *Application for Temporary Employment Certification* is limited to one area of intended employment, except as otherwise permitted by this subpart, without regard to the type of employer filing the application (*i.e.,* fixed-site employer, joint-employers, agricultural association filing as a sole employer or agent, or H–2ALC). An H–2ALC application and job order will continue to be limited to places of employment within a single area of intended employment. However, pursuant to the Department's proposed § 655.130(e) that this same limitation applies to all applications and job orders, the Department proposes to remove current paragraph (a) to eliminate any confusion or redundancy in the regulatory text.

Therefore, the Department proposes that current paragraph (b) becomes paragraph (a) in the proposed rule. This paragraph continues to explain the enhanced documentation requirements for H–2ALCs with minor amendments. The Department observes that the number of H–2ALCs applying for temporary agricultural labor certifications has risen dramatically in recent years and is expected to continue to increase.[76] Given the increased use of the H–2A program by H–2ALCs and the relatively complex and transient nature of their business operations, the Department has determined the enhanced documentation requirements for H–2ALCs, provided at the time of filing an *Application for Temporary Employment Certification,* continue to be necessary in order to protect the safety and security of workers and ensure basic program requirements are met. Under this paragraph, H–2ALCs

[76] Based on an analysis of *Applications for Temporary Employment Certification* processed for FYs 2014 and 2017, the number of applications filed by H–2ALCs more than doubled from 660 (FY 2014) to 1,410 (FY 2017), and the number of worker positions certified for H–2ALCs nearly tripled from approximately 24,900 (FY 2014) to 72,400 (FY 2017). Between FYs 2014 and 2017, the average annual increase in H–2ALC applications requesting temporary labor certification was 29 percent, compared to only 18 percent for agricultural associations and 11 percent for individual farms and ranches.

will continue to include in or with their *Applications for Temporary Employment Certification* at the time of filing the information and documentation listed in redesignated paragraphs (a) through (e) to demonstrate compliance with regulatory requirements, with the following proposed revisions.

In proposed paragraph (e)(2), the Department proposes a minor editorial clarification and a technical correction. Because H–2ALC operations typically require transporting workers to multiple worksite locations owned or operated by the fixed-site agricultural business, the Department proposes to replace the term ''the worksite'' with ''all place(s) of employment'' to clarify that transportation provided by the fixed-site agricultural business between all the worksites and the workers' living quarters must comply with the requirements of this section. Additionally, the Department has corrected the reference for workers' compensation coverage of transportation from § 655.125(h) to § 655.122(h).

In proposed paragraph (c), the Department is retaining the requirement that an H–2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations in the form of a surety bond. 20 CFR 655.132(b)(3); 29 CFR 501.9. This bonding requirement, which became effective in 2009, allows the Department to ensure that labor contractors, who may be transient and undercapitalized, can meet their payroll and other program obligations, thereby preventing program abuse. 20 CFR 655.132(b)(3); 29 CFR 501.9. Following a final decision that finds violations, the WHD Administrator may make a claim to the surety for payment of wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced, up to the face amount of the bond. Currently, bond amounts range from $5,000 to $75,000 depending on the number of H–2A workers employed by the H–2ALC under the labor certification. 29 CFR 501.9(c).

Based on the Department's experience implementing the bonding requirement and its enforcement experience with H–2ALCs, the Department proposes updates to the regulations. These updates are intended to clarify and streamline the existing requirement and to strengthen the Department's ability to collect on such bonds, including by accepting electronic surety bonds and requiring the use of a standard bond form. Further, the Department proposes adjustments to the required bond amounts to reflect annual increases in the AEWR and to address the increasing number of certifications covering a significant number of workers (*e.g.,* more than 150 workers).

Under the current regulations, application requirements for an H–2ALC, including obtaining a surety bond, are found in 20 CFR 655.132. Most of the requirements pertaining to bonds, however, including the required bond amounts and scope of bond coverage, are found in 29 CFR 501.9. The Department has observed that a large proportion of the surety bonds submitted by labor contractors do not meet the requirements of 29 CFR 501.9. This hinders the Department's ability to effectively collect wages and benefits owed to workers when violations are found. Therefore, to make these regulations more accessible to the regulated community, the Department proposes moving the substantive requirements governing the content of labor contractor surety bonds to 20 CFR 655.132(c) so that these requirements are in the same section as other requirements for the *Application for Temporary Employment Certification*.[77] Requirements that pertain solely to the WHD's procedures for enforcing bonds will remain in 29 CFR 501.9.

To further address the issue of noncompliant bonds and streamline its review of bond submissions, the Department proposes to expand the capabilities of the iCERT System to permit the electronic execution and delivery of surety bonds and to adopt a bond form that will include standardized bond language.

Since the implementation of e-filing in December 2012, OFLC has permitted employers to upload a scanned copy of the surety bond at the time of filing and, upon acceptance of the application under § 655.143, provided a written notice reminding employers to submit the original surety bond during processing, before issuance of the certification.[78] Implementing a process to accept electronic surety bonds will eliminate delays associated with the mailing of an original paper bond and promote efficiency in the review of the bonds without compromising program integrity. The Department, therefore, proposes to develop a process for accepting electronic surety bonds that would involve a bond form to be completed through the iCERT System, verify the identity and authority of signatories to the bond (the H–2ALC and surety's representative), allow both parties to sign the bond form electronically, and securely store and transmit the executed bond to the Department along with the rest of the application. Under this proposal, electronic surety bonds are required for all H–2ALCs subject to the Department's proposed mandatory e-filing requirement. H–2ALCs exempt from mandatory e-filing under § 655.130(c) due to a disability or lack adequate access to e-filing would be permitted to submit paper surety bonds, along with the rest of their paper application.

Until such time as the Department's proposed process for accepting electronic surety bonds is operational, the Department will allow H–2ALCs to submit an electronic (scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the certification is issued. To ensure that the original bond is received within this time period, the Department proposes to revise § 655.182 to specify that failure to submit a compliant, original surety bond within this time period will constitute a substantial violation that may warrant debarment. This proposed addition means that the failure to submit a compliant, original surety bond is also grounds for revoking the certification. This will allow greater flexibility and efficiency in the processing of applications while protecting the Department's ability to enforce the bonds. Under this alternative proposal, the Department still requires the use of a standardized form bond.

The use of a standardized form bond will also streamline the processing and improve compliance with the bonding requirement. Currently, the bonds received by the Department vary considerably in wording and form. Not only does this make it more difficult to discern whether a bond is sufficient for the purposes of the *Application for Temporary Employment Certification,* it also results in different sureties and labor contractors believing they are subject to differing legal requirements. For instance, as discussed below, different bonding companies have interpreted the current regulatory language in different ways. The Department's proposed bond form is ETA–9142A—Appendix B. The Department seeks comments from the public, and particularly from stakeholders and those in the bond industry, on the feasibility and accessibility of its proposals to implement a process for accepting

[77] *Available at https://www.foreignlaborcert.doleta.gov/h-2a.cfm.*

[78] Notice, *Electronic Filing of H–2A and H–2B Labor Certification Applications Through the iCERT Visa Portal System,* 77 FR 59672 (Sept. 28, 2012).

electronic surety bonds and to use a standardized bond form.

The proposed bond form with its standardized language is intended to incorporate the existing bond requirements in most respects, while clarifying certain requirements for the regulated community. For example, the proposed bond language still requires a surety to pay sums for wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced based on a final decision finding a violation or violations of 20 CFR part 655, subpart B, or 29 CFR part 501, but clarifies that the wages and benefits owed may include the assessment of interest.

Similarly, the proposed language also clarifies the time period during which liability on the bond accrues, as distinguished from the time period in which the Department may seek payment from the surety under the bond. Currently 29 CFR 501.9(b) provides that bonds must be written to cover ''liability incurred during the term of the period listed in the *Application for Temporary Employment Certification*.'' Language in paragraph (d), pertaining to the time period in which claims can be made against a bond, permits cancellation or termination of the bond with 45 days' written notice to the WHD Administrator. 29 CFR 501.9(d). This provision was intended to permit a surety to end the period in which a claim can be made against a bond provided that the minimum claims period of paragraph (d) had elapsed. Instead, some sureties have interpreted this language as permitting the early termination of the bond during the period in which liability accrues. The proposed bond language described below makes it clear that liability accrues for the duration of the period covered by the labor certification.

The Department proposes several changes to the bond requirements. Currently, a bond must be written to cover liability incurred during the period of the labor certification and the labor contractor is required to amend the surety bond to cover any requested and granted extensions of the labor certification. 29 CFR 501.9(b). The standardized bond language proposed by the Department provides that liability accrues during the period of the labor certification, including any extension, thereby eliminating the need to amend the surety bond, streamlining the extension process, and reducing the risk of errors introduced when amending the bonds.

The Department also proposes extending and simplifying the time period in which a claim can be filed against the surety. As currently written, the Department must be given no fewer than 2 years from the expiration of the labor certification in which to enforce the bond. This is tolled when the Administrator commences enforcement proceedings. After this time, sureties are permitted to terminate this claims period with 45 days' written notice to the WHD Administrator. Under the proposed rule, this period of enforcement is extended to 3 years (and is still tolled by the commencement of enforcement proceedings). This does not extend the accrual of liability. Instead, it allows the Department more time to complete its investigations while retaining the ability to seek recovery from the surety. Because the Department's proposed standardized bond language provides more specificity as to the length of the claims period (3 years as opposed to ''no less than [2] years''), the provision allowing cancellation or termination of the claims period with 45 days' written notice has been eliminated.

Further, the Department proposes adjusting the required bond amounts annually to reflect increases in the AEWR and increasing the bond amounts required for certifications covering a significant number of workers (*e.g.,* 150 or more workers). The bonding requirement for H–2ALCs was created because, in the Department's experience, these employers can be transient and undercapitalized, making it difficult to recover the wages and benefits owed to their workers when violations are found.[79] Current required bond amounts range from $5,000 to $75,000, based on the number of H–2A workers to be employed under the labor certification, with the highest amount required for certifications covering 100 or more workers. 29 CFR 501.9(c). However, the Department has found that the current bond amounts often are insufficient to cover the amount of wages and benefits owed by labor contractors, limiting the Department's ability to seek back wages for workers. The Department seeks comment on the specific adjustments proposed, as well as alternative means of adjusting the bond amounts to better reflect risk and ensure sufficient coverage.

First, the Department proposes adjusting the current bond amounts to reflect the annual increase in the AEWR. For certifications covering fewer than 75 workers, the bond amounts have remained the same since 2009, when the bonding requirement was implemented; for certifications covering 75 or more workers, the bond amounts have been unchanged since 2010. *See* 2008 Final Rule, 73 FR 77110, 77231. As a result, as the AEWR rises, the bonds are less likely to cover the full amount of wages and benefits owed to workers. When the Department examined the required bond amounts in its 2009–2010 rulemaking, it proposed and adopted additional bond amounts for certifications covering 75 to 99 workers and those covering 100 or more workers. 2009 NPRM, 74 FR 45906, 45925; 2010 Final Rule, 75 FR 6884, 6941. In so doing, it based the new bond amount for certifications covering 100 or more workers on the amount of wages 100 workers would be paid over a 2-week period (80 hours) assuming an AEWR of $9.25. 2009 NPRM, 74 FR 45906, 45925. Therefore, the Department proposes to adjust the existing required bond amounts proportionally on an annual basis to the degree that a nationwide average AEWR exceeds $9.25. The Department will calculate and publish an average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b). The average AEWR will be calculated as a simple average of these AEWRs applicable to SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse). To calculate the updated bond amounts, the Department will use the current bond amounts as a base, multiply the base by the average AEWR, and divide that number by $9.25. Until the Department publishes an average AEWR, the updated amount will be based on a simple average of the 2018 AEWRs, which the Department calculates to be $12.20. For instance, for a certification covering 100 workers, the Department would calculate the required bond amount according to the following formula:

$75,000 (base amount) × $12.20 ÷ $9.25 = $98,919 (updated bond amount).

In subsequent years, the 2018 average AEWR of $12.20 would be replaced in this calculation by the average AEWR calculated and published in that year.

Second, the Department proposes increasing the required bond amounts for certifications covering a significant number of workers (*e.g.,* 150 or more workers). In recent years, the

[79] *See* 2008 Final Rule, 73 FR 77110, 77163; *see also* 2010 Final Rule, 75 FR 6884, 6941 (''The Department's enforcement experience has found that agricultural labor contractors are more often in violation of applicable labor standards than fixed-site employers. They are also less likely to meet their obligations to their workers than fixed-site employers.'').

Department has observed more certifications for which the current bond amounts do not provide adequate protection. In the first half of FY 2018 alone, OFLC issued 75 certifications to labor contractors that planned to employ 150 or more workers (9.8 percent of the certifications issued to labor contractors). In contrast, during the entire FY 2014 (the first year with easily comparable data), only 28 (4.7 percent) of the certifications issued by OFLC covered 150 or more workers. This represents more than a two-fold increase between 2014 and 2018 in the percentage of certifications for crews of 150 or more workers; and more than a five-fold increase in the total number of such certifications over the same time period. Further, certifications are being issued that cover even larger numbers of workers. In FY 2014, no certifications were issued for 500 or more workers. In contrast, in the first half of FY 2018, several certifications have been issued which each cover nearly 800 workers.

Given these dramatic increases in crew sizes, the Department proposes increasing the required bond amount for certifications covering 150 or more workers. For such certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional set of 50 workers. The interval by which the bond amount increases will be updated annually to reflect increases in the AEWR. This value will be based on the amount of wages earned by 50 workers over a 2-week period and, in its initial implementation, would be calculated using the 2018 average AEWR as demonstrated:

$12.20 (2018 Average AEWR) × 80 hours × 50 workers = $48,800 in additional bond for each additional 50 workers over 100.

For example, a certification covering a crew of 150 workers would require additional surety in the amount of $48,800 (150 − 100 = 50; 1 additional set of 50 workers). For a crew of 275 workers, additional surety of $146,400 would be required (275 − 100 = 175; 175÷50 = 3.5; this is 3 additional sets of 50 workers). As explained above, this additional surety is added to the bond amount required for certifications of 100 or more workers. Thus, for a crew of 150 workers the required bond amount would be $147,719 ($98,919 required for certifications of 100 or more workers + $48,800 in additional surety). Likewise, for a crew of 275 workers, the required bond amount would be $245,319 ($98,919 + $146,400 in additional surety).

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for farm labor contractor surety bonds generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better); therefore, any increase in premiums will be reasonably calculated given the large number of workers potentially impacted. Further, the Department believes this is necessary to ensure fairness among labor contractors and for workers. The current framework ''disproportionately advantages larger H–2ALCs while providing diminishing levels of protection for employees of such contractors''—the very concerns which led the Department to create higher bond amounts for certifications covering 75 to 99 and 100 or more workers. 2010 Final Rule, 75 FR 6884, 6941.

Finally, because the proposed rule in § 655.103 expands the definition of agriculture to include reforestation and pine straw activities, employers in these industries may qualify as H–2ALCs and therefore would be required to comply with the surety bond requirements described in this section.

The Department seeks comments on the impact of the Department's proposed updates to the required bond amounts and whether these appropriately reflect the amount of risk that would otherwise be borne by workers.

Additionally, the Department seeks comments as to whether any additional filing requirements for H–2ALCs are needed to ensure that labor contractors are able to meet H–2A program obligations.

4. *Section 655.134, Emergency Situations*

The Department proposes minor amendments to § 655.134 to provide greater clarity with respect to the procedures for handling *Applications for Temporary Employment Certification* filed on an emergency basis. Proposed paragraph (a) contains minor technical changes, including moving a parenthetical example of ''good and substantial cause'' to paragraph (b), where the meaning of ''good and substantial cause'' is discussed in more detail.

Paragraph (b) continues to address what an employer must submit to the NPC when requesting a waiver of the time period for filing an *Application for Temporary Employment Certification,* including a statement describing the emergency situation that justifies the waiver request. The factors that may constitute good and substantial cause will continue to be nonexclusive, but the Department has clarified that these situations involve the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* 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. The minor clarifications do not materially change the regulatory standards, but establish greater consistency with a similar provision contained in the H–2B regulation at § 655.17.[80]

The Department also proposes changes to paragraphs (b) and (c) to simplify the emergency application filing process for employers and provide greater clarity with respect to the procedures for handling such applications. Consistent with the proposal in § 655.121(a) to require employers to submit job orders to the NPC, rather than a SWA, the Department proposes to eliminate the requirement that an employer requesting an emergency situation waiver submit a copy of the job order concurrently to both the NPC and the SWA serving the area of intended employment. Rather, the employer must submit the required documentation to the NPC. Upon receipt of a complete waiver request, the CO promptly will transmit a copy of the job order, on behalf of the employer, to the SWA serving the area of intended employment and request review for compliance with the requirements set forth in §§ 653.501(c) and 655.122. This proposed change simplifies the application filing process by providing one point of submission (*i.e.,* the NPC) for all job orders and will save employers time and cost by eliminating the need to file a duplicate copy of the job order concurrently with the NPC and the SWA. In addition, it makes the process for filing job orders in emergency situations consistent with the process for filing job orders under proposed § 655.121.

Under this proposal, the CO will continue to process emergency

[80] Pursuant to 20 CFR 655.17(b), the employer may request a waiver of the required time period(s) for filing an *H–2B Application for Temporary Employment Certification* based on good and substantial cause that ''may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.'' 80 FR 24041, 24116, 24117.

Applications for Temporary Employment Certification in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make final determinations in accordance with §§ 655.160 through 655.167. The CO will concurrently review the *Application for Temporary Employment Certification,* job order, other documentation, and statement submitted by the employer that details the reason(s) that necessitate the waiver request. The Department's proposed paragraph (c)(1) requires that the SWA inform the CO of any deficiencies in the job order within 5 calendar days of the date the SWA receives the job order. Under proposed paragraph (c)(2), if the employer's submission does not justify waiver of the filing timeframe and/or the CO determines there is not sufficient time to undertake an expedited test of the labor market, the CO will issue a NOD under § 655.141 that states the reason(s) the waiver request cannot be granted. The NOD will also provide the employer with an opportunity to submit a modified *Application for Temporary Employment Certification* or job order that brings the requested workers' anticipated start date into compliance with the required time periods for filing. In providing these clarifying amendments, the Department proposes to eliminate current procedures that require the CO to deny certification under in § 655.164 if the waiver cannot be granted, without first providing the employer with an opportunity to modify the application or job order to bring it into compliance with the non-emergency job order filing timeliness requirement at § 655.121(b).

The Department believes that providing employers with an opportunity to submit a modified *Application for Temporary Employment Certification* or job order before a denial determination is issued will result in better customer service and more efficient processing for OFLC and employers. The Department's experience under the current regulation demonstrates that employers prefer to adjust their first date of need to comply with regulatory requirements, and thereby continue the application process, rather than receive a denial determination and either follow the procedures under § 655.121 to submit the same job order to the NPC, revised only to list the anticipated start date as at least 60 days from the filing date, or face a time-consuming and costly appellate process. More importantly, the COs and SWAs expend considerable time and effort reviewing *Applications for Temporary Employment Certification* and job orders for compliance with regulatory requirements, and if those efforts result in denials, employers begin the process again and file duplicate applications and job orders with modified periods of employment. For these reasons, when an employer has failed to justify a waiver request and/or there is not sufficient time to undertake an expedited test of the labor market, the Department proposes that employers be provided an opportunity to modify their applications or job orders.

5. Section 655.135, Assurances and Obligations of H–2A Employers

a. Paragraph (d), 30-Day Rule

The Department proposes to replace the 50 percent rule in § 655.135(d) with a 30-day rule requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification,* including any modifications thereof, and a longer recruitment period for those employers who choose to stagger the entry of H–2A workers into the United States under proposed § 655.130(f). The 50 percent rule, which requires employers of H–2A workers to hire any qualified, eligible U.S. worker who applies to the employer during the first 50 percent of the work contract period, was originally created by regulation as part of the predecessor H–2 agricultural worker program in 1978.[81] In 1986, the IRCA added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct as well as review of ''other relevant materials including evidence of benefits to U.S. workers and costs to employers, addressing the advisability of continuing a policy which requires an employer, as a condition for certification under this section, to continue to accept qualified, eligible United States workers for employment after the date the H–2A workers depart for work with the employer.'' Section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii). In the absence of the enactment of Federal legislation prior to the end of the 3-year period, the statute instructed the Secretary to publish the findings immediately and promulgate an interim or final regulation based on the findings.

To comply with these requirements, the Secretary hired a research firm to analyze the cost-benefit impact of the 50 percent rule on U.S. workers, growers, and the general public. *See* 2008 NPRM, 73 FR 8538, 8553. The research firm studied the impact of the 50 percent rule in just Virginia and Idaho, the two States that were determined to have the highest number of U.S. worker referrals made pursuant to the 50 percent rule. The number of growers interviewed was extremely small, as the firm interviewed only those growers that actually hired U.S. workers because of the 50 percent rule—only 66 growers (0.1 percent) in all of Virginia and Idaho's total 64,346 farms (according to USDA). The study sought to determine the costs to employers that hire referred 50 percent rule workers and the concomitant benefits to the U.S. workers hired under the rule. Even with this narrow focus, the study made it clear that the H–2A program was not regarded as desirable by growers. Of those questioned, 6 percent said they were dropping out of the H–2A program because of the 50 percent rule. Forty percent wanted the rule eliminated entirely and 33 percent wanted to alter the requirement by, for example, requiring the 50 percent rule workers to finish the season or modifying substantially the 50 percent rule by requiring the hiring of U.S. workers only up to a certain point before the first date of need.

In 1990, pursuant to what is now section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), ETA published an interim final rule to continue the 50 percent requirement.[82] That rule was never finalized. In 2007, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H–2A rule on U.S. farmworkers. *See* 2008 Final Rule, 73 FR 77110, 77127 n.3. The surveyors for this study conducted interviews with a number of stakeholders to gather information on the impact of the 50 percent rule, including employers, SWAs, and farm worker advocacy organizations. The researchers found that the rule played an insignificant role in the program overall, hiring-wise, and had not contributed in a meaningful way to protecting employment for domestic agricultural workers. The researchers estimated that the number of agricultural hires resulting from

[81] *See* 20 CFR 655.203(e) (1978); Final Rule, *Temporary Employment of Alien Agricultural and Logging Workers in the United States,* 43 FR 10306, 10316 (Mar. 10, 1978).

[82] Continuation of Interim Final Rule, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; ''Fifty-Percent Rule'',* 55 FR 29356 (July 19, 1990).

referrals to employers during the 50 percent rule period was exceedingly small, with H–2A employers hiring less than 1 percent of the legal U.S. agricultural workforce through the 50 percent rule. All surveyed stakeholder groups reported that U.S. workers hired under the 50 percent rule typically did not stay on the job for a significant length of time once hired.

In 2008, the Department eliminated the 50 percent rule, based on its determination that the rule created substantial uncertainty for employers in managing their labor supply and labor costs during the life of an H–2A contract and served as a substantial disincentive to participate in the program. 2008 Final Rule, 73 FR 77110, 77127. The Department determined that the obligation to hire additional workers mid-way through a season was disruptive to agricultural operations and made it difficult for agricultural employers to be certain they would have a steady, stable, properly trained, and fully coordinated workforce. *Id.* On the other hand, the Department found that some U.S. workers secured jobs through referrals made pursuant to the rule, but that the number of hires was small, and that many workers hired pursuant to the rule did not complete the entire work period. *Id.* at 77127–28. Therefore, the Department concluded that the costs of the rule substantially outweighed any potential benefits for U.S. workers. *Id.* at 77128. However, in order to prevent the disruption of access of U.S. workers to agricultural employment activities and allow for the collection of additional data about the costs and benefits of mandatory post-date-of-need hiring, the Department created a 5-year transitional period under the Final Rule during which mandatory post-date-of-need hiring of qualified and eligible U.S. workers would continue to be required of employers for a period of 30 days after the employer's first date of need. *Id.* In effect, the Department replaced the 50 percent rule with a 30-day rule for the transitional period.

In 2010, the Department reinstated the 50 percent rule, concluding that the potential costs to employers incurred as a result of the 50 percent rule were outweighed by the benefits to U.S. workers of having access to these jobs through 50 percent of the contract period. 2010 Final Rule, 75 FR 6884, 6922. The Department cited the lack of definitive data as the basis for its reinstatement of the rule. *Id.*

Since the implementation of the current regulation, the Department has gained additional experience and collected a significant amount of data that can assess whether the 50 percent rule is an effective means of protecting the employment opportunities of U.S. workers from potential adverse impact resulting from the employment of foreign workers. Specifically, as part of the audit examination process under § 655.180, the recruitment reports submitted by employers to the Department are a relevant and readily available source of information in assessing how many U.S. workers applied for the certified job opportunities and at what point in time, as well as the disposition of each U.S. worker. Under the current regulation, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed, and update the recruitment report for each U.S. worker who applied through the entire recruitment period.[83]

The Department examined the recruitment reports of 1,824 certified H–2A applications covering more than 33,510 jobs selected for audit examination and fully audited during calendar years 2016 to 2018.[84] Approximately 87 percent (1,582) of the recruitment reports of 1,824 certified H–2A applications reviewed, covering 23,324 jobs, reported that no U.S. workers applied for the job opportunities at any point during the 50 percent recruitment period. Of the remaining 13 percent (242) of the 1,824 certified H–2A applications, covering 10,186 jobs, employer recruitment reports revealed that 3,392 U.S. workers applied for the available job opportunities at some point from the beginning of the employer's H–2A recruitment efforts through 50 percent of the work contract period. Of those who applied, only 2,053 were reportedly hired, accounting for approximately 6 percent of the total 33,510 jobs available.

Of that 13 percent, the Department conducted a detailed review of 52 recruitment reports showing that U.S. workers applied for available jobs from the beginning of the employer's H–2A recruitment efforts through 50 percent of the work contract period. That review revealed that more than 84 percent of the U.S. workers who applied for the available job opportunities did so during the active recruitment period before the start date of work and through the first 30 days after the start date of work.[85] For the remaining 16 percent of U.S. workers who applied and/or were hired more than 30 days after the start date of work, employer recruitment reports revealed that the overwhelming majority of the referral and hiring activities occurred within the next 60 days of the recruitment period. Employers also reported that many of these U.S. workers who were hired either did not report to work or voluntarily resigned or abandoned the job shortly after beginning work.

The language of section 218(c)(3)(B)(iii) of the INA, 8 U.S.C. 1188(c)(3)(B)(iii), suggests that when issuing regulations dictating whether agricultural employers should be required to hire U.S. workers after H–2A workers have already departed for the place of employment, the Department should weigh the ''benefits to United States workers and costs to employers.'' Based on the data described above, it appears that a very low number of U.S. workers apply for the job opportunity within thirty days after the start date of work, and even fewer after that; therefore, the costs of the rule to employers, including the actual or potential cost of returning displaced H–2A workers to the place from which they departed, outweigh any benefits the rule may provide to U.S. workers. The 50 percent rule is not an effective method of filling available jobs for employers needing a stable workforce and, according to the data, provides little benefit to U.S. workers who, based on the data described above, apply for jobs either before the start date of work or during the first 30 days after the start date of work. In order to balance the needs of workers and employers, proposed paragraph (d)(1) replaces the 50 percent rule with a rule requiring employers to hire qualified, eligible U.S. worker applicants for a period of 30 days after the employer's first date of

[83] In accordance with § 655.156(b), this updated written recruitment report is retained by the employer and must be made available to the Department in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

[84] In accordance with § 655.180(a), the 1,824 certified H–2A applications were selected for audit examination between October 1, 2015 and April 2, 2018, at random and based on the discretion of the CO. Nearly 75 percent (24,782) of the 33,500 jobs covered by the 1,824 audited H–2A applications were located in the states of Florida, Georgia, New York, Louisiana, California, Kentucky, Washington, North Carolina, South Carolina, and Mississippi—the same states that consistently constitute more than 68 percent of all certified jobs in the H–2A program during FY 2015, 2016, and 2017.

[85] Of the 2,809 U.S. workers who applied for the certified jobs, 50 percent (1,393) applied before the start date of work; 36 percent (1,002) applied within 30 days after the start date of work; and 15 percent (414) applied more than 30 days after the start date of work. Of the 1,843 U.S. workers hired for the certified jobs, 47 percent (862) were hired before the start date of work; 37 percent (687) were hired within 30 days after the start date of work; and 16 percent (294) were hired more than 30 days after the start date of work.

need. Requiring employers to hire workers 30 days into the contract period, while still disruptive to agricultural operations, shortens the period during which such disruptions may occur and restores some stability to employers that depend on the H–2A program. Moreover, it is clear from the data provided above that the vast majority of U.S. workers hired after the first date of need were hired within the first 30 days of the period of need. Providing U.S. workers the ability to apply for these job opportunities 30 days into the contract period ensures that U.S. workers still have access to these jobs after the start of the contract period during the period of time they are most likely to apply.

Furthermore, the Department notes that the impact of this proposed change on U.S. workers is minimized by the staggered entry proposal, discussed further in the preamble to § 655.130(f). Under that proposal, if a petition for H–2A nonimmigrant workers filed by an employer is granted, the employer may bring the H–2A workers described in the petition into the United States at any time up to 120 days from the first date of need stated on the *Application for Temporary Employment Certification.* Proposed paragraph (d)(2) of § 655.135 provides that if an employer chooses to stagger the entry of H–2A workers, it must hire any qualified, eligible U.S. worker who applies for the job opportunity through the period of staggering or the end of the 30-day period, whichever is longer, for a period of up to 120 calendar days from the first date of need. The Department has determined that in order to fulfill its statutory duty to ensure that foreign workers are not admitted unless sufficient U.S. workers are unavailable, the period during which employers are obligated to hire qualified and eligible U.S. workers must extend beyond 30 days to the last date on which the H–2A workers enter the country.

Under proposed § 655.135(d), an employer may choose the relative stability and predictability of a shorter recruitment period, or may choose the flexibility of staggering the entry of its H–2A workers that comes with a longer recruitment period, depending on its needs. In the case of staggered entry, the resulting longer recruitment period should be less disruptive than the 50 percent rule, since, in most cases in which the employer chooses to stagger the entry of its workers, a U.S. worker hired after the beginning of the contract period would not displace an H–2A worker who has already begun employment. Rather than displacing an H–2A worker who has already entered the United States and begun work, the U.S. worker would most likely fill one of the positions with a later start date (*i.e.,* one of the staggered positions). Regardless of the employer's choice, U.S. workers will continue to have access to these job opportunities for a significant period of time after the work contract has commenced and, in the case of staggered entry, for a period of time almost comparable to that available under the 50 percent rule.

The Department proposes conforming changes to those sections of the current rule that refer to the 50 percent rule. In §§ 655.122(h)(2) and (i)(4), 655.144(b), 655.150(b), 655.156(b), 655.157(c), 655.220(c), and 655.225(b), the Department has replaced references to the 50 percent rule with language referring to the recruitment periods described in § 655.135(b). These changes account for the Department's proposals both to replace the 50 percent rule with a 30-day rule and to require a longer recruitment period for those employers who choose to stagger the entry of their H–2A workers into the United States.

In making the proposal to replace the 50 percent rule, the Department has considered available data as well as its experience administering the H–2A program, but it would like to consider additional information from the public before making a final decision. To that end, the Department invites comments from parties who may have data illustrating the costs and benefits of the 50 percent rule in the current labor market, particularly, comprehensive studies of the frequency with which H–2A employers hire U.S. workers pursuant to the 50 percent rule. The Department also invites comments on whether, if the employer chooses to stagger the entry of H–2A workers, the resulting recruitment period should run to the last date on which the employer expects foreign workers to enter the country, as proposed herein, or if the recruitment period should extend 30 days beyond the period of staggering.

b. Paragraph (k), Contracts With Third Parties Comply With Prohibitions

Finally, the Department proposes to clarify that employers engaging any foreign labor contractor or recruiter ''must contractually prohibit in writing'' the foreign labor contractor or recruiter, or any agent of such contractor or recruiter, from seeking or receiving payments from prospective employees. For employers' convenience and to facilitate more consistent and uniform compliance with this regulatory provision, the Department proposes contractual language employers must use to satisfy this requirement.

The Department makes this proposal because when employers use recruiters, they must make it abundantly clear that their foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity. The proposed contractual language specifies that foreign labor contractors and recruiters, and their agents and employees, are not to receive payments of any kind from any prospective employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification. To help monitor compliance with this prohibition, the Department is retaining the requirement that employers make these written contracts or agreements available upon request by the CO or another Federal party.

6. Section 655.136, Withdrawal of an Application for Temporary Employment Certification and Job Order

As discussed in the preamble discussing § 655.124 above, the Department proposes to reorganize the current withdrawal provisions at § 655.172 by moving withdrawal procedures for specific stages of H–2A processing to the portion of the regulation that addresses that processing stage. The Department proposes to move the current *Application for Temporary Employment Certification* and related job order withdrawal provision from § 655.172(b) to new § 655.136, located in the ''*Application for Temporary Employment Certification* Filing Procedures'' portion of the regulation, which begins at § 655.130. By placing the provisions for *Application for Temporary Employment Certification* filing and withdrawal together, the Department anticipates employers will be able to find these withdrawal procedures more easily.

In addition, the Department proposes to revise the current provision by removing language limiting withdrawal to the period after formal acceptance. Instead, the proposal permits employers to submit a withdrawal request at any time before the CO makes a final determination. Employers may realize after filing and before formal acceptance that they cannot comply with certification requirements (*e.g.,* after reviewing a NOD), or for some other reason, they may no longer wish to pursue the application. Withdrawal is an efficient mechanism to end processing of the application and job order. Finally, proposed § 655.136(b) clarifies that employers must submit

withdrawal requests in writing to the NPC, identifying the *Application for Temporary Employment Certification* and job order to be withdrawn and stating the reason(s) for requesting withdrawal.

The Department proposes no change to an employer's continuing obligations to workers recruited in connection with the job order and/or *Application for Temporary Employment Certification;* these obligations attach at recruitment and continue after withdrawal.

D. Processing of Applications for Temporary Employment Certification

1. Section 655.140, Review of Applications

The Department proposes minor amendments to § 655.140 to clarify existing procedures and explain the first actions available to the CO after initial review of the *Application for Temporary Employment Certification,* job order, and any necessary supplementary documentation. Under current paragraph (a), the CO conducts an initial review of the application and issues a NOA to the employer under § 655.143 if the application meets acceptance requirements or a NOD under § 655.141 if the application contains deficiencies. The Department proposes to amend paragraph (a) by adding language that explains that in addition to issuance of a NOA or NOD, the CO's first action may be issuance of a Final Determination under § 655.160. As explained in the preamble discussing § 655.123 above, the Department proposes to permit the employer to conduct recruitment prior to filing its application. Consistent with that proposal, a Final Determination to certify the application may be the appropriate first action if the employer conducts pre-filing recruitment, provided the application meets all certification criteria and the employer has complied with all regulatory requirements necessary for certification. Likewise, a Final Determination to deny the application may be the appropriate first action if the application is incurably deficient at the time it is filed, such as an application filed by a debarred employer.

The Department proposes to amend paragraph (b) to include language that permits the CO to send electronic notices and requests to the employer and permits the employer to send electronic responses to these notices and requests, which is consistent with current practice and other modernization proposals explained in this NPRM. The Department encourages electronic communication and OFLC currently permits H–2A employers to respond to notices and requests electronically. Proposed paragraph (b) retains the option to issue and respond to notices and requests using traditional methods that assure next day delivery, which is necessary in some cases, such as when the employer does not have access to e-filing methods. Proposed paragraph (b) also clarifies that the CO will send notices and requests to the address the employer provides in the *Application for Temporary Employment Certification.*

2. Section 655.141, Notice of Deficiency

In paragraph (b), the Department proposes to remove language that allows an employer to request expedited administrative review or a de novo hearing of a NOD. The Department proposes this change to conform to the language of the INA, which requires expedited administrative review, or a de novo hearing at the employer's request, only for a denial of certification or a revocation of such a certification. *See* section 218(e)(1) of the INA, 8 U.S.C. 1188(e)(1). Because the NOD is neither a denial of certification nor a revocation of such a certification, this proposal better conforms with statutory requirements under the INA. For the same reason, the Department also proposes to remove current paragraph (c), which permits employers to appeal a NOD. Additionally, the Department proposes to remove language from paragraph (b)(5) that prohibits the employer from appealing the denial of a modified *Application for Temporary Employment Certification.* This change aligns this section with the language in § 655.142(c), which permits the appeal of a denial of a modified application.

In paragraph (b)(3), the Department proposes to add language to clarify that the employer may submit a modified job order in response to a NOD. This proposal conforms paragraph (b)(3) with the language in paragraphs (a), (b)(1), and (b)(2) of the current rule, which allows the CO to issue a NOD for job order deficiencies and provides the employer an opportunity to submit a modified job order to cure those deficiencies.

3. Section 655.142, Submission of Modified Applications

The Department proposes amendments to clarify the provisions at § 655.142 that govern the employer's submission of a modified *Application for Temporary Employment Certification* or job order. The Department proposes to add language to paragraphs (a) and (b) that clarifies the employer may submit a modified job order in response to a NOD, which conforms these paragraphs to the provisions at § 655.141 that permit the CO to issue a NOD for job order deficiencies and provide the employer opportunity to submit a modified job order to cure those deficiencies. Proposed paragraph (a) also clarifies that if the employer submits a modified application or job order, the CO will postpone the Final Determination for a maximum of 5 calendar days, consistent with the current provision that the CO's Final Determination will be postponed by 1 calendar day for each day the employer's response is untimely (*i.e.,* past the due date for submitting a modification under § 655.141(b)(2)).

In addition, proposed paragraph (a) explicitly authorizes the CO to issue multiple NODs, if necessary, which mirrors language included at § 655.32(a) of the 2015 Interim Final Rule that governs the H–2B temporary labor certification program. *See* 80 FR 24041, 24122. Authority to issue multiple NODs provides the CO with the necessary flexibility to work with employers to resolve deficiencies that prevent acceptance of their *Applications for Temporary Employment Certification* or job orders. For example, a CO may discover a deficiency while reviewing submissions by the employer, such as an employer's response to a NOD, which raises other issues that require the CO to request additional modifications.

4. Section 655.143, Notice of Acceptance

The Department proposes revisions to § 655.143 to clarify current policy and to reflect proposed changes to the organizing structure of this section to ensure the NOA content requirements reflect the proposals to amend positive recruitment requirements, such as labor supply State determinations in proposed § 655.154(d), requiring the CO to transmit the job order to the SWAs for interstate circulation, and permitting the employer to conduct prefiling recruitment. As explained in the preamble discussing § 655.123 above, the Department's proposed rule permits the employer to conduct the positive recruitment activities required by §§ 655.151 through 655.154 before filing its *Application for Temporary Employment Certification* (*i.e.,* prefiling recruitment). To ensure § 655.143 is consistent with this proposal, the proposed content requirements for NOAs account for whether the employer has conducted prefiling recruitment, and whether that recruitment is complete and compliant with the

employer's positive recruitment obligations.

Proposed paragraphs (b)(1)(i) through (iii) correspond with paragraphs (b)(1) through (3) in the current regulation and describe the content requirements for NOAs sent to an employer that has not chosen to commence positive recruitment prior to filing the *Application for Temporary Employment Certification,* or an employer that has submitted, along with its *Application for Temporary Employment Certification,* evidence of satisfactorily fulfilling some, but not all, of its positive recruitment obligations following the procedures set forth in proposed § 655.123. The proposed content requirements are substantively the same as those described in current paragraphs (b)(1) through (3), but the Department has made minor editorial revisions to reflect the modification of the job order circulation procedure in proposed § 655.150, explained in the preamble for that section. Under proposed paragraph (b)(1)(i), the NOA will not direct the SWA serving the area of intended employment to send the job order to other SWAs for circulation because the CO will be responsible for sending the job order to the appropriate SWAs under the proposed rule. Under proposed paragraph (b)(1)(ii), the NOA continues to direct the employer to engage in positive recruitment and to submit a recruitment report, but the Department has replaced the reference to § 655.154 with §§ 655.151 through 655.154 to better reflect positive recruitment requirements. Finally, under proposed paragraph (b)(1)(iii), the NOA continues to state that the employer's positive recruitment must occur during and in addition to SWA recruitment, and continues to specify the date on which the employer's positive recruitment obligation terminates. However, the Department has simplified the language by stating the employer's recruitment obligation ends on the date specified in § 655.158, as amended in this proposed rule, instead of quoting that section unnecessarily.

Proposed paragraph (b)(2) describes the content of the NOA the CO will send to an employer who submitted, along with its *Application for Temporary Employment Certification,* evidence of having commenced some or all aspects of positive recruitment, as permitted by proposed § 655.123, but failed to comply with some or all of the requirements for the positive recruitment activities conducted. When an employer has engaged in prefiling recruitment activities, the CO will evaluate that recruitment to ensure positive recruitment requirements at §§ 655.151 through 655.154 have been met and, if not, direct the employer to bring its recruitment into compliance. Under proposed paragraph (b)(2)(i), the NOA will direct the employer to conduct corrective positive recruitment and to submit proof of compliant advertising concurrently with the recruitment report. Under proposed paragraph (b)(2)(ii), the NOA will state that the employer's positive recruitment must occur during and in addition to SWA recruitment, and will terminate on the date specified in § 655.158.

In addition, proposed paragraph (b)(3) will require all NOAs to specify any other documentation or assurances the employer must provide in order for the *Application for Temporary Employment Certification* to meet the requirements for certification. This might include, for example, a required original surety bond, housing documentation, or MSPA Farm Labor Contractor Certificate of Registration. Under this provision, the CO may issue a NOA in cases where the application is complete and compliant for recruitment purposes, but the employer has not submitted all documentation required for certification. This reflects current practice, which allows the employer to engage in positive recruitment while simultaneously gathering additional information that will be required for certification. This process is more efficient than requiring the employer to submit all information required for certification prior to allowing the employer to commence recruitment.

Finally, proposed paragraph (b)(4) retains the requirement that all NOAs state that the CO will issue a Final Determination not later than 30 calendar days prior to the employer's first date of need, except in cases where the employer's application requires modification under § 655.141. The Department proposes to amend paragraph (b)(4) by adding language that permits the CO to issue a Final Determination fewer than 30 calendar days prior to the employer's first date of need. The proposed revisions would allow the CO to hold an application that would otherwise be denied on the thirtieth day before the employer's start date to allow the employer more time to meet all certification requirements. For example, the SWA may have inspected the employer's housing and identified a repair that must be made before the housing certification can be issued, which the employer is in the process of addressing. Therefore, this proposal gives the employer a short period of time beyond the 30-day mark to submit the missing documentation, thereby minimizing unnecessary burdens and delays. Furthermore, the proposal minimizes inefficiencies for the NPC, which would otherwise be required to issue a denial and either reopen and certify the application following a successful appeal or fully process a second application for the same job opportunity.

5. Section 655.144, Electronic Job Registry

The Department is retaining the current language of the electronic job registry provisions at § 655.144, with the exception of three minor amendments to make this section consistent with other proposals and current practice. The Department's public disclosure of redacted job orders (Forms ETA–790/790A) through the electronic job registry on OFLC's website is essential to ensuring transparency and accountability in the Department's administration of the foreign labor certification program. In addition, the electronic job registry is a valuable resource for worker advocacy organizations, State and Federal agencies and public officials, and interested members of the public. OFLC's publication of job order information on the registry reduces Government costs and paperwork burdens by reducing the number of Freedom of Information Act requests the Department receives. Finally, placement of job orders on the electronic job registry helps to make information about employers' job opportunities more widely available to U.S. workers.

The Department also proposes to add the phrase ''in active status'' to clarify that job orders must remain in active status on the electronic job registry until the end of the recruitment period set forth in § 655.135(d); when the recruitment period ends, the job order remains on the electronic job registry in inactive status. Finally, the Department proposes to amend paragraph (a) by deleting the sentence that explains the Department will begin posting job orders on the registry once it has initiated operation of the registry. The registry is now fully operational; therefore, this sentence is unnecessary and should be removed.

E. Post-Acceptance Requirements

1. Section 655.150, Interstate Clearance of Job Order

The Department is retaining § 655.150, which addresses the process for placement of approved job orders into interstate clearance, with clarifying revisions necessary to conform this section to proposed revisions to the

recruitment and filing processes. The Department proposes to revise § 655.150 consistent with the centralization of job order submission to, and dissemination from, the NPC as proposed in § 655.121. Under proposed § 655.121(c), the employer files its job order with the NPC, rather than a SWA serving the area of intended employment. After receiving the job order from the employer, the NPC sends the job order to a SWA serving the area of intended employment for review and, after approval, circulation in that SWA's intrastate employment service system, as described in § 655.121. The CO, rather than the SWA, would then transmit the approved job order to the appropriate SWAs for interstate clearance (*e.g.,* SWAs serving other states where work will be performed) on the employer's behalf. Finally, proposed paragraph (a) also clarifies that the job order will be placed into interstate clearance in labor supply states designated by the OFLC Administrator, consistent with proposed changes to the labor supply state determination method in § 655.154(d).

2. Section 655.151, Advertising in the Area of Intended Employment

The Department recently proposed revisions to § 655.151 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[86] This Proposed Rule does not propose any revisions to this section, and the revisions proposed in the separate rulemaking are not reflected in this proposed rule.

3. Section 655.152, Advertising Content Requirements

The Department proposes only minor editorial amendments to the advertising content provisions in § 655.152 to clarify existing obligations and ensure consistency with changes made in other sections of this proposed rule. The Department will continue to require advertisements to state certain job offer information that complies with H–2A program requirements and is essential to apprising prospective workers of the job opportunity (*e.g.,* offered wage, or wage range floor, no lower than the amount required under §§ 655.120(a) and 655.122(l)).

The Department proposes to add the word ''content'' to the section title to clarify the section addresses advertising content requirements specifically. The Department proposes to amend the introductory paragraph to include a reference to § 655.154 to clarify that the § 655.152 content requirements apply to additional positive recruitment conducted under that section as well. The proposed revisions to paragraphs (a) and (d) explain that advertisements must include the names of each joint employer and the name of the agricultural association, if applicable. Finally, the Department proposes to delete references to employer interviews of U.S. applicants in paragraph (j) because the proposed rule includes this language in proposed § 655.123, ''Positive recruitment of U.S. workers.''

4. Section 655.153, Contact With Former U.S. Workers

The Department retains § 655.153 with some minor proposed revisions. Section 655.153 presently requires an employer to contact, by mail or other effective means (*e.g.,* phone or email),[87] U.S. workers it employed in the occupation at the place of employment during the previous year to solicit their return to the job. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities and to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H–2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite. The Department proposes to add language to § 655.153 requiring an employer to provide the notice described in § 655.122(n) [88] to the NPC with respect to a U.S. worker who abandoned employment or was terminated for cause in the previous year. The proposal also requires an employer to have provided the notice in a manner consistent with the NPC **Federal Register** notice issued under § 655.122(n).[89] This proposal is intended to ensure that there is virtually contemporaneous documentation to support an employer assertion that a U.S. worker abandoned employment or that it terminated the U.S. worker for cause. Under this proposal, the employer must contact former U.S. workers who abandoned employment or it terminated for cause if, while subject to H–2A program requirements, it fails to provide notice in the required manner.

The Department may not certify an application unless the prospective employer has engaged in positive recruitment efforts of able, willing, and qualified U.S. workers available to perform the work. *See* section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The prospective employer's positive recruitment obligation is distinct from, and in addition to, its obligation to circulate the job through the SWA system. *Id.* E.O. 13788 requires the Department, consistent with applicable law, to protect the economic interests of U.S. workers. *See* 82 FR 18837, sec. 2(a), 5. The requirement to notify the Department of abandonment and termination for cause would protect the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA and E.O. 13788. In addition, the notice could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by § 655.153.

The proposed notice obligation should not increase the existing regulatory burden. Section 655.122(n) permits an employer to avoid the responsibility to satisfy the three-fourths guarantee as well as its return transportation and subsistence payment obligations when a U.S. worker voluntarily abandons employment or the employer terminates the worker for cause if the employer notifies the NPC not later than 2 working days after the abandonment or termination. Employers already have a strong financial incentive to submit this notice to avoid responsibility for the three-fourths guarantee and return transportation and subsistence costs and the requirement to submit the notice to avoid § 655.153's contact obligation is unlikely to change the current regulatory burden on employers.

As noted above, § 655.153 currently permits employers to contact U.S. workers by mail or other effective means. The regulatory text of the 2008 Final Rule specified that other effective means included phone and email contact. 73 FR 77110, 77215. The 2010 Final Rule removed the specific reference to phone or email contact from the text to simplify the regulatory language, but the 2010 preamble expressly stated that phone or email contact remained effective means to

[86] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a final rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

[87] *See* 2010 Final Rule, 75 FR 6884, 6929.

[88] Under § 655.122(n), a worker's abandonment of employment or termination for cause relieves an employer of responsibility for subsequent transportation and subsistence costs and the obligation to meet the three-fourths guarantee for that worker, if the employer provides notice to the ETA NPC, and in the case of an H–2A worker DHS, of the abandonment or termination.

[89] *See* Notice, *Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H–2A Temporary Agricultural Labor Certifications,* 76 FR 21041 (Apr. 14, 2011).

contact U.S. workers. 75 FR 6884, 6929. The Department hereby reaffirms that phone and email contact continue to be effective means to contact U.S. workers.

The Department understands there are circumstances where employers had not employed H–2A workers in the previous year but are now applying to employ H–2A workers for the current year. In those circumstances, employers often have employed U.S. workers in the occupation at the place of employment during the previous year. Similarly, a regular user of the H–2A program might employ U.S. workers in the pertinent occupation at the place of employment to provide agricultural services for the first time and then use the H–2A program in the succeeding year.

In each instance, § 655.153 requires these employers to contact the U.S. workers employed in the previous year. This obligation applies to entities that employed U.S. workers in the previous year under the common law definition of employer incorporated in § 655.103(b). For example, if a grower applying to employ H–2A workers used farm labor contractors to provide U.S. workers during the previous year and the grower employed the U.S. workers under the common law of agency, then § 655.153 requires the employer to contact those U.S. workers. In the event that the grower has not kept payroll records for such U.S. workers, the regulations implementing MSPA will typically have required the farm labor contractors to have furnished the grower with a copy of all payroll records including the workers' names and permanent addresses. The growers must maintain these records for 3 years. 29 CFR 500.80(a), (c). These records should provide the employer with contact information for the pertinent U.S. workers.

While the Department's proposal would continue to impose the contact obligation found in § 655.153 on employers that did not participate in the H–2A program in the previous year, the proposal would not require such employers to have provided the NPC the notice described in § 655.122(n) in order to avoid the obligation to contact U.S. workers the employer terminated for cause in the previous year or who abandoned the employment in the previous year.

Finally, the proposed rule clarifies that the employer's contact with former U.S. workers must occur during the positive recruitment period (*i.e.,* while the employer's job order is circulating with the SWAs in interstate clearance system and terminating on the date workers depart for the place of employment, as determined under § 655.158) by including a reference to § 655.158.

5. Section 655.154, Additional Positive Recruitment

The INA requires employers to engage in positive recruitment of U.S. workers within a multi-State region of traditional or expected labor supply. Section 218(b)(4) of the INA, 8 U.S.C. 1188(b)(4). The Department proposes to provide greater clarity with respect to the procedures OFLC will use to determine the States of traditional or expected labor supply.

Under the current regulation, the CO receives informal information from the SWAs at least once every 6 months on the availability of workers and interstate referrals to agricultural job openings. Based on that information, if traditional or expected labor supply States exist for an area of intended employment, the CO will designate such States in the NOA to inform the locations where the employer must conduct positive recruitment. The designation of traditional or expected labor supply States is not publicly accessible and, based on the Department's experience implementing the current regulation, has not resulted in any significant changes in State designations year to year.

The Department proposes to clarify the procedure for identifying traditional or expected labor supply States. The OFLC Administrator would make an annual determination of traditional or expected labor supply States based primarily on information provided by the SWAs within 120 calendar days preceding the determination. The OFLC Administrator may also consider information from other sources in making this determination. A listing of the States designated as States of labor supply for each State, if any, would be published by OFLC on an annual basis on the OFLC website at *www.foreignlaborcert.doleta.gov.* The State designations issued by OFLC would become effective on the date of publication for employers who have not commenced positive recruitment under this subpart and would remain valid until a new determination is published. The Department has determined that the increased transparency resulting from this proposal would provide clear expectations for employers to meet their positive recruitment obligations, especially employers who choose to begin their positive recruitment activities as soon as their job orders are approved by the SWA under § 655.121 and prior to the filing of an *Application for Temporary Employment Certification* under § 655.123.

6. Section 655.156, Recruitment Report

The Department proposes minor revisions to § 655.156, which requires the employer to prepare and maintain in its records a written report describing recruitment steps undertaken and the results of those efforts, including the name and contact information of U.S. worker applicants, identification of recruitment sources, confirmation of contact with former U.S. workers, the number of applicants hired and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. The Department will maintain the requirement that employers must update their recruitment reports throughout the recruitment period to ensure the employers account for contact with each prospective U.S. worker during that time. The Department proposes minor revisions to paragraph (a) to simplify language and reflect procedural changes resulting from the proposed positive recruitment provisions at § 655.123. Finally, the Department proposes minor amendments to paragraphs (a)(1) and (3) to clarify existing obligations related to recruitment reports.

The Department's proposed positive recruitment provisions at § 655.123, explained in more detail above, will permit an employer with an approved job order to begin positive recruitment prior to submitting its *Application for Temporary Employment Certification* application and to submit its initial recruitment report simultaneously with the application. Under this proposal, if an employer chooses to conduct prefiling positive recruitment, does so properly, and submits a compliant initial recruitment report at the time of filing, the CO may determine certification is the appropriate first action under § 655.140. Under these circumstances, the employer would not receive a NOA. Consistent with these proposed changes, the Department proposes to amend paragraph (a) of § 655.156 by deleting the language that requires employers to submit the recruitment report on a date specified by the CO in the NOA. Under circumstances which require the CO to issue a NOA, § 655.143 specifies that the NOA must direct the employer to submit a recruitment report.

Additionally, the Department proposes to add language to paragraph (a)(1) to make explicit the employer's obligation to include in its recruitment report the date of advertisement for each recruitment source. The proposed rule also clarifies that the employer's recruitment report must identify the

specific, proper name of each recruitment source, rather than identifying the general type of recruitment source, like ''web page'' or ''online job board.'' Finally, paragraph (a)(3) of the proposed rule clarifies that if the employer has no former U.S. workers that it is required to contact, the employer must include an affirmative statement in the report explaining the reason(s) the recruitment report does not include confirmation of such contact. This amendment enables COs to confirm that the employer's omission of language describing contact with former U.S. workers was intentional, rather than inadvertent.

F. Labor Certification Determinations

1. Section 655.161, Criteria for Certification

The Department proposes amendments to this section to clarify existing rules and procedures. The Department proposes to revise paragraph (a) by replacing references to establishment of temporary need and compliance with specific sections of the regulation with clearer language stating the employer must comply with all requirements of 20 CFR part 655, subpart B, necessary for certification, which encompasses the requirements to establish temporary need and comply with the specific sections referenced in the current regulation. The revisions to paragraph (b) clarify that the CO will count as available any U.S. worker whom the employer must consider and whom the employer has not rejected for a lawful, job-related reason. The proposed language does not revise the substance of the paragraph, but sets out the current provision in clearer terms.

2. Section 655.162, Approved Certification

The Department proposes to amend § 655.162 to accommodate two procedural changes that will modernize the filing process, and streamline both the issuance of temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS. Currently, the CO issues a certification to the employer by completing the last page of the Form ETA–9142A, *Application for Temporary Employment Certification,* printing it on blue security paper, and sending the original certification using means that normally assures next day delivery. The employer then includes this original Form ETA–9142A, printed on blue security paper, in its H–2A Petition to USCIS.

To both simplify and expedite this process, while maintaining program integrity, the Department proposes to issue certifications using a new Final Determination notice that would contain succinct, essential information about the certified application. The CO would send the Final Determination notice that confirms certification, as well as a copy of the certified *Application for Temporary Employment Certification* and job order, both to the employer and USCIS using an electronic method designated by the OFLC Administrator. In cases where an employer is permitted to file by mail as set forth in § 655.130(c), the Department would use the same electronic method to transmit the certification documentation directly to USCIS as all other electronically filed applications, but would deliver certification documentation to the employer using a method that normally assures next day delivery. Consistent with current practice, the Department would send a copy of the certification documentation to the employer and, if applicable, to the employer's agent or attorney.

In addition to increasing processing efficiency, the Department anticipates these proposed procedures would reduce paperwork, time, and resource burdens on employers that currently must receive hard-copy certifications from OFLC. The proposal would reduce paperwork and expedite processing of petitions at USCIS, in part, by providing certification information directly from OFLC to USCIS electronically. Further, in cases in which an original certification is lost or misplaced, the new procedure would also eliminate the need for an employer to request USCIS to obtain a duplicate certification directly from OFLC.

3. Section 655.164, Denied Certification

The Department proposes revisions to § 655.164 to modernize the procedure for transmission of Final Determination notices to employers and make this section consistent with the proposed appeal procedures at § 655.171. Consistent with proposed procedural changes to § 655.162 and other modernization proposals explained above in this NPRM, the Department proposes to require COs to send Final Determination notices to employers 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 § 655.130(c), in which case the CO would send the notice using a method that normally assures next day delivery.

The Department proposes a revision to paragraph (a) specifying that, in addition to stating the reasons the certification is denied, the denial will cite to the relevant regulatory standards. Additionally, to streamline information on appealing a denied certification, the Department proposes to reference—in paragraphs (b) and (c)—the proposed appeal procedures outlined in § 655.171. Rather than duplicate information on the request for review in each section that contains an appealable decision by the CO, the Department's proposal consolidates that information in one location at § 655.171. In addition to decreasing duplicative information, this change would align the appeal information in § 655.164 with the corresponding section in the H–2B regulations. *See* 20 CFR 655.53.

Under this proposal, both regulations will house information on the request for review in a central location for ease of reference and consistency. The Department proposes, as part of this effort, to modify paragraph (c) to clarify that if a request for review is not submitted in accordance with § 655.171, the CO's decision is final and the Department will not accept an appeal of that determination. This change mirrors the language used in the corresponding H–2B section. *See* 20 CFR 655.53(c).

4. Section 655.165, Partial Certification

The Department proposes revisions to § 655.165 to streamline this section and make it consistent with other proposals in this NPRM. The proposed introductory paragraph explains that the CO will send Final Determination notices using the electronic transmission procedures proposed in § 655.162. This paragraph also proposes a minor amendment to clarify that partial certification is not limited to U.S. workers the SWA refers to the employer. The CO can issue a full certification only where the employer has fully considered each U.S. worker who applied, whether directly or through SWA referral, and identified a lawful, job-related reason for not hiring the worker.

The Department proposes a revision to paragraph (a) by specifying that the partial certification will cite the relevant regulatory standards supporting the reduction of the period of employment, the number of H–2A workers, or both. Additionally, as discussed in the preamble to § 655.164, the Department proposes to replace language discussing appeal procedures in paragraphs (b) and (c) with a reference to § 655.171. This proposal avoids the duplication of information and consolidates that information in one location at § 655.171. This change also aligns the appeal information in § 655.165 with the corresponding section in the H–2B regulations. *See* 20 CFR 655.54.

Lastly, as part of efforts to ensure ease of reference and consistency, proposed paragraph (c) clarifies that if a request for review is not submitted in accordance with § 655.171, the CO's decision is final and the Department will not accept an appeal of that determination. This change mirrors proposed changes to § 655.164 and the language used in the corresponding H–2B section on partial certification. *See* 20 CFR 655.54(d).

5. Section 655.166, Requests for Determinations Based on Nonavailability of U.S. Workers

The Department proposes clarifying amendments to § 655.166 to simplify the provision and to ensure consistency with the e-filing and certification procedures proposed in §§ 655.130 and 655.162, which require all such requests to be made and responded to in writing using electronic methods, unless the employer requests to file a request for new determination by mail or for a reasonable accommodation using the procedures set forth in § 655.130(c).

The Department proposes to amend paragraph (b) by replacing current language that permits employers to request new determinations telephonically or using email with language consistent with the electronic methods proposed in this NPRM.

Similarly, the proposal revises paragraph (c) by specifying that the CO would issue determination notices following the electronic or other methods proposed in §§ 655.162 and 655.165.

6. Section 655.167, Document Retention Requirements of H–2A Employers

The proposal retains, with minor clarifying amendments, the document retention requirements in § 655.167. The proposal revises paragraph (c)(1)(iii) by replacing the word ''or'' with ''and'' to clarify that employers must comply with each recruitment step applicable to the *Application for Temporary Employment Certification.* In addition, the proposal clarifies that if a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, as set forth in § 655.122(n), employers must retain records demonstrating they notified the NPC and DHS. The Department recently proposed revisions to § 655.167 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[90] Those proposed revisions are not reflected in this proposed rule.

G. Post Certification

1. Section 655.171, Appeals

a. General Changes

The Department proposes to conform the text in § 655.171 with the corresponding appeals section in the H–2B regulations to the extent possible. This change includes adding proposed paragraph (a) to describe the content of the request for review and the procedures for its submission. Proposed paragraph (a) draws on language from the H–2B appeals procedures at § 655.61 as well as existing text in the H–2A regulations. General information on the request for review was previously located in sections of the H–2A regulations that discussed the CO's authority and procedure for issuing a specific decision (*e.g.,* a denied certification). *See, e.g.,* 20 CFR 655.164. The Department's proposal seeks to consolidate this information in proposed paragraph (a) for ease of reference and consistency with the H–2B regulations.

In particular, the Department proposes to extend the time in which an employer may file a request for review from 7 calendar days to within 10 business days of the date of the CO's decision. This proposal aligns with the timeframe to request review under the H–2B regulations, except in one aspect. Unlike the timeframe to request review under the H–2B regulations, the proposal requires the request for review in H–2A to be received by—rather than sent to—the Chief ALJ and the CO within 10 business days of the CO's decision. However, the Department believes that specifying a time for receipt of the request for review is a reasonable modification of the H–2B timeframe because it enables the Department to more easily determine if a request was filed in a timely manner. The proposal also allows the employer more time to develop a robust request, which in the case of a request for administrative review will serve as the employer's brief to the Office of Administrative Law Judges (OALJ). To this end, the Department seeks to clarify that the request must include the specific factual issues the employer seeks to have examined as part of its appeal. Having this information allows for the prompt and fair processing of appeals by providing the ALJ and the CO adequate notice regarding the nature of the appeal.

The Department has additionally found that in the past, some requests did not identify the type of review sought by the employer, which could result in delays (as the ALJ asked for clarification) or a type of review not desired by the employer (as the ALJ presumed the employer requested a hearing). To avoid this situation, the Department proposes to include language in proposed paragraph (a) that the request for review clearly state whether the employer is requesting administrative review or a de novo hearing. The Department proposes to add that the case will proceed as a request for administrative review if the request does not clearly state the employer is seeking a hearing. *See* 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review or, at the employer's request, for a de novo hearing). Similarly, an employer requesting a de novo hearing should state whether it is requesting an expedited hearing in accordance with proposed paragraph (e)(1)(ii), or its request for a hearing will be construed as requesting a non-expedited hearing. Taken together, this proposed change is expected to improve judicial efficiency and the orderly and consistent administration of appeal proceedings, which allows the parties and the ALJ, in turn, to adequately prepare for the case at hand.

The Department proposes to clarify that where the request is for administrative review, the request may only contain such evidence that was before the CO at the time of his or her decision. The Department seeks the addition of this language in proposed paragraph (a), which tracks language in the administrative review section (proposed paragraph (d)), so that employers or their representative(s) can prepare their requests accordingly. The Department also proposes to add language that an employer may submit new evidence with its request for a de novo hearing, which will be considered by the ALJ if the new evidence is introduced during the hearing. The Department seeks the inclusion of this language in proposed paragraph (a), which tracks language in the de novo hearing section (proposed paragraph (e)), so that employers or their representative(s) can assemble their requests and prepare their cases accordingly.

Similar to the reorganization of information in proposed paragraph (a), proposed paragraphs (b) and (c) draw on existing language in the H–2A regulations and language from the H–2B appeals procedures to reorganize information on the appeal file and the assignment of the case into separate sections. The Department proposes

[90] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a Final Rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

minor amendments to the language of proposed paragraph (c) to clarify that the ALJ assigned to the case may be a single member or a three-member panel of the BALCA. The proposed amendments to paragraphs (b) and (c) mirror the wording and organization of the appeals section in the H–2B regulations. *See* 20 CFR 655.61(b), (d).

Finally, the Department proposes changes to the issuance of the ALJ's decision for both an administrative review and a de novo hearing. Proposed paragraphs (d)(4) and (e)(3) modify the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H–2B regulations, namely, the employer, the CO, and counsel for the CO. *See* 20 CFR 655.61(f). This proposed change also removes language from current paragraphs (a) and (b)(2) stating the ALJ's decision is the final decision of the Secretary because the language is unnecessary in light of the OALJ's Rules of Practice and Procedure for Administrative Hearings. Under those rules, the ALJ's decision is the final agency action for purposes of judicial review when the applicable statute or regulation does not provide for a review procedure, as here. *See* 29 CFR 18.95; 20 CFR 655.171. In addition, the removal of the ''final decision'' language is consistent with the H–2B regulations, which lacks similar language, and does not affect the issue of whether the parties may appeal to the ARB, which is governed by other authorities issued by the Department. *See* 20 CFR 655.61; Secretary's Order 02–2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FR 69378 (Nov. 16, 2012). To clarify an employer's existing administrative exhaustion obligations, however, the Department proposes to specify in proposed paragraph (a) that when a hearing or administrative review of a CO's decision is authorized in this subpart, an employer must request such review in accordance with § 655.171 in order to exhaust its administrative remedies.

b. Paragraph (d), Administrative Review

The Department proposes specific changes to address the briefing schedule, standard and scope of review, and the timeline for a decision in cases of administrative review. In proposed paragraph (d)(1), the Department seeks to clarify the briefing schedule so that it is consistent across cases of administrative review and better informs the ALJ's decision-making process. The current H–2A regulations governing administrative review do not provide for a briefing schedule,[91] and the Department has found that the briefing schedule has varied across cases as a result. In most cases, the ALJ has permitted the CO and the employer to file a brief simultaneously within a certain period, usually 2 to 4 business days, after receipt of the OFLC administrative file. However, this current practice of simultaneous briefing results in situations where issues raised in the employer's brief are not addressed in the CO's brief. The CO and the employer, moreover, do not know when briefing is due until the issuance of the order setting the briefing schedule.

In contrast, the proposed briefing schedule allows an employer that wishes to file a brief as part of its appeal to do so with its request for review. To provide the employer time to develop a brief that sets forth the specific grounds for its request and corresponding legal argument, the Department proposes to extend the time in which the employer may request review from 7 calendar days to within 10 business days of the CO's decision. The CO may then respond to the employer's brief within 7 business days of the receipt of the OFLC administrative file. Under this proposed schedule, an employer is afforded a predictable amount of time to present its legal arguments in one place and the CO may then respond to those arguments within a set timeframe. Similar to current practice, the employer and the CO each file one brief to allow for an accelerated briefing schedule. But compared with the practice of simultaneous briefing, the proposal more effectively 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 briefing schedule that remains expedited. The Department invites the public to comment on other ways, including alternative briefing procedures that address the concern for a predictable, effective, yet expedited briefing schedule for cases of administrative review.

In proposed paragraph (d)(2), the Department seeks to incorporate the arbitrary and capricious standard of review into requests for administrative review. This proposed change codifies the Department and OALJ's well-established and longstanding interpretation of the standard of review for such requests. *See J and V Farms, LLC,* 2016–TLC–00022, at 3 & n.2 (Mar. 7, 2016). As the regulation is currently silent on the standard of administrative review, this proposed change provides helpful clarity and ensures the OALJ is conducting its administrative review in a consistent manner.

In proposed paragraph (d)(3), the Department seeks to include clarifying language that the scope of administrative review is limited to evidence in the OFLC administrative file that was before the CO when the CO made his or her decision. The Department proposes this clarifying language because the administrative file may contain 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 administrative file, the ALJ may not consider this new evidence because it was not before the CO at the time of the CO's decision. This amendment incorporates legal principles already in existence for H–2A cases, namely, that administrative review is limited to (1) evidence in the written record that was (2) before the CO when the CO made his or her decision.[92]

In proposed paragraph (d)(4), the Department has modified the timeline in which the ALJ should issue a decision from 5 business days to 10 business days after receipt of the OFLC administrative file, or within 7 business days of the submission of the CO's brief, whichever is later. This schedule conforms to the timeline in the H–2B appeals procedures while continuing to provide for an expedited review procedure. *See* 20 CFR 655.61(f).

c. Paragraph (e), De Novo Hearing

The Department proposes specific changes to proposed paragraphs (e)(1), the conduct of a de novo hearing, and (e)(2), the standard and scope of review for such hearings. In proposed paragraph (e)(1), if the employer requests an expedited hearing, the Department proposes to change the time in which such a hearing must occur from 5 to 14 business days after the ALJ's receipt of the OFLC administrative file. This proposed change is based on the Department's administrative experience and is intended to allow the parties reasonable time to adequately

[91] *See* 20 CFR 655.171(a).

[92] *See* 20 CFR 655.171(a) (allowing written submissions ''which may not include new evidence''); *Keller Farms, Inc.,* 2009–TLC–00008, at 5 (Nov. 21, 2008) (''all evidence . . . not before ETA at the time it made its decision will not be considered''); *see also J and V Farms,* 2016–TLC–00022, at 3 n.2 (the ''substance of [the appeals regulation] has remained the same since 1987'') (citation and internal quotation marks omitted).

prepare for a hearing while effectuating the INA's concern for prompt processing of H–2A applications.

Additionally, the Department proposes to clarify that the ALJ has broad discretion to limit discovery and the filing of pre-hearing motions in a way that contributes to a fair hearing while not unduly burdening the parties. As is the case with the 2010 Final Rule, 29 CFR part 18 governs rules of procedure during the hearing process, subject to certain exceptions discussed in this section and part 18. Although 29 CFR 18.50 *et seq.* permits an ALJ to exercise discretion in matters of discovery, the Department's proposed language makes explicit the ALJ's broad discretion to limit discovery and the filing of pre-hearing motions in the circumstances of a hearing under the H–2A program. The Department proposes to include this language because in the H–2A program, the time to hold a hearing and to issue a decision following that hearing are expedited, such that the need for limits on requests for discovery and the filing of pre-hearing motions is particularly pronounced. The administrative procedures in 29 CFR part 18, and particularly the sections on discovery and motions, were not specifically designed for the H–2A program, nor for situations that require an accelerated adjudication process, as is required by the H–2A program. As such, the Department's proposal provides the ALJ with broad discretion to restrict discovery and the filing of pre-hearing motions to situations where they are needed to ensure the fundamental fairness of the proceedings.

The Department has retained the 10-calendar-day timeframe in which an ALJ must issue a decision after a hearing, but invites the public to comment on whether this time period should be modified. For cases in which the employer waives its right to a hearing, the Department proposes to clarify that the proper standard and scope of review is the standard and scope used for administrative review. This is because under the INA, the regulations must provide for expedited administrative review or, at the employer's request, a de novo hearing. *See* section 218(e)(1) of the INA, 8 U.S.C. 1188(e)(1). If the employer requests a de novo hearing, but then waives its right to such a hearing, the case reverts to the other option—administrative review. In that circumstance, the standard and scope of review for administrative review applies. Similarly, should an ALJ determine that a case does not contain disputed material facts to warrant a hearing, review must proceed under the standard and scope used in cases of administrative review.

With regard to the standard and scope of review, the Department proposes to clarify that the ALJ will review the evidence presented during the hearing and the CO's decision de novo. This standard of review recognizes that new evidence may be introduced during the hearing and allows the ALJ, as permitted under section 218(e)(1) of the INA, to review such evidence and other evidence introduced during the hearing de novo. *See* 8 U.S.C. 1188(e)(1) (noting regulations shall provide for a de novo administrative hearing at the applicant's request). Similarly, the INA permits the ALJ to review the CO's decision de novo when the employer requests a de novo administrative hearing. *See id.* As the INA supports a de novo standard of review, the Department proposes to codify it in the regulations so that the standard is clearly and consistently applied.

In addition, the Department has recognized that there may be instances when the issues are purely legal, or when only limited factual matters are necessary to determine the issues in the case. Proposed paragraphs (e)(2) and (e)(1)(ii) have been revised to address this possibility and provide that the ALJ may determine the issues following a hearing only on the disputed factual issues, if any. The OALJ already relies on mechanisms, including, but not limited to, status conferences and prehearing exchanges, to determine which issues raised in the request for review can be resolved as a matter of law and which issues involve disputed material facts requiring the introduction of new evidence during a hearing. The Department's proposed language acknowledges and codifies this existing practice.

The Department also proposes to clarify that if new evidence is submitted with a request for de novo hearing, and the ALJ determines that a hearing is warranted, the new evidence submitted with the request for review must be introduced during the hearing to be considered by the ALJ. This proposed change continues to allow for the introduction of new evidence, and for the de novo review of that evidence by the ALJ, while ensuring new evidence submitted with a request for review is subject to the same procedures that apply to new evidence introduced during a hearing, such as the opportunity for cross-examination and rebuttal.

Finally, as part of its efforts to conform this section with the appeals section in the H–2B regulations, the Department intends to move language that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action from proposed paragraph (e)(3) to proposed paragraph (e)(2), which addresses the standard and scope of review.

2. Section 655.172, Post-Certification Withdrawals

The Department proposes to revise § 655.172 by relocating the job order withdrawal provision from § 655.172(a) to proposed § 655.124 and the *Application for Temporary Employment Certification* withdrawal provision from § 655.172(b) to proposed § 655.136, as discussed in the preamble for those sections. As a result, proposed § 655.172 addresses only the withdrawal of certifications, which is appropriate because § 655.172 is located in the post-certification section of the regulation. This new provision includes proposed procedures for requesting withdrawal that are consistent with those an employer must follow to request withdrawal of a job order or an *Application for Temporary Employment Certification* and job order: all withdrawal requests must be made in writing and submitted to the NPC, and must identify the certification to be withdrawn and state the reasons for the employer's request. Also, the proposed language reiterates that withdrawal does not nullify an employer's obligations to comply with the terms and conditions of employment under the certification.

3. Section 655.173, Setting Meal Charges; Petition for Higher Meal Charges

The Department is retaining the methodology used to adjust meal charge rates annually and the requirement that an employer charge workers no more than the allowable meal charge set by the regulation, unless the CO approves a higher meal charge amount and, then, only after the effective date the CO specifies. For clarity, in paragraph (a) the Department proposes to replace the standard meal charge in effect in 2010 when the current regulations were published (*i.e.,* $10.64) with the current amount of $12.26 per day. The Department proposes one additional revision in paragraph (a), which would make the annually adjusted meal charge effective on a date specified in the **Federal Register** notice, which would be no more than 14 calendar days after publication in the **Federal Register**. This proposal would provide a brief period for adjustment to updated rates.

In paragraph (b), the Department will continue to allow employers to petition for authorization to charge workers more than the standard meal charge set

under paragraph (a), provided the employer justifies the requested higher meal charge. The provision retains the basic process for requesting higher meal charges, with clarifying edits, including a revision to clarify that a request to charge a higher amount will be denied if the employer's documentation does not justify the amount requested, or if the amount requested exceeds the permitted maximum higher meal charge. In addition, the proposal provides that the maximum higher meal charge would be adjusted in the same manner as the standard meal charge.

The Department is retaining the requirement that an employer that directly provides meals to workers (*i.e.,* through its own kitchen facilities and cooks) submits the documentation specified in paragraph (b)(1)(i) and ensures that its requested higher meal charge includes only permitted costs. Increasingly, however, employers submit higher meal charge requests based on the employer's costs to provide meals to workers through a third party (*e.g.,* hiring a food truck to prepare and deliver meals or engaging restaurants near the housing or place of employment to provide meals). Therefore, the Department proposes documentation requirements in new paragraph (b)(1)(ii) that address situations in which the employer has engaged the services of a third party to provide meals to workers. Proposed paragraph (b)(1)(ii) would require documentation identifying each third party engaged to prepare meals, describing how the employer's agreement with each third party will fulfill the employer's obligation to provide three meals a day to workers, and documenting each third party's charges to the employer for the meals to be provided. Proposed paragraph (b)(1)(ii) would also prohibit the employer, or anyone affiliated with the employer, from receiving a direct or indirect benefit from a higher meal charge to a worker. Finally, this paragraph requires the employer to retain records of payments to the third party and deductions from worker's pay.

The Department proposes minor revisions to paragraph (b)(2) to clarify that the employer may not begin charging higher rates for meals until it has received the CO's approval and it has disclosed the new rate to workers. The proposed changes also clarify that a CO's decision approving a request to charge a higher rate is valid only with respect to the arrangement described in the documentation submitted with the employer's request. If such arrangement changes, the employer may charge no more than the maximum amount permitted under paragraph (a), until the employer submits, and the CO approves, a new petition for a higher meal charge.

As a further measure to ensure that an employer's choice to engage a third party to provide three meals a day to workers does not unreasonably reduce workers' wages, in paragraph (b), the Department proposes implementing a ceiling on the maximum amount the CO may approve as a higher meal charge amount. An objective ceiling on allowable higher meal charges would not only ensure workers' wages are not subject to improper deductions, but also would provide predictability on meal charges, enabling employers and workers to make more informed financial decisions involving the meal charge included in the job offer. An employer would be able to make informed business decisions, knowing the maximum amount it may be permitted to charge workers for providing meals, regardless of the specific way in which it chooses to provide meals to workers, while the worker would be assured that the worker will not be charged more than the maximum higher meal charge amount set by the regulation.

The proposed maximum allowable higher meal charge is consistent with the Department's use of a ceiling on higher meal charge amounts prior to the implementation of the 2008 Final Rule.[93] The proposed ceiling of $14.94 per day is derived from the last maximum allowable higher meal charge amount published in the **Federal Register** and effective in 2008 (*i.e.,* $12.27 per day), updated using the same methodology as in paragraph (a) to adjust the standard meal charge amount.[94] This higher meal charge ceiling would be adjusted annually using the same methodology as is currently in place for adjusting standard meal charge amounts in paragraph (a).

The Department invites comments on methods for processing and evaluating higher meal charge requests involving third-party prepared meals, including documentation requirements and the process for determining and updating a higher meal charge ceiling. In particular, the Department invites comments on alternative methods for determining and updating a higher meal charge ceiling that will not inhibit the provision of sufficient, adequate meals and will not reduce workers' wages without justification. For example, the Department invites comments on whether an appropriate higher meal charge ceiling could be set in relation to worker's wages (*e.g.,* as proportion of the AEWR applicable to the job opportunity or the actual wage offered to the worker, or average local, regional, or national meal costs).

4. Section 655.175, Post-Certification Amendments

The Department proposes to add a new § 655.175 that would permit an employer to request minor amendments to the places of employment listed in an approved certification under certain limited conditions. The Department's current regulations offer some options for an employer to address changed circumstances after certification, such as the option to file a new *Application for Temporary Employment Certification* based on good and substantial cause under the emergency processing provisions at § 655.134. However, the current rule does not permit amendments to an application after the CO has issued a Final Determination. Therefore, the Department proposes this new section to provide employers some flexibility to respond to unforeseen circumstances arising after certification is granted. The Department continues to expect an employer to ensure bona fide work is available at all places of employment disclosed in its *Application for Temporary Employment Certification* and to take into consideration all foreseeable circumstances and factors within its control when describing the need for H–2A workers on its application. This is critically important so that the recruitment conducted in connection with that application appropriately tests the U.S. labor market and the Department's determination as to whether insufficient U.S. workers are available at the time and place needed by the employer is accurate.

In proposed paragraph (a), the Department proposes to permit post-certification amendments to the certified places of employment as long as (1) the employer has good and substantial cause for the requested amendment; (2) the circumstances underlying the amendment request

[93] Notice, *Allowable Charges for Agricultural and Logging Workers' Meals,* 73 FR 10288 (Feb. 26, 2008). *See* page I–28 of the ETA Handbook NO. 398, discussing the methods used to provide meals and meal charge limits. At that time, employers used a centralized cooking and feeding facility at the place of employment; arranged for a catering service to prepare meals elsewhere and deliver them to the employer's place of employment; or furnished at no cost to the workers convenient cooking and eating facilities of sufficient size and capacity (including utensils) which would enable workers to prepare their own meals. Where the employer provided meals, its daily charge for providing three meals could not exceed the standard amount permitted by the regulations, absent a higher meal charge request at 20 CFR 655.102 or the maximum higher meal charge amount permitted at 20 CFR 655.111.

[94] 73 FR 10288.

could not have been reasonably foreseen before certification and are outside the employer's control; (3) the material terms and conditions of the job order are not affected by the requested amendment; and (4) the new places of employment requested are within the certified areas of intended employment. The proposal limits post-certification amendments to situations in which good and substantial cause exists, such as when an employer requires immediate adjustments to places of employment within the certified area of intended employment in order to respond to unforeseen emergent situations that may jeopardize or severely damage crops or other agricultural commodities. For example, a post-certification amendment may be available when an Act of God severely damages some of the employer's crops and, as a result, the work scheduled to be performed at that places of employment is no longer needed, while crops at other locations within the same area of intended employment need urgent attention. As defined in the emergency situations provision at § 655.134, ''[g]ood and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.''

The proposal also limits post-certification amendments to situations in which the reasons for the request could not have been reasonably foreseen before certification and are wholly outside the employer's control. In situations where the employer could foresee the need for amendment after filing, but prior to the CO issuing a Final Determination, the employer may request amendment under the provisions set forth at § 655.145. For example, if unusually heavy storms and rains occur before the employer files its *Application for Temporary Employment Certification,* impacts on crop conditions are known or reasonably foreseeable before the CO issues the Final Determination. Further, staffing levels are within the employer's control. Therefore, related minor modifications to the job order and *Application for Temporary Employment Certification* would be appropriately addressed through a pre-certification amendment request under § 655.145. If the employer experiences normal, predictable, or foreseeable circumstances within its control that would cause a reasonable employer to take mitigation measures in advance of receiving certification, the employer will be required to submit a new *Application for Temporary Employment Certification.* For example, in an area where the local or State government has announced plans to release water from a reservoir to provide more water to farmers, which has become an annual event, and the employer's fields are known to be more productive when they receive more water, the release of reservoir water is a normal, predictable, and foreseeable event that is not extraordinary or unforeseeable.

The circumstances under which the Department proposes to permit post-certification amendments are limited to ensure the amendments will not compromise the terms and conditions of the job offer contained in the certification, apart from the specific places of employment within the certified area of intended employment. In addition, post-certification amendments must not compromise the underlying determinations the CO made when issuing the certification, most importantly the determinations ''that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.'' Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii); 20 CFR 655.103(a).

Finally, under this proposal, all places of employment an employer requests to add to the certification must be located within the same areas of intended employment as the certification issued. When an employer requires agricultural labor or services at a place of employment not located within the area of intended employment certified, the employer would be required to file a new *Application for Temporary Employment Certification,* and engage in a labor market test to support the determinations required by § 655.100.

Proposed paragraph (b) outlines the procedures for requesting post-certification amendments. An employer desiring amendment to its approved places of employment would submit a written request to the NPC. The request would specify the certified places of employment the employer wishes to add or remove from the certification, the expected start and end dates of work at each place of employment, and if the places of employment are not owned or operated by the employer, the fixed-site agricultural businesses to which the employer would be providing labor or services. In addition, the employer must provide a description of the good and substantial cause justifying the need for the amendments requested and explain how the circumstances were not reasonably foreseeable and are wholly outside the employer's control.

Proposed paragraph (b) would also require the employer's amendment request to include three assurances. First, the employer would assure the amendments requested would not change the material terms and conditions of the work contract underlying the certification. This assurance informs the CO that the employer has taken necessary steps to ensure that it continues to meet its program obligations. For example, if an employer sought to add a place of employment across a State border from its certified places of employment, the employer would be required to have or secure workers' compensation coverage adequate for the new State and pay the required wage rate for the new State, if higher than the certified wage offer, as appropriate. An employer seeking to add a place of employment it does not own or control would be required to secure additional documents to cover the new location where it will be acting as an H–2ALC (*e.g.,* a fully-executed contract for that place of employment and any additional employee transportation authorizations required by the MSPA Farm Labor Contractor Certificate of Registration provisions due to the changed circumstances). Further, this assurance informs the CO that the labor or services to be provided at the new place of employment are the same as the work performed under the temporary agricultural labor certification.

Second, the employer would be required to assure that it complied with its duty to provide a copy of the modified job order to workers. *See* 20 CFR 655.122(q). Third, the employer would assure that it will retain and make available all documentation substantiating the amendment request, if approved by the CO, following the procedures at § 655.167. For example, an H–2ALC would be required to retain, and submit upon request, the fully-executed work contract with the grower at each place of employment added.

Proposed paragraph (c) sets forth the procedures for processing amendment requests. Given the urgency of the circumstances under which an employer would submit a post-certification amendment request, the Department proposes the CO to review the employer's request and issue a decision within 3 business days of receipt. In deciding whether to grant the request, the CO would take into

consideration whether the employer sufficiently justified its request, whether the employer provided the necessary assurances, and how the amendment will affect the underlying labor market test for the job opportunity. Amendments would not be effective unless and until approved by the CO.

The Department invites comments on all aspects of the proposal to allow post-certification amendments. For example, the Department seeks comments on whether post-certification amendments should be permitted and, if so, the conditions under which an employer should be permitted to request amendments to a certification. The Department is particularly interested in comments that address the types of circumstances that should be considered extraordinary and unforeseeable for the purposes of post-certification amendments and the volume and frequency of post-certification amendments anticipated. The Department also invites comment on methods through which the Department can balance employers' needs to adapt quickly to changed circumstances with the Department's need to protect the integrity of the labor certification program, such as comments that explain the advantages or disadvantages of an attestation-based amendment process and alternative processes. The Department is especially interested in comments that specify the types of limitations it should impose on post-certification amendments, such as comments that address the necessity of a time limit on post-certification amendment requests, and whether the Department should consider alternatives, such as limiting requests to 45 days after certification, after which time the employer could submit an emergency processing request; 30 days after certification, consistent with the proposed end of the recruitment period for the certification; or 60 days after certification, consistent with the normal timeframe for submitting the job order. Finally, the Department seeks comments regarding the reasonableness of the timeframe for CO review and determination.

H. Integrity Measures

1. Section 655.180, Audit

The Department proposes minor revisions to this section to clarify the procedures by which OFLC conducts audits of applications for which certifications have been granted. Proposed revisions to paragraphs (b)(1) and (2) clarify that audit letters will specify the documentation that employers must submit to the NPC, and that such documentation must be sent to the NPC not later than the due date specified in the audit letter, which will be no more than 30 calendar days from the date the audit letter is issued. In paragraph (b)(2), the Department proposes to revise the timeliness measure from the date the NPC receives the employer's audit response to the date the employer submits its audit response. This change is more consistent with other filing requirements contained in this proposed rule and better ensures employers' ability to timely submit their responses. Proposed revisions to paragraph (b)(3) clarify that partial audit compliance does not prevent revocation or debarment. Rather, employers must fully comply with the audit process in order to avoid revocation under § 655.181(a)(3) or debarment under § 655.182(d)(1)(vi) based on a finding that the employer impeded the audit.

The Department proposes adding language to paragraph (c) to clarify that the CO can issue more than one request for supplemental information if the circumstances warrant. It is current practice for the CO to issue multiple requests for supplemental information to ensure employers have every opportunity to comply fully with audit requests and to ensure the CO's audit findings are based on the best record possible; this proposal would codify that practice.

Finally, the Department proposes revisions in paragraph (d) to clarify the referrals a CO may make as a result of audit, including updating the name of the office within the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, that will receive referrals related to discrimination against eligible U.S. workers.

2. Section 655.181, Revocation

The Department proposes minor revisions to paragraph (b)(2) of this section to clarify that if an employer does not appeal a final determination to revoke a certification according to the procedures in proposed § 655.171, that determination will become final agency action. The Department has removed language referring to the timeline for filing an appeal, as that information is provided in proposed § 655.171.

3. Section 655.182, Debarment; 29 CFR 501.16, Sanctions and Remedies—General; 29 CFR 501.19, Civil Money Penalty Assessment; 29 CFR 501.20, Debarment and Revocation; 29 CFR 501.21, Failure To Cooperate With Investigations; 29 CFR 501.41, Decision and Order of Administrative Law Judge; 29 CFR 501.42, Procedures for Initialing and Undertaking Review; 29 CFR 501.43, Responsibility of the Office of Administrative Law Judges; 29 CFR 501.44, Additional Information, if Required; and 29 CFR 501.45, Final Decision of the Administrative Review Board

The Department proposes to revise the debarment provision for the H–2A labor certification program to improve integrity and promote compliance with program requirements. Under the INA, the Department may not issue a certification for an H–2A worker if the Secretary has determined that the employer substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. Section 218(b)(2)(A) of the INA, 8 U.S.C. 1188(b)(2)(A). The Department implemented this INA provision by enacting regulations allowing the debarment of employers, and later agents and attorneys, and their successors in interest, who appeared before it, and the effect of the debarment was that a debarred entity will not be issued future labor certifications. *See* 20 CFR 655.182(a), (b); 20 CFR 655.118(a) (2008); 20 CFR 655.110(a) (1987). The Department proposes to revise § 655.182 to clarify that if an employer, agent, or attorney is debarred from participation in the H–2A program, the employer, agent, or attorney, or their successors in interest, may not file future *Applications for Temporary Employment Certification* during the period of debarment. *See* proposed 20 CFR 655.182(b). If any such applications are filed, the Department will deny them without review. *See id.* The proposed revision to § 655.182 does not change the regulation's current prohibition on debarred entities' participation in the H–2A program in ways other than the filing of the *Application for Temporary Employment Certification,* such as placing advertisements, or recruiting workers.

When an application is filed by a debarred entity under the current regulations, the Department's practice has been to issue a NOD before denying the application pursuant to § 655.182. However, the INA does not require the issuance of such a notice in this

instance. Section 218(c)(2) of the INA, 8 U.S.C. 1188(c)(2), requires that an employer be notified within 7 days of the date of filing if the application does not meet the standards for approval. The INA's grant of debarment authority for the H–2A labor certification program appears in the section dealing with the conditions for denial of certification and requires the Department to deny certification on any application sought by a debarred employer. *See* section 218(b) of the INA, 8 U.S.C. 1188(b). Thus, when a debarred employer files an application, the Department is statutorily required to deny the application. There would be little to be gained from issuing a NOD and offering the employer an opportunity to correct the deficiency where the deficiency cannot be overcome.[95] Processing applications filed by, or through, an entity that has been debarred imposes a resource burden for the Department though the Department has no discretion over the issuance of such certifications.

Under the proposal, if an employer represented by a debarred agent or attorney files an application, the application would be denied without review. Following the denial, in order to obtain certification, the employer would need to submit a new application without the debarred entity as the employer's representative. Finally, as with all certification denials, denials on the basis of debarment will be appealable to OALJ pursuant to § 655.164.

The Department also proposes to revise § 655.182 to allow for the debarment of agents or attorneys, and their successors in interest, based on their own misconduct. Since the 2008 Final Rule, the H–2A regulations have allowed the Department to debar an agent or attorney based on its participation in the employer's substantial violation. *See* 20 CFR 655.182(b); 2010 Final Rule, 75 FR 6884, 6936–37; 2008 Final Rule, 73 FR 77110, 77188. The Department proposes to hold agents and attorneys of the employer accountable in debarment for their own violations as well as for their participation in the employer's violation. Under proposed § 655.182(a), the Department may debar an agent or attorney for its own substantial violations, as those are defined in § 655.182(d). The Department also proposes conforming revisions to the definition of ''successor in interest'' in § 655.103(b) to reflect that a debarred agent's or attorney's successor in interest may be held liable for the debarred agent's or attorney's violation.

The Department has had concerns about the role of agents in the H–2A program, and has questioned whether agents' participation in the H–2A labor certification process is undermining compliance with program requirements. However, the current H–2A debarment provision does not provide a mechanism for holding the agent or attorney accountable for its own violation unless the Department finds that it participated in the employer's violation. Nevertheless, there may be situations where an agent or attorney commits a violation that the Department finds it cannot or, in its discretion, should not, attribute to the employer. For example, if an agent that is responsible for conducting recruitment for an H–2A employer fails to refer U.S. worker applicants to the employer, the Department may find, in appropriate circumstances, that only the agent should be debarred. In addition, if an agent forges employer signatures to file fraudulent applications for H–2A workers, or if an agent or attorney commits a heinous act within the meaning of § 655.182(d), the employer may not necessarily be responsible for such misconduct.

The Department has determined that in order to improve program integrity and compliance, agents and attorneys should be accountable for their own misconduct independent of the employer's violation. This revision would make agent and attorney misconduct debarrable to the same extent as the misconduct of the employer-clients. Further, the proposal would institute consistency between the H–2A regulations and the other labor certification programs the Department administers. *See* 20 CFR 655.73(b) (H–2B); 20 CFR 656.31(f) (PERM).

The Department has inherent power to regulate the conduct of agents and attorneys who practice before it, as well as the authority to debar such individuals for unprofessional conduct. As the Department has previously explained, administrative agencies have the authority to regulate who can practice and participate in administrative proceedings before them. *See Goldsmith* v. *U.S. Board of Tax Appeals,* 270 U.S. 117, 121 (1926); *Koden* v. *U.S. Dep't of Justice,* 564 F.2d 228, 232–33 (7th Cir. 1977). Such power exists even if they do 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). In addition, agencies with the authority to determine who may practice before them have the power to debar or discipline such individuals for unprofessional conduct. *Koden,* 564 F.2d at 233.

The Department has exercised the authority to debar agents and attorneys from the H–2A program for the last decade. In the 2008 Final Rule, the Department revised the debarment provision to permit the debarment of employers' agents and attorneys. 73 FR 77110, 77188. The 2010 Final Rule maintained the provision permitting the debarment of agents and attorneys for participating in the employer's violation to ''ensure that we are able to address substantial violations committed by the attorneys or agents themselves, or committed in concert with the employers.'' 75 FR 6884, 6936–37. The preamble explained that debarment of agents and attorneys was necessary to uphold the integrity and effectiveness of the H–2A program. *Id.*

As the examples provided above illustrate, where an agent or attorney commits a substantial violation, though generally the employer would be responsible for the misconduct, the Department believes it is necessary to have the ability to target debarment actions at the bad actor directly. Under this proposal, and as has been the case in the H–2A program for the last decade, agents and attorneys could still be debarred for participating in the employer's substantial violation, just as the employer could be debarred based on the agent or attorney's misconduct.

I. Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Operations

The Department proposes changes to this section mainly to conform the labor certification process for herding and the production of livestock on the range to other revisions in the proposed rule, as appropriate. Minor proposed changes include replacing a dash between two sections with the word ''through'' (*e.g.,* replacing ''§§ 655.200–655.235'' with ''§§ 655.200 through 655.235'') for technical consistency with other sections of the proposed rule. The Department seeks public comment on the substantive changes, which are discussed below, and affect portions of proposed §§ 655.205, 655.211(a)(2), 655.215(b) introductory text and (b)(1), 655.220(b), (c), and 655.225(b), (d). Except for these minor and substantive proposed changes, the Department is not reconsidering—and therefore not requesting comment on—any other portions of §§ 655.200 through 655.235. In particular, the Department is neither

[95] Any challenges to the debarment would be raised separately. Under current regulations, the employer, agent, or attorney has an opportunity to challenge the debarment before it becomes effective. *See* 20 CFR 655.182(f), 29 CFR 501.20(e).

reconsidering nor seeking comment on the wage rate methodology for herding and range livestock job opportunities. Instead, the entirety of §§ 655.200 through 655.235 are reprinted in subpart B of this proposed rule for ease of reference only.

1. Section 655.205, Herding and Range Livestock Job Orders

The Department proposes to revise § 655.205 to reflect proposed revisions to the normal job order filing procedures in § 655.121 and to clarify variances from proposed § 655.121 that remain for job opportunities involving herding or production of livestock on the range. Consistent with current procedures, a job order filed under § 655.205 would not be subject to the timeframe requirements specified in paragraphs (a) and (b) of § 655.121 or the SWA job order review procedure described in paragraphs (e) and (f). Rather, an employer qualifying for processing under §§ 655.200 through 655.235 would submit its completed job order to the NPC at the same time as the related *Application for Temporary Employment Certification,* which it must submit no less than 45 days before its first date of need in compliance with the timeframe requirement of § 655.130(b), unless the application qualifies for emergency situations processing under § 655.134. The NPC would coordinate review of the job order with the SWA and address any job order and *Application for Temporary Employment Certification* deficiencies in a manner consistent with the provisions set forth in §§ 655.140 through 655.145.

2. Section 655.211, Herding and Range Livestock Wage Rate

The Department proposes to revise § 655.211 for consistency with the annual AEWR update notice procedure proposed in § 655.120(b). As discussed in relation to § 655.120(b), providing a short transition period (*i.e.,* no more than 14 days) for an employer to implement a new higher AEWR prevents adverse effect on the wages of U.S. workers by quickly implementing any newly required higher wage rate, while giving employers a brief window to update their payroll systems to implement a newly-issued wage.

3. Section 655.215, Procedures for Filing Herding and Range Livestock Applications for Temporary Employment Certification

The Department proposes revisions to simplify § 655.215 and conform to revisions in this proposed rule. In paragraph (b) detailed language about required additional information is obsolete, as the job order Form ETA–790/790A addenda include data fields for employers to provide detailed information about the job opportunity. Revised language in paragraph (b)(1) clarifies that an *Application for Temporary Employment Certification* for herding or production of livestock on the range may cover multiple areas of intended employment in one state or in two or more contiguous states.

4. Section 655.220, Processing Herding and Range Livestock Applications for Temporary Employment Certification

In addition to minor revisions to § 655.220 proposed for consistency within the proposed rule, the Department proposes to revise paragraph (b) to reflect the centralization of job order dissemination from the NPC to the SWAs as proposed in § 655.121. Consistent with § 655.121, after the content of a job order for herding or production of livestock on the range has been approved, the NPC would transmit the job order to all applicable SWA to begin recruitment.

5. Section 655.225, Post-Acceptance Requirements for Herding and Range Livestock

The Department proposes minor revisions in § 655.225 to simplify language and reflect procedural changes proposed in this proposed rule, such as the proposed revision of the duration of the recruitment period at § 655.135(d). The Department recently proposed revisions to § 655.225 in a separate proposed rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.*[96] Those proposed revisions are not reflected in this proposed rule.

J. Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

1. Section 655.300, Scope and Purpose

The introductory provision proposes to establish that, because of the unique nature of the occupations, employers who seek to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, custom combining, and reforestation as defined in proposed §§ 655.103 and 655.301, are subject to certain standards that are different from the regular H–2A procedures in subpart B of the part. To date, the Department has processed these applications using Departmental guidance letters (TEGLs), one specific to each occupation, containing variances that are substantially similar to those standards and procedures the Department now proposes.[97] In this proposed rule, the Department proposes to create a set of procedures for employers who employ workers engaged in these four occupations. Establishing a single set of procedures, with certain variations where appropriate, for these occupations will create administrative efficiencies for the Department, promote greater consistency in the review of H–2A applications, provide foreign workers and workers in the United States similarly employed with largely the same benefits and guarantees, and provide greater clarity for employers with respect to program requirements. The Department seeks comments from the public on all aspects of these proposed regulations.

In order to employ foreign workers under these procedures, an employer's job opportunity must possess all of the characteristics described in §§ 655.300 through 655.304. As a preliminary matter, the job opportunity must involve work in one of the covered occupations: Animal shearing, commercial beekeeping, custom combining, or reforestation. In addition, the procedures apply to job opportunities in those occupations where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment in one or more contiguous States. Unless otherwise specified in the proposed procedures, employers whose job opportunities meet the criteria under §§ 655.300 through 655.304 must comply with the H–2A requirements in

[96] 83 FR 55994 (Nov. 9, 2018). On June 17, 2019, the Department submitted a final rule of that rulemaking to OMB for review. *See https://www.reginfo.gov/public/do/eoDetails?rrid=129233.*

[97] *See* Training and Employment Guidance Letter, No. 17–06, Change 1, Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041*; Training and Employment Guidance Letter, No. 33–10, Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043*; Training and Employment Guidance Letter, No. 16–06, Change 1, Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program (June 14, 2011), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040*; and Training and Employment Guidance Letter, No. 27–06, Special Guidelines for Processing H–2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations (June 12, 2007), accessed at *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446.*

§§ 655.100 through 655.185,[98] including payment of the highest applicable wage rate, determined in accordance with § 655.122(l) for all hours worked.[99]

Where the job opportunity does not fall within the scope of the covered occupations in §§ 655.300 through 655.304, the employer must comply with all of the regular H–2A procedures. If an employer submits an application containing information and attestations indicating that its job opportunity is eligible for processing under these proposed regulations but later, as a result of an investigation or other compliance review, it is determined that the employment was not eligible for inclusion under these regulations, the employer will be responsible for compliance with all of the regular H–2A procedures and requirements in §§ 655.100 through 655.185. In addition, the Department may seek other remedies, such as civil monetary penalties and potentially debarment from use of the H–2A program, for the violations.

2. Section 655.301, Definition of Terms

The proposed definitions contained in this section define the occupations subject to proposed §§ 655.300 through 655.304, and are intended to assist employers in understanding the only types of work that qualify for these regulatory variances. Though the TEGLs did not contain definitions of these terms, the proposed definitions are based on the Department's current understanding of what work in these occupations generally involves.

The proposed definition of *animal shearing* describes typical activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece. Those activities include gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position prior to shearing; selecting and using suitable equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts due to shearing; cleaning and washing animals after shearing; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers, or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Wool or fleece grading constitutes animal shearing under the proposed definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. In addition, for purposes of this definition, hauling shearing equipment would be considered animal shearing under the proposed definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the shearing crew.

The proposed definition of *commercial beekeeping* describes typical activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers. Those services include assembling, maintaining and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

The proposed definition of *custom combining* describes typical activities associated with combining crops for agricultural producers, including operating self-propelled combine equipment (*i.e.,* equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to cutters, blowers, and conveyers; performing safety checks on harvesting equipment; and maintaining and repairing equipment and other tools used for performing swathing or combining work. Transporting harvested crops to elevators, silos, or other storage areas constitute activities associated with custom combining for the purposes of the proposed definition only where such activities are performed by workers who are employed by the same employer as the combining crew and who travel and work with the custom combining crew. Though transporting equipment from one field to another does not constitute agricultural work, the Department finds it is appropriate to include those activities in the proposed definition of custom combining because such activities are a necessary part of performing combine work on an itinerary. Thus, solely for the purposes of the proposed variance in §§ 655.300 through 655.304, transporting combine equipment and other tools used for custom combining work from one field to another is included in the definition of custom combining only where such activities are performed by workers who are employed by the same employer as the custom combining crew and who travel and work with the custom combining crew. Component parts of custom combining not performed by the harvesting entity, such as grain cleaning, do not fall within the proposed definition. The planting and cultivation of crops, and other related activities, are not considered custom combining for the purposes of this proposed definition.

The Department proposes a definition of *reforestation* for inclusion in § 655.103, as discussed above. As noted above, the proposed rule states that reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way. As defined in proposed § 655.103, reforestation activities exclude right-of-way vegetation management activities such as the removal of vegetation that may interfere with utility lines or lines-of-sight, herbicide application, brush clearing, mowing, cutting, and tree trimming around roads, railroads, transmission lines, and other rights-of-way. Employers seeking workers for occupations involving these activities therefore would not be eligible to file under the provisions set forth in §§ 655.300 through 655.304.

The Department seeks comments on all the definitions. In particular, the Department seeks comments on whether the definitions accurately and comprehensively reflect the activities

[98] For example, covered employers must comply, as they do currently, with the processing procedures in 20 CFR 655.150–655.158 related to recruitment. Similarly, they must comply with § 655.122(g) and either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

[99] Compliance with 20 CFR 655.122(l), as revised by this proposed rule, requires an employer to ''pay the worker at least the AEWR, a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of § 655.120(c), the agreed-upon collective bargaining rate, the Federal minimum wage, or the State minimum wage rate, whichever is highest, for every hour or portion [of an hour] worked during a pay period.''

workers in these occupations perform and whether a final rule should limit additional job duties that workers may perform under certifications approved under §§ 655.300 through 655.304 beyond those duties outlined in this proposed section.

3. Section 655.302, Contents of Job Orders

a. Paragraph (a), Content of Job Offers

This provision addresses proposed variances from the job order filing requirements in § 655.121. Unless otherwise specified in proposed §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders under § 655.121 and for the content of job orders established under part 653, subpart F, and § 655.122.

b. Paragraph (b), Job Qualifications and Requirements

The Department proposes variances addressing certain aspects of the job qualifications and requirements to clarify those the Department generally considers normal and accepted for these occupations, which may be included in job orders for each of the occupations subject to §§ 655.300 through 655.304. The provisions in this proposed rule, described below, are similar to those provided by the TEGLs for the itinerant animal shearing, commercial beekeeping, and custom combining employers in the H–2A program. The proposed rule does not include variances from the regular H–2A job order requirements for employers in the reforestation occupation. As with all other applications, the CO may require the employer to submit documentation to substantiate the appropriateness of any job qualifications and requirements specified in the job order. Each job qualification listed in the job offer must be bona fide. In all cases, the employer must apply all qualifications and requirements included in the job offer equally to U.S. and foreign workers in order to maintain compliance with the prohibition against preferential treatment of foreign workers contained at § 655.122(a).

i. Animal Shearing

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations and require references for the employer to verify this experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at the place the employer is located, and must be available to complete the scheduled itinerary under the job order. In addition, U.S. worker applicants who possess experience based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the shearing method or pattern preferred by the employer.

ii. Commercial Beekeeping

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 3 months of experience in similar occupations and require references for the employer to verify this experience. The job offer for commercial beekeeping occupations may also specify that applicants may not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

iii. Custom Combining

Consistent with the TEGL, the Department proposes to allow a job offer in these occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations and require references for the employer to verify applicant experience. The job offer for custom combining occupations may also specify that applicants must be willing to join the employer at the time and place the employer is located and available to complete the scheduled itinerary under the job order.

c. Paragraph (c), Communication Devices

Employers are obligated under § 655.122(f) to provide each worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. Due to the potentially remote, isolated, and unique nature of the work to be performed by workers in animal shearing and custom combining occupations, the proposed procedures would require the employer to provide each worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. The procedures are consistent with those in place for workers primarily engaged in the herding and production of livestock on the range under the H–2A program. *See* 20 CFR 655.210(d)(2). Communication means are necessary to perform the work and can include, but are not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer would also have to specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit.

This proposed rule is similar to the Department's current policy in the TEGLs for the itinerant animal shearing and multi-state custom combining occupations.[100] Because of the remote, transient, and unique nature of these occupations, effective means of communication between the employer and the worker are necessary to ensure that the employer is able to check the worker's status, and that the worker is able to communicate an emergency to persons capable of responding.

The Department's current regulation at § 655.122(f) requires an employer to provide all tools, supplies, and equipment required to perform the duties assigned. All employers participating in the H–2A program must comply with the requirement in § 655.122(f), including those employers in the animal shearing, beekeeping, and custom combining industries. Similarly, the Department's current regulation at § 655.122(p) prohibits an employer from making an unlawful deduction that is primarily for the benefit or convenience of the employer. Though the TEGL covering reforestation may allow employers to require workers to provide their own tools and equipment in certain cases, the proposed rule does not provide a variance from the requirements in § 655.122(f) and (p), because all tools, supplies, and equipment required to perform the duties assigned are primarily for the benefit and convenience of the employer. Consequently, employers in the animal shearing, custom combining,

[100] Specifically, the Department's current policy in the TEGLs requires an employer to provide at no cost to each worker in animal shearing and custom combining occupations effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 17–06, Change 1 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf. See also* Department of Labor, Employment and Training Administration, Advisory: Training and Employment Guidance Letter No. 16–06, Change 1 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf.*

beekeeping, and reforestation industries must comply with § 655.122(f) and (p) and provide, without charge or deposit charge, to the workers all tools, supplies, and equipment to perform the duties assigned.

These tools, supplies, and equipment include any items required by law, the employer, or the nature of the work to perform the job safely and effectively. For example, if a reforestation employer requires its employees to wear a particular brand or type of boots for safety reasons, or for compliance with the OSHA standards or contractual obligations with upper-tier contractors, the employer must provide the boots without charge or deposit charge. Similarly, if an employer in beekeeping occupations requires certain equipment for safety reasons, such as a veil, gloves, or beekeeping suit, the employer must provide this equipment to the workers without charge or deposit charge. Additional examples of tools, supplies, and equipment that may be required by law, the employer, or the nature of the work in these occupations include combs, cutters, hand pieces, and grinders in the animal shearing occupations; bee brushes, hive tools, smokers, veils, and gloves in the commercial beekeeping occupations; and chainsaws, boots, seedling satchels, planting trowel, rain gear, gloves, ear and eye protection, and protective masks in the reforestation occupations. The Department invites comments as to whether it should require specific tools, supplies, and equipment in these industries, or whether it would be helpful to include in the regulation a list of items that typically are required by law, the employer, or the nature of the work and location, and which must be provided to the workers without charge or deposit.

d. Paragraph (d), Housing

For job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304. As discussed below, employers of workers in these occupations will be permitted to offer mobile housing that meets the standards set forth in § 655.304, except for situations when the mobile housing is located on the range as defined in § 655.201. When the housing unit is on the range, the mobile housing must meet the standards for range housing in § 655.235.

4. Section 655.303, Procedures for Filing Applications for Temporary Employment Certification

Under proposed § 655.303, employers in covered occupations will continue to satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132. In addition, the Department proposes to continue to require employers seeking workers in the covered occupations to provide the locations, estimated start and end dates, and, if applicable, names for each farmer or rancher for whom work will be performed under the job order when filing an *Application for Temporary Employment Certification.* The locations should be identified with as much specificity as possible in order to apprise potential U.S. workers of where the work will be performed and to ensure recruitment in all areas of intended employment.

The Department proposes to continue to allow employers or agricultural associations engaged in the covered occupations to file applications and job orders covering work locations in multiple areas of intended employment and within one or more contiguous States.[101] This approach is warranted by the unique nature of work in these occupations, particularly the itinerant nature of work crews. In addition, the Department proposes to continue to allow an agricultural association to file a master application as a joint employer covering work locations in multiple areas of intended employment within two or more contiguous States.

The Department proposes to apply the geographic limitation in § 655.303(b)(1) and (2) to applications for job opportunities involving commercial beekeeping, with the exception that those applications may include one noncontiguous State at the beginning and end of the period of employment for retrieving bee colonies from and returning them to the overwintering location. For beekeepers, winter months provide an opportunity to engage in colony health and maintenance activities, such as splitting and building colonies, while the bees are not engaged in the pollination, pollen collection, and honey production activities of the rest of the year. Typically, migratory beekeeping operations overwinter their hives in warm-winter states, such as Texas. As warmer weather returns to the rest of the country and plants begin to flower, beekeepers may move their hives from these overwintering locations to the places where their pollination and honey-production activities will take place for the rest of the year, such as cultivated fields and orchards in California and uncultivated fields in North Dakota and South Dakota where clover and wildflowers grow. Apart from accommodating the initial care and gathering of the hives at overwintering locations for transport and the hives' return to the overwintering locations, the Department proposes to maintain the same geographic scope criteria for all applications covered under the provisions at §§ 655.300 through 655.304. Once the hives are moved from the overwintering location to their non-winter destinations, a beekeeping *Application for Temporary Employment Certification* and job order would be limited to multiple areas of intended employment in one or more contiguous States. Where a beekeeping operation involves pollination or honey production activities in non-contiguous States, the employer would be required to submit separate applications. For example, a beekeeping employer could not file an application including an itinerary that begins and ends at a place of employment in Texas and, in between, list places of employment in California, North Dakota, and South Dakota. Instead, the employer could submit two separate applications, one with an itinerary including Texas and California and the other with an itinerary including Texas, North Dakota, and South Dakota.

Under the proposed rule, an employer would need to file one H–2A application for each crew of itinerant workers. This requirement is consistent with current practice for all covered occupations except reforestation, where employers have been permitted to submit one H–2A application covering multiple itineraries. The Department believes permitting multiple crews and itineraries on a single application undermines the integrity and efficacy of U.S. worker recruitment. Therefore, to promote the integrity of the application process in these occupations, and provide consistency across applications in the H–2A program, the proposed rule would require the employer to file one application for each itinerant crew, within the parameters of §§ 655.300 through 655.304.

Aside from these filing variances, the usual H–2A filing requirements would apply to job opportunities involving animal shearing, custom combining,

[101] This would continue the current practice that permits a variance from the geographic scope limitations of 20 CFR 655.132(a) for H–2ALCs engaged in these occupations, and from 20 CFR 655.131(b) for master applications that include worksites in more than two contiguous States.

commercial beekeeping, and reforestation. For example, all H–2ALCs filing under the provisions of §§ 655.300 through 655.304 would be required to comply with § 655.132(d). Thus, employers in those occupations would have to provide fully-executed contracts for each anticipated work location on the itinerary. *See* 20 CFR 655.132(d). Such contracts would demonstrate to the Department the work to be performed along the itinerary with sufficient specificity to allow the Department to ensure compliance with program requirements.

5. Section 655.304, Standards for Mobile Housing

Under the Department's current and proposed regulation at § 655.122(d), an employer must provide housing at no cost to H–2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Additionally, employer-provided housing must meet applicable safety and health standards.[102] Due to the unique nature of animal shearing and custom combining occupations, however, the Department has historically permitted the use of mobile housing for workers engaged in these occupations,[103] the standards for which are found in the TEGLs. The proposed rule continues this longstanding practice, and includes proposed standards for mobile housing for workers engaged in these occupations.

The proposed standards largely incorporate the housing standards in the TEGLs, with two key exceptions. First, the TEGL for workers engaged in animal shearing occupations expressly provides that an animal shearing contractor may lease a mobile unit owned by a crew member or other person or make some other type of ''allowance'' to the owner. Under the proposed rule, such an arrangement is not permitted. Upon further consideration of this practice, the Department concludes that this type of arrangement is inconsistent with the employer's obligation to provide housing at no cost to all H–2A workers and those non-H–2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. *See* section 218(c)(4) of the INA, 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1). Allowing an employer to compensate a worker for housing the worker owns or secures inappropriately shifts at least part of this obligation from the employer to the worker. By requiring animal shearing employers to independently secure sufficient housing in advance of the start date, as required of all other H–2A employers, this change ensures that all housing (including mobile units) has been inspected and certified as meeting housing standards before a temporary labor certification is issued. This change further ensures that all prospective applicants have access to the job opportunity without preference for applicants who possess their own units. Second, the proposed standards align less closely than the TEGLs with the standards for range housing found at § 655.235. Although, historically, the animal shearing and custom combining TEGLs set out the same or similar mobile housing standards as the standards applicable to range housing, there are important differences in these occupations that necessitate different standards for range housing (for workers engaged in herding or the range production of livestock) and mobile housing (for itinerant workers engaged in animal shearing and custom combining occupations). Specifically, the standards for range housing anticipate that workers generally will be on call 24 hours per day, 7 days a week in uniquely remote, isolated areas. Animal shearing and custom combining workers, on the other hand, though itinerant, typically work in less isolated areas with greater access to facilities, and generally there is no expectation that these workers continuously be on call.

The Department recognizes that itinerant workers engaged in the animal shearing and custom combining occupations may work in locations that meet the definition of range in § 655.201 and, therefore, requires use of housing that meets only the standards for range housing in § 655.235 for some portion of the period of employment. In these situations, the Department proposes that mobile housing must be inspected to ensure that it meets the standards for range housing, and that it needs to meet the standards for range housing in § 655.235 only during the period in which the housing is located on the range to enable work to be performed on the range. The applicability of the standards for range housing or mobile housing depends on the sites where mobile housing units are parked. This provision intends to address the fact that itinerant workers in the animal shearing and custom combining occupations may, on occasion, be working in areas so remote that it is not feasible for the employer to provide certain amenities, such as hot and cold water under pressure. However, once the mobile housing unit is moved to a location off of the range, the mobile housing standards in § 655.304 are once again applicable. Therefore, a mobile housing unit that the employer anticipates using both on and off the range is subject to both the procedure for securing and submitting a range housing inspection approval in § 655.230(b) and (c) and the procedure for securing and submitting an inspection approval of the mobile housing unit as proposed in § 655.122(d)(6).

The Department recognizes that the mobile housing units Canadian employers use to perform custom combining operations in the United States are typically located in Canada when not in use, making it unfeasible for these employers to secure pre-occupancy housing inspection and approval from a SWA. Therefore, the Department proposes to continue the longstanding practice reflected in the TEGL of permitting these employers to secure approval of each mobile unit from an authorized representative of the Federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

The proposed standards for mobile housing are for use *only* for itinerant workers engaged in the animal shearing and custom combining occupations. Although the commercial beekeeping [104] and reforestation [105] occupations are also frequently itinerant, the TEGLs for these occupations historically have not allowed for mobile housing, and employers in these occupations tend to house their workers in fixed-site housing, hotels, and motels. The Department invites comment from employers engaged in commercial beekeeping and reforestation regarding

[102] Specifically, employer-provided housing must meet the OSHA standards at 29 CFR 1910.142, or the ETA standards at §§ 654.404 through 654.417 of this chapter, whichever standards are applicable under § 654.401 of this chapter.

[103] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 17–06, Change 1, Attachment B (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf;* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 16–06, Change 1, Attachment A (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf.*

[104] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 33–10 (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL33-10.pdf.*

[105] *See* Department of Labor, Employment and Training Administration, Training and Employment Guidance Letter No. 27–06 (June 12, 2007), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL27-06.pdf.*

the current practices and their specific housing needs.

a. Paragraph (b)

As proposed, the standards for mobile housing combine certain provisions from the standards for range housing at § 655.235 and the ETA housing standards at §§ 654.404 through 654.417, as did the TEGLs. The proposed standards are intended to protect the health and safety of workers engaged in animal shearing and custom combining occupations, while also being sufficiently flexible to apply to a variety of mobile housing units. In its enforcement experience, the Department has seen a variety of mobile housing units used by workers engaged in these occupations, including RVs, trailers, and custom bunk-houses built in the back of tractor-trailers. Some mobile housing units are complete with functioning bathrooms, showers, generators, and washer/dryers, while others are smaller and simpler. Consequently, the Department proposes to allow mobile housing units without certain facilities (*e.g.,* showers and laundry facilities) as long as the employer otherwise supplements these facilities. For example, if the mobile housing unit does not contain bathing facilities, facilities with hot and cold water under pressure must be provided at least once per day. This standard contemplates that some mobile housing units may not include showers, but the mobile housing sites, such as farms, ranches, campgrounds, RV parks, or cities and towns, should have bathing facilities, and workers must be afforded access to these facilities. The Department requests comments on the feasibility of these standards in the animal shearing and custom combining occupations, as well as if any additional standards for mobile housing should be incorporated.

b. Paragraph (c), Housing Site

The proposed rule incorporates the standards for the housing site from the range housing standards and the TEGLs. Specifically, the Department proposes that mobile housing sites must be well drained and free from depressions where water may stagnate.[106] In addition, the Department proposes that mobile housing sites shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create a nuisance or a hazard to health; and shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards. Mobile housing sites shall also be free from debris, noxious plants (*e.g.,* poison ivy, etc.), and uncontrolled weeds or brush.[107] The Department has determined that employers will not find it overly burdensome to place mobile housing units at sites that comply with these provisions.

c. Paragraph (d), Drinking Water Supply

Similar to the TEGLs for these occupations, the Department proposes that an adequate and convenient supply of potable water that meets the standards of the local or state health authority must be provided, as well as individual drinking cups.[108] The Department also proposes to require employers to provide a cold water tap within a reasonable distance from each individual living unit when water is not provided in the unit. Itinerant workers engaged in animal shearing and custom combining occupations may stay in mobile housing units with water tanks or water hookups that provide water in the unit. If no water is available in the unit, workers may park the mobile housing unit within a reasonable distance of a cold water tap.[109] Additionally, adequate drainage facilities for overflow and spillage must be provided.

d. Paragraph (e), Excreta and Liquid Waste Disposal

The Department proposes to require that toilet facilities, such as portable toilets, RV or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, state, or federal health authority, whichever is most stringent. Many mobile housing units are equipped with toilet facilities that would comply with these standards. Where mobile housing units are not equipped with toilet facilities, the employer must provide access to toilet facilities.

Where mobile housing units contain toilet facilities, the employer must provide access to sewage hookups whenever feasible. Some campgrounds or RV parks have sewage hookups; the employer must place workers at these locations if feasible. If wastewater tanks are used because such access to sewage hookups is unavailable or the mobile housing units have toilet facilities but are not designed to connect to sewage hookups, the employer must make provision to regularly empty the wastewater tanks. Consistent with the TEGLs, if pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use.[110] The maintenance of disposal pits must be in accordance with local and state health and sanitation requirements.

The proposed mobile housing standards for excreta and liquid waste disposal deviate from the standards for range housing in § 655.235 and the TEGLs for these occupations, which do not require toilet facilities. Itinerant workers in the animal shearing and custom combining occupations frequently work in relatively more populated areas that provide easy access to running water, indoor plumbing, sewage hookups, vault toilets, and/or portable toilets. The Department, therefore, concludes that it is reasonable and necessary to require employers to provide toilet facilities. The Department invites comment on whether any additional standards (*i.e.,* specific toilet facilities, a specific number of toilet facilities, etc.) should be included.

e. Paragraph (f), Housing Structure

Consistent with the TEGLs, the Department proposes to require that housing be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants. Similarly, the housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering, and each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.[111] Acknowledging the variety of possible mobile housing units, the Department has not proposed specific measurements for windows, but invites comment on whether specific measurements should be required.

[106] This provision is similar to standards for range housing found at § 655.235(a)(1) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[107] These provisions are similar to the ETA housing standards found at § 654.404, but exclude the provision that requires that the housing site must provide a space for recreation reasonably related to the size of the facility and the type of occupancy. *See* 20 CFR 654.404(d).

[108] These proposed standards are similar to the standards for range housing found at § 655.235(b); however, these standards exclude the provision for delivery of water. These provisions are also similar to the standards found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[109] Unlike the ETA housing standards, which requires that a cold water tap be provided within 100 feet of each living unit, the Department's proposal does not require the water tap to be located within a certain number of feet of the mobile housing unit because some campgrounds may not comply with these specific standards. *See* 20 CFR 654.405(b).

[110] TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[111] These standards are also identical to those included in the standards for range housing in § 655.235(d).

Housing standards for fire, safety, and first aid discuss a second means of escape, which may be a window if the window is sufficiently large to allow for escape.

f. Paragraph (g), Heating

The Department proposes to fully incorporate the heating standards from § 655.235(e). These standards are also substantially the same as those contained in the TEGLs for these occupations.[112]

g. Paragraph (h), Electricity and Lighting

The Department proposes that, barring unusual circumstances that prevent access, electrical service or generators must be provided. This may include an electrical hookup, solar panel, battery generator, or other type of device that provides electrical service. This provision differs from the standards for range housing promulgated in § 655.235(f) and existing standards for mobile housing contained in the TEGLs, which require only that lanterns be provided if it is not feasible to provide electrical service to mobile housing. The Department has determined that, in the majority of circumstances, workers in animal shearing and custom combining occupations will be in areas with access to electrical service; therefore, it is necessary and reasonable to require that it be accessible to workers in mobile housing units. Many mobile housing units, such as some RVs, will comply with this requirement. In the rare circumstances in which it is not feasible to provide electrical service, lanterns must be provided to each unit, one per occupant of each unit.[113]

h. Paragraph (i), Bathing, Laundry, and Hand Washing

The Department proposes that bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day. Some mobile housing units may contain functioning showers with hot and cold water under pressure; in which case, the employer has complied with this provision as long as all workers have access to the bathing facilities. If the mobile housing units do not have bathing facilities, workers should have access to facilities no less frequently than once per day. There are no restrictions on how the employer may provide access to these facilities (*e.g.,* at a campground, RV park, ranch bunkhouse, temporary labor camp, motel, etc.).

Similarly, the Department proposes that the employer must provide access to laundry facilities, supplied with hot and cold water under pressure, at no cost to all occupants no less frequently than once per week. The Department anticipates that most mobile housing units will not include laundry facilities; therefore, the employer must supplement its mobile housing units with laundry facilities.

The Department also proposes that alternative bathing and laundry facilities, such as washtubs, must be available to all occupants at all times when water under pressure is unavailable. For example, if a worker needs to bathe or launder clothes, but is hours away from being provided access to a shower or days away from being provided access to a laundry facility, a washtub must be available so that the worker is able to bathe or launder clothes without water under pressure.

Finally, the Department proposes that hand washing facilities must be available to all occupants at all times, even when water under pressure is not available.

These proposed standards differ from the standards for range housing promulgated in § 655.235(g) and the existing standards for mobile housing in the TEGLs, which require that mobile bathing, laundry, and handwashing facilities must be provided when it is not feasible to provide hot and cold water under pressure. However, itinerant workers in the animal shearing and custom combining occupations frequently work in relatively more populated areas that provide easy access to running water with hot and cold water under pressure, and the Department therefore concludes that it is necessary and reasonable to provide periodic, if not constant, access to these amenities.

i. Paragraph (j), Food Storage

The Department proposes that provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.[114] When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator.[115]

j. Paragraph (k), Cooking and Eating Facilities

The proposed standards for cooking and eating facilities are nearly identical to those in the TEGLs. The Department proposes that, when workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates. The Department also proposes that wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.[116]

k. Paragraph (l), Garbage and Other Refuse

The proposed standards for garbage and refuse are substantially the same as those in the TEGLs. The Department proposes that durable, fly-tight, clean containers must be provided to each housing unit for storing garbage and other refuse. Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal.[117] The Department also proposes that the disposal of refuse, which includes garbage, shall be in accordance with applicable local, state, and federal law, whichever is most stringent.[118]

l. Paragraph (m), Insect and Rodent Control

With minor revisions, the proposed standards for insect and rodent control are the same as those in the TEGLs. The Department proposes that appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.[119]

m. Paragraph (n), Sleeping Facilities

The Department proposes that a separate comfortable and clean bed, cot,

[112] TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[113] This proposed standard is similar to the standards for range housing found at § 655.235(f)(2) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[114] This proposed standard is similar to the ETA housing standards found at § 654.413(a)(3).

[115] This proposed standard is similar to the standards for range housing found at § 655.235(h) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B, but excludes references to dehydrating or salting foods.

[116] These proposed provisions are similar to the standards for range housing found at § 655.235(i) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[117] These proposed provisions are similar to the standards for range housing found at § 655.235(j) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[118] This proposed provision is similar to ETA housing standards found at § 654.414.

[119] This proposed provision is similar to the standards for range housing found at § 655.235(k) and for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.[120] This proposed provision is similar to the standards for range housing found in § 655.235(l) and in the current TEGLs for animal shearing and custom combining occupations, excluding the variance that allows for workers to share beds in certain circumstances. The range housing standards allow workers to share a bed for a short period of time, so long as separate bedding is provided, while transitioning from one herder tending the livestock on the range to another herder. However, the Department concludes that such a variance is not necessary, and therefore not appropriate, for mobile housing units for workers engaged in custom combining and animal shearing not located on the range. Clean and sanitary bedding must be provided to for each person. The Department also proposes that no more than double deck bunks are permissible.[121]

n. Paragraph (o), Fire, Safety, and First Aid

This standard is also substantially the same as the ones in the TEGLs. The Department proposes that all units in which people sleep or eat must be constructed and maintained according to applicable local or state fire and safety law; no flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use; mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty; and adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.[122]

o. Paragraph (p), Maximum Occupancy

The Department proposes that the number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit. The Department recognizes that implementing space standards in mobile housing is difficult because mobile housing is, by its nature, compact. Many RVs and trailers incorporate beds in unexpected places. However, workers should be able to live comfortably in the space provided, and the employer must not house more workers than that for which such space is designed. For example, an RV intended for 5 people must not be used to house more than 5 workers. Similarly, if the mobile housing unit in which the employer houses 20 workers has 1 shower facility, not all workers may have access to the shower facility. The Department welcomes comment on whether specific space standards should be incorporated.

K. Terminology and Technical Changes

The Department proposes to revise various terms and phrases used throughout the regulation. These modifications would improve the regulation's internal consistency, or correct or update the relevant terms or titles. These modifications are explained below.

- The Department proposes to use the term ''*Application for Temporary Employment Certification*'' throughout the regulation when referring to Form ETA–9142A for clarity and to improve the regulation's internal consistency.
- The Department proposes to use the term ''agricultural association'' in place of ''association'' to ensure consistency with the terms defined in § 655.103(b).
- The Department proposes to change the term ''worksite'' to ''place of employment'' throughout the regulation to ensure consistency with the terms defined in § 655.103(b).
- The Department proposes to add the word ''calendar'' before the word ''days'' in a number of provisions, to clarify that the timeframe or deadline in question is based on calendar days, not business days.
- The Department proposes to change the term ''temporary labor certification'' to ''temporary agricultural labor certification'' to ensure consistency throughout the regulation and with the definition of ''temporary agricultural labor certification'' in § 655.103(b).
- The name of the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices, has been changed to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, to reflect its current name.
- The Department proposes additional changes throughout the text to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. Substantive changes to the current regulatory text are discussed in the corresponding section of the preamble.

III. Discussion of Proposed Revisions to 29 CFR Part 501

The Department proposes revisions to the regulations at 29 CFR part 501, which set forth the responsibilities of WHD to enforce the legal, contractual, and regulatory obligations of employers under the H–2A program. WHD has a statutory mandate to protect U.S. workers and H–2A workers. The Department proposes these amendments concurrent with and in order to complement the changes ETA proposes to its certification procedures.

A. Conforming Changes

Where discussed and noted above in the Section-by-Section Analysis of 20 CFR part 655, the Department proposes various revisions to 29 CFR part 501, which will conform to revisions the Department is proposing to 20 CFR part 655. These proposed conforming revisions include, among others, to add or revise (including technical revisions) the following definitions of terms in § 501.3, to conform to proposed changes to 20 CFR 655.103(b): Act, Administrator, adverse effect wage rate, agent, agricultural association, agricultural labor, applicant, Application for Temporary Employment Certification, area of intended employment, attorney, Certifying Officer, Chief Administrative Law Judge, corresponding employment, Department of Homeland Security, employer, Employment and Training Administration, first date of need, H–2A petition, job order, joint employment, logging employment, maximum period of employment, metropolitan statistical area, National Processing Center, Office of Foreign Labor Certification, OFLC Administrator, period of employment, piece rate, pine straw activities, place of employment, reforestation activities, Secretary of Labor, successor in interest, temporary agricultural labor certification, United States, U.S. Citizenship and Immigration Services, U.S. worker, wages, Wage and Hour Division, WHD Administrator, and work contract.

B. Section 501.9, Surety Bond

The Department proposes revisions to WHD's surety bond provision at 29 CFR 501.9 as described fully in the discussion of proposed 20 CFR 655.132 above.

C. Section 501.20, Debarment and Revocation

The Department proposes revisions to WHD's debarment provisions at 29 CFR

[120] This proposed provision is similar to the standards for range housing found in § 655.235(l), excluding the variance that allows for workers sharing beds in certain circumstances. The proposed provision is also similar to the standards for mobile housing found in TEGL 16–06–CH–1 Attachment B and TEGL 17–06–CH–1 Attachment B.

[121] This proposal is similar to the ETA standards at § 654.416(c).

[122] These proposed provisions are also similar to those found in the standards for range housing at § 655.235(m).

501.20 to maintain consistency with the proposed changes to 20 CFR 655.182(a). The Department has long had concerns about the role of agents in the program, and has questioned whether the participation of agents in the H–2A labor certification process is undermining compliance with program requirements. Under the current debarment provision, however, the Department can debar agents and attorneys only for their participation in the employer's substantial violations. Thus, to increase program integrity and promote compliance with program requirements, the Department proposes to permit the debarment of agents and attorneys for their own misconduct, rather than solely for participating in the employer's violations. Proposed 29 CFR 501.20 would permit WHD to debar an agent or employer for substantially violating a term or condition of the temporary agricultural labor certification. The Department is otherwise retaining 29 CFR 501.20 as in the current regulation.

D. Terminology and Technical Changes

In addition to proposed revisions to conform to the terminology and technical changes proposed to 20 CFR part 655, subpart B, the Department proposes minor changes throughout part 501 to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. For example, the Department proposes throughout part 501 to replace the phrase ''the regulations in this part'' with the phrase ''this part.''

IV. Administrative Information

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. 58 FR 51735. 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 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. This proposed rule is an economically significant regulatory action under this section and was reviewed by OIRA.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected 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.

E.O. 13771 directs agencies to reduce regulation and control regulatory costs by eliminating at least two existing regulations for each new regulation, and by controlling the cost of planned regulations through the budgeting process. *See* 82 FR 9339. In relevant part, OMB defines an ''E.O. 13771 regulatory action'' as ''a significant regulatory action as defined in section 3(f) of E.O. 12866 that has been finalized and that imposes total costs greater than zero.'' [123] By contrast, an ''E.O. 13771 deregulatory action'' is defined as ''an action that has been finalized and has total costs less than zero.'' [124] For the purpose of E.O. 13771, this proposed rule, if finalized as proposed, is expected to be an E.O. 13771 deregulatory action because while the quantifiable rule familiarization, surety bond, and recordkeeping costs associated with the rule are larger than the quantifiable cost savings, the Department expects the total annualized cost savings of this proposed rule would outweigh the total annualized costs. However, the final designation of this rule's E.O. 13711 status will be determined in any final rule. In the interim, the Department requests public comments regarding this determination. The cost savings associated with the rule will result from the proposed electronic processing of applications, digitized application signatures, the ability to stagger entry of workers under a single *Application for Temporary Employment Certification,* and the electronic sharing of job orders submitted to the NPC with the SWAs (655.150).

Outline of the Analysis

Section V.A.1 describes the need for the proposed rule, and section V.A.2 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section V.A.3 explains how the provisions of the proposed rule will result in quantifiable costs, cost savings, and transfer payments, and presents the calculations the Department used to estimate them. In addition, section V.A.3 describes the qualitative costs, cost-savings, transfer payments, and benefits of the proposed rule. Section V.A.4 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, net costs, perpetuated net costs, and transfer payments of the proposed rule. Finally, section V.A.5 describes the regulatory alternatives that were considered during the development of the proposed rule.

Summary of the Analysis

The Department estimates that the proposed rule will result in costs, cost savings, and transfer payments. As shown in Exhibit 1, the proposed rule is expected to have an average annual quantifiable cost of $4.01 million and a total 10-year quantifiable cost of $28.18 million at a discount rate of 7 percent. The proposed rule is estimated to have annual quantifiable cost savings of $1.32 million and total 10-year quantifiable cost savings of $10.39 million at a discount rate of 7 percent. Also, the proposed rule is estimated to result in annual transfer payments of $95.28 million and total 10-year transfer payments of $673.07 million at a discount rate of 7 percent. The Department estimates that the proposed rule would result in total annualized net quantifiable costs of $2.62 million at a discount rate of 3 percent and $2.53 million at a discount rate of 7 percent, both expressed in 2017 dollars. The Department was unable to quantify cost savings resulting from fewer incomplete or incorrect applications due to lack of data. The Department invites comments

[123] Office of Information and Regulatory Affairs, Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' (Apr. 5, 2017), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

[124] *Id.*

regarding how this impact may be estimated.

EXHIBIT 1—ESTIMATED MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE

[2017 $millions]

	Costs	Cost savings	Net costs *	Transfer payments
Undiscounted 10-Year Total	$40.11	$13.21	$26.89	$952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	22.36	803.57
10-Year Total with a Discount Rate of 7%	28.18	10.39	17.79	673.07
10-Year Average	4.01	1.32	2.69	95.28
Annualized at a Discount Rate of 3%	4.01	1.39	2.62	94.20
Annualized with at a Discount Rate of 7%	4.01	1.48	2.53	114.41
Perpetuated Net Costs * with a Discount Rate of 7%			3.24	

* Net Costs = [Total Costs] − [Total Cost Savings].

The total cost of the proposed rule is associated with rule familiarization and recordkeeping requirements for all H–2A employers,[125] as well as increases in the amount of surety bonds required for H–2ALCs. The two largest contributors to the cost savings of the proposed rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the NPC with the SWAs. Transfer payments are the results of changes to the AEWR and changes to the requirement that employers provide or pay for transportation and subsistence for certain workers for the trips between the worker's place of recruitment and the place of employment. See the costs, cost savings, and transfer payments subsections of section V.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some cost, cost-savings, transfer payments, and the benefits of the proposed rule. The Department describes them qualitatively in section V.A.3 (Subject-by-Subject Analysis). The Department invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs, cost savings, and transfer payments from this proposed rule.

1. Need for Regulation

The Department has determined that new rulemaking is necessary for the H–2A program and furthers the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The ''Hire American'' directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

It is the policy of the Department to increase protections of U.S. workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of working conditions in the United States.[126]

Consistent with the E.O.'s mandate, the Department's policy, and the goal of modernizing the H–2A program, the Department proposes to update its regulations to ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. The changes proposed in this NPRM would streamline the Department's review of H–2A applications and enhance WHD's enforcement capabilities, thereby removing workforce instability that hinders the growth and productivity of our nation's farms, while allowing aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers. Among other proposals to achieve these goals, the Department proposes to: (1) Require mandatory e-filing and accept electronic signatures; (2) revise the current wage methodology so that the AEWR better protects against adverse effect on an occupation-specific basis and to modernize the prevailing wage methodology to provide accurate and reliable prevailing wage rates consistent with modern budget realities; (3) update surety bond and clarify recordkeeping requirements; (4) expand the definition of ''agricultural labor or services'' such that ''reforestation activities'' and ''pine straw activities'' are included in the H–2A program; (5) authorize SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for up to 24 months; (6) permit the staggering of H–2A workers; (7) replace the current 50 percent rule, which requires employers of H–2A workers to hire any qualified, eligible U.S. worker who applies to the employer during the first 50 percent of the work contract period, with a requirement to hire such workers through 30 days of the contract period, unless the employer chooses to stagger the entry of H–2A workers, in which case a longer hiring obligation applies; and (8) revise the debarment provisions to allow the Department to debar agents and attorneys, and their successors in interest, based on their own substantial violations.

2. Analysis Considerations

The Department estimated the costs, cost savings, and transfer payments of the proposed rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B).

[125] The Department does not consider the cost of H–2A employers learning how to e-file. Based on H–2A Certification data from FY 2019, 94.1 percent of applications are submitted electronically. Almost of all the remaining 5.9% of H–2A applicants have access to email, so very few applicants will need to learn how to e-file.

[126] *See* News Release, U.S. Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse (June 6, 2017), *https://www.dol.gov/newsroom/releases/opa/opa20170606.*

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the proposed rule (*i.e.,* costs, cost savings, and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2020 through 2029) to ensure it captures major costs, cost savings, and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2017 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of affected entities that are expected to be affected by the proposed rule. The number of affected entities is calculated using data from the OFLC certification data from 2016 and 2017. The Department provides these estimates and uses them throughout this analysis to estimate the costs, cost savings, and transfer payments of the proposed rule.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2016–2017 average]

Entity type	Number
H–2A Applications Processed ..	9,391
Unique H–2A Applicants	[127] 7,282
Certified H–2A Employers	[128] 7,023
Certified H–2A Workers	[129] 187,740

Growth Rate

The Department estimates a 14 percent annual growth rate in the number of certified applications and in applications processed based on historical H–2A program data on labor certifications for FY 2012–2018. The Department also estimates a 19 percent geometric growth rate in certified H–2A workers, a 4 percent growth rate in H–2A certified employers, and a 16 percent growth rate in H–2A certified labor contractors. The average annual growth rates were applied to the estimated costs, cost savings, and transfer payments of the proposed rule to forcast participation in the H–2A program. Employment projections from BLS forecast that cumulative employment in the agriculture sector will not change through FY 2026.[130] As such, the growth rates presented in this rule are the upmost upper bounds of certified H–2A workers in the 10-year analysis time-frame.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of workers and the change in hours required to comply with the proposed rule per worker for each activity in section V.A.3 (Subject-by-Subject Analysis). For some activities, such as rule familiarization and application submission, all applicants will experience a change. For other activities, the proposed will only affect certified H–2A employers. These numbers are derived from OFLC certification data for the years 2016 and 2017 and represent an average of the two FYs.[131] To calculate these estimates, the Department estimated the average amount of time (in hours) needed for each activity to meet the new requirements relative to the baseline.

Compensation Rates

In section V.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the proposed rule. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the proposed rule. The Department used the mean hourly wage rate for private sector human resources specialists [132] and the wage rate for federal employees at the NPC (Grade 12, Step 5).[133] To account for fringe benefits and overhead costs, the mean hourly wage rate has been doubled.[134] The Department adjusted these base wage rates using a loaded wage factor to reflect total compensation, which includes non-wage factors such as health and retirement benefits. First, the Department calculated a loaded wage rate of 1.44 for private industry workers by calculating the ratio of average total compensation [135] to average wages and salaries in 2017 for the private sector.[136] In addition, the Department added 56 percent to account for overhead costs. For the Federal Government, the Department multiplied the loaded wage rate for private workers (1.44) by the ratio of the loaded wage factors for Federal workers to private workers (1.13) using data from a Congressional Budget Office report [137] to estimate the 2017 loaded wage rate for Federal workers of 1.63. The Department then multiplied the loaded wage factor by the corresponding occupational category's wage rate to calculate an hourly compensation rate. In addition, the Department added 37 percent to account for overhead costs.

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

[127] This average includes 103 unique H–2B applicants that will now be considered H–2A.

[128] This average includes 55 certified H–2B employers that will now be considered H–2A. 3,990 workers were estimated from FY 2016–2017 program data.

[129] This average includes 3,990 certified H–2B workers that will now be considered H–2A.

[130] The projected growth rate for the agricultural sector was obtained from BLS's Industrial Employment Projections and Output, which may be accessed at *https://www.bls.gov/emp/data/industry-out-and-emp.htm.*

[131] The total unique H–2A applicants in 2016 and 2017 were 7,560 and 7,004, respectively. The total certified H–2A employers in 2016 and 2017 were 6,780 and 7,265, respectively. This includes H–2B applicants and employers that will now be considered H–2A.

[132] Bureau of Labor Statistics. (2018). May 2017 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[133] Office of Personnel Management, Salary Table 2018—CHI Incorporating the 1.4% General Schedule Increase and a Locality Payment of 27.47% for the Locality Pay Area of Chicago-Naperville, IL–IN–WI (Jan. 2018), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/CHI_h.pdf.*

[134] 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.* In its guidelines, HHS states, ''as an interim default, while HHS conducts more research, analysts should assume overhead costs (including benefits) are equal to 100 percent of pre-tax wages.'' HHS explains that 100 percent is roughly the midpoint between 46 and 150 percent, with 46 percent based on ECEC data that suggest benefits average 46 percent of wages and salaries, and 150 percent based on the private sector ''rule of thumb'' that fringe benefits plus overhead equal 150 percent of wages. To isolate the overhead costs from HHS's 100 percent assumption.

[135] Bureau of Labor Statistics, *2017 Employer Costs for Employee Compensation, https://www.bls.gov/ncs/ect/data.htm.* Total compensation for all workers. Average Series ID CMU2010000000000D, CMU2010000000000P. To calculate the average total compensation in 2017, the Department averaged the total compensation for all workers for quarters 1–4.

[136] Bureau of Labor Statistics, *2017 Employer Costs for Employee Compensation, https://www.bls.gov/ncs/ect/data.htm.* Wages and salaries for all workers. Average Series ID CMU2020000000000D, CMU2020000000000P. To calculate the average wage and salary in 2017, the Department averaged the wages and salaries for all workers for quarters 1–4.

[137] Congressional Budget Office. (2012). *Comparing the compensation of federal and private-sector employees.* Tables 2 and 4. Retrieved from *https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/01-30-FedPay_0.pdf.* The Department calculated the loaded wage rate for Federal workers of all education levels of 1.64 by dividing total compensation by wages (1.63 = $52.50/$32.30). The Department then calculated the loaded wage rate for private sector workers of all educations levels of 1.44 by dividing total compensation by wages (1.44 = $45.40/$31.60). Finally, the Department calculated the ratio of the loaded wage factors for Federal to private sector works of 1.13 (1.13 = 1.63/1.44).

EXHIBIT 3—COMPENSATION RATES

[2017 dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Private Sector Employees					
HR Specialist	N/A	$31.84	$14.01 ($31.84 × 0.44)	$17.83 ($31.84 × 0.56)	$63.68
Federal Government Employees					
National Processing Center Staff	12	$44.02	$27.73 ($44.02 × 0.63)	$16.29 ($44.02 × 0.37)	$88.04

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs, cost savings, and transfer payments of the proposed rule. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society.

The Department emphasizes that many of the provisions in the proposed rule are existing requirements in the statute, regulations, or regulatory guidance. The proposed rule codifies these practices under one set of rules; therefore, they are not considered ''new'' burdens resulting from the proposed rule. Accordingly, the regulatory analysis focuses on the costs, cost savings, and transfer payments that can be attributed exclusively to the new requirements in the proposed rule.

Costs

The following sections describe the costs of the proposed rule.

Quantifiable Costs

a. Rule Familiarization

When the proposed rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization, the Department applied the geometric average growth rate of H–2A applications (14 percent) to the number of unique H–2A applications (7,282) to determine the annual number H–2A applications impacted in the first year. The number of H–2A applications (8,268) was multiplied by the estimated amount of time required to review the rule (2 hours).[138] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($63.68 per hour). This calculation results in a one-time undiscounted cost of $1,053,057 in the first year after the proposed rule takes effect. This one-time cost yields a total average annual undiscounted cost of $105,306. The annualized cost over the 10-year period is $123,450 and $149,932 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

b. Surety Bond Amounts

An H–2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations under the H–2A program in the form of a surety bond.[139] Based on the Department's experience implementing the bonding requirement and its enforcement experience with H–2ALCs, the Department proposes updates to the regulations. These updates are intended to clarify and streamline the existing requirement and to strengthen the Department's ability to collect on such bonds. Further, the Department proposes adjustments to the required bond amounts to reflect annual increases in the AEWR and to address the increasing number of certifications that cover a significant number of workers under a single application and surety bond.

Currently, the required bond amounts range from $5,000 to $75,000, depending on the number of H–2A workers employed by the H–2ALC under the labor certification. For less than 25 workers, the required bond amount is currently $5,000. These amounts increase to $10,000, $20,000, $50,000, and $75,000 for 25 to 49 workers, 50 and 74 workers, 75 to 100 workers, and more than 100 workers, respectively. The Department proposes to adjust the existing required bond amounts proportionally, on an annual basis, to the degree that a national average AEWR exceeds $9.25. The Department will calculate and publish an average AEWR annually when it calculates and publishes AEWRs in accordance with § 655.120(b). The average AEWR will be calculated as a simple average of these AEWRs. To calculate the updated bond amounts, the Department will use the current bond amounts as a base, multiply the base by the average AEWR, and divide that number by $9.25. Until the Department publishes an average AEWR, the updated amount will be based on a simple average of the 2018 AEWRs, which the Department calculates to be $12.20. For instance, for a certification covering 100 workers, the required bond amount would be calculated by the Department using the following formula:

$75,000 (base amount) × $12.20 ÷ $9.25 = $98,918.92 (updated bond amount).

In subsequent years, the 2018 average AEWR of $12.20 would be replaced in this calculation by the average AEWR calculated and published in that year.

The Department also proposes to increase the required bond amounts for certifications covering 150 or more workers. For such certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional 50 workers. The interval by which the bond amount increases will be updated annually to reflect increases in the AEWR. This value will be based on the amount of wages earned by 50 workers over a 2-week period and, in its

[138] This estimate reflects the nature of the proposal. As a proposal to amend to parts of an existing regulation, rather than to create a new rule, the 2-hour estimate assumes a high number of readers familiar with the existing regulation. Further, portions of this proposal (*e.g.,* portions of §§ 655.200 through 655.235) reprint existing regulatory provisions for ease of reference only. In addition, a major component of the Department's H–2A regulations—employer-conducted recruitment—is excluded from this proposal; they are the subject of a separate rulemaking. *See Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States.* 83 FR 55985 (Nov. 9, 2018).

[139] *See* 20 CFR 655.132(b)(3); 29 CFR 501.9.

initial implementation, would be calculated using the 2018 average AEWR as demonstrated:

$12.20 (2018 Average AEWR) × 80 hours × 50 workers = $48,800 in additional bond for each additional 50 workers over 100.

For example, a certification covering a crew of 150 workers would require additional surety in the amount of $48,800 (150 − 100 = 50; 1 additional set of 50 workers). For a crew of 275 workers, additional surety of $146,400 would be required (275 − 100 = 175; 175 ÷ 50 = 3.5; this is 3 additional sets of 50 workers). As explained above, this additional surety is added to the bond amount required for certifications of 100 or more workers.

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for farm labor contractor surety bonds generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better).[140]

For this analysis, the Department assumes that the bond premium faced by H–2ALCs will be 4 percent. To calculate the costs of the proposed increase in the required bond amounts, the Department first calculated the average number of H–2ALCs (including those labor contractors in the H–2B program that are becoming H–2A) in FYs 2016 and 2017 and the current required bond amounts. Also, the Department calculated the average number of additional sets of 50 workers in FYs 2016 and 2017. Next, the Department calculated the proposed required bond amounts for each category of number of workers using the 2018 national average AEWR of $12.20, as well as the proposed bond amount for each set of additional 50 workers per H–2ALC. Exhibit 4 presents these calculations.

EXHIBIT 4—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H–2ALCs in FYs 16 and 17	Proposed required bond amount	Change in required bond amount	Cost increase
Fewer than 25	$5,000	295	$6,594.59	$1,594.59	$63.78
25–49	10,000	88	13,189.19	3,189.19	127.57
50–74	20,000	54.5	26,378.38	6,378.38	255.14
75–100	50,000	38	65,945.95	15,945.95	637.84
More than 100	75,000	147	98,918.92	23,918.92	956.76
Each Additional Set of 50 Workers Greater than 100	N/A	[a] 667.5	48,800.00	48,800.00	1,952.00

[a] This value represents the total number of additional sets of 50 for H–2ALCs with more than 100 workers.

The Department calculated the first-year cost for H–2ALCs with fewer than 25 workers by multiplying the average number of H–2ALCs in FYs 2016 and 2017 with fewer than 25 workers (295 H–2ALCs) by the change in the required bond amount ($1,594.59) and the assumed bond premium (4 percent). The Department calculated this for each category of number of workers. Additionally, the Department calculated the total cost due to the proposed required bond amounts for additional sets of 50 workers by multiplying the average additional sets of 50 workers (667.5 H–2ALCs) in the FYs 2016 and 2017 by the required bond amount ($48,800.00) and the assumed bond premium (4 percent). The geometric growth rate of H–2A labor contractors (16 percent) was applied to account for anticipated increased H–2A applicants. These costs were then summed to obtain the total annual costs resulting from the increase in bond premiums. This calculation yields an average annual undiscounted cost of $3.74 million.

The total cost from the proposed required bond amounts over the 10-year period is estimated at $37.36 million undiscounted, or $31.69 million and $25.89 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $3.72 million and $3.69 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

c. Recordkeeping

i. Earnings Records

The Department is considering whether to require an employer to maintain a worker's email address and phone number(s) in the worker's home country when available. This information would greatly assist the Department in contacting an H–2A worker in the worker's home country, should the Department need to do so to conduct employee interviews as part of an investigation, to secure employee testimony during litigation, or to distribute back wages.

To calculate the estimated recordkeeping costs associated with collecting and maintaining this information, the Department first multiplied the number of certified H–2A employers (7,023 employers) by the 4-percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the estimated time required to collect and maintain this information (2 minutes) to obtain the total amount of recordkeeping time required. The Department then multiplied this estimate by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $15,557 in 2020 to $22,839 in 2029. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

ii. Housing

The Department proposes to authorize the SWAs (or other appropriate authorities) to inspect and issue an employer-provided housing certification valid for up to 24 months. Under the proposal, an employer must self-certify that the employer-provided housing remains in compliance for a subsequent *Application for Temporary Employment Certification* filed during the validity

[140] The Department reviewed premium rates provided on the websites of companies that offer farm labor contractor bonds and, as noted in the discussion of sections 655.132 and 29 CFR 501.9, above, found that employer premiums generally range from 1 to 4 percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better). The Department assumed contractors would have fair/average credit and so used a premium of 4 percent to approximate the rate on the high side for premiums on the standard bond market. The Department seeks comments on the impact of the proposed updates to the required bond amounts.

period of the official housing certification.

To calculate the estimated recordkeeping costs associated with maintaining records of these certifications, the Department first multiplied the number of certified H–2A employers (7,023 employers) by the 4 percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that will self-certify each year (100 percent). This amount was then multiplied by the estimated time required to maintain this information (2 minutes) to calculate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $15,557 in 2020 to $22,839 in 2029. This assumes that the SWAs will exercise their right to certify housing for more than 1 year. Some SWAs do not issue housing certifications valid for more than 1 year as a rule; others do not on a case-by-case basis. It would be accurate to say that employers would be assumed to self-certify 100 percent whenever the SWA's certification permitted it. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

iii. Abandonment of Employment or Termination for Cause

The Department proposes to revise § 655.122(n) to require an employer to maintain records of notification detailed in the same section for not less than 3 years from the date of the certification. An employer is relieved from the requirements relating to return transportation and subsistence costs and three-fourth guarantee when the employer notifies the NPC (and the DHS in case of an H–2A worker), in a timely manner, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause. Additionally, the employer is not required to contact its former U.S. workers, who abandoned employment or were terminated for cause, to solicit their return to the job.

To estimate the recordkeeping costs associated with maintaining records of these notifications, the Department first multiplied the number of certified H–2A employers (7,023) by the 4 percent annual growth rate of ceritifed H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that will have 1 or more workers abandon employment or be terminated for cause (70 percent). This amount was then multiplied by the estimated time required to maintain these records (2 minutes) to estimate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This yields an annual cost ranging from $10,890 in 2020 to 15,988 in 2029. The Department invites comments regarding the assumptions and data sources used to estimate the costs resulting from this provision.

iv. Total Recordkeeping Costs

The total cost from the proposed recordkeeping requirements over the 10-year period is estimated at $0.51 million undiscounted, or $0.45 million and $0.38 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $0.052 million and $0.054 million at discount rates of 3 and 7 percent, respectively.

d. Reforestation Applications

The proposed rule mandates all forestry employers reclassified as H–2A employers must now submit an application per each crew, rather than one application for multiple crews. The Department estimates that this will increase the number of applications required from each forestry employer by two. The change impacts the average of 75.5 forestry employers.[141] The Department applied the growth rate of H–2A certified employers (4 percent) to determine the annual number of forestry employers impacted. The annual number of forestry employers was then multiplied by the increase in applications (2) to determine the annual number of increased applications. To estimate the costs to forestry employers, the Department multiplied the annual number of applications by the cost per application ($460).[142] The Department also multiplied the annual number of applications by the number of hours it takes for a Human Resources Specialist to file the application (1), the Human Resources Specialist's compensation rate ($31.84 per hour), and the sum of the loaded wage factor and overhead cost for the private sector (2.00). To determine the cost to DOL staff to review increased applications, the annual number of applications was mutlipled by the amount of time spent reviewing an application (1 hour), the hourly wage for DOL staff ($44.02), and the sum of the loaded wage factor and overhead cost for the federal government (2.00). Costs to employers and DOL were then summed. This calculation yields an average annual undiscounted cost of $117,676.

The total cost from the proposed increase in forestry applications over the 10-year period is estimated at $1.18 million undiscounted, or $1,023,229 and $863,624 at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $119,954 and $122,961 at discount rates of 3 and 7 percent, respectively.

Non-Quantifiable Costs and Transfers

a. Definition of Agriculture

If finalized as proposed, the proposed rule would expand the regulatory definition of agriculture labor or services pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(1) to include reforestation and pine straw activities. Consequently, nonimmigrant workers engaged in reforestation and pine straw activities, who historically have been and are currently admitted under the H–2B visa program, will be included in the H–2A program.

As described earlier, the Department believes that such transfer would not impose significant burdens for the employers. Protections that currently apply to H–2A workers are generally comparable to the protections afforded to H–2B workers engaged in reforestation and pine straw activities.[143] Additionally, work in both the reforestation and pine straw industries, as defined in the proposed rule, often meets the definition of agricultural employment under the MSPA.[144] In the Department's experience in the administration and enforcement of the H–2B visa program, the pine straw industry is not an active user of the H–2B program, as workers engaged in pine straw activities are frequently local seasonal agricultural workers. Consequently, the proposed rule would not have significant effects in that industry. Based on OFLC performance data from FY 2016 and FY 2017, 3,990 represents the average amount of reforestation and pinestraw workers that receive H–2B visas per year. The growth rates were applied to

[141] Average annual number of unique certified forestry employers for FY16–17 from H–2B dataset.

[142] Cost per USDA, see *https://www.farmers.gov/manage/h2a.*

[143] *See* 80 FR 24041.

[144] *See Morante-Navarro* v. *T & Y Pine Straw, Inc.,* 350 F.3d 1163, 1170–72 (11th Cir. 2003); *Bresgal* v. *Brock,* 843 F.2d 1163, 1171–72 (9th Cir. 1987); *Davis Forestry Corp.* v. *Smith,* 707 F.2d 1325, 1328 n.3 (11th Cir. 1983).

project their numbers over the course of the 10-year analysis timeframe.

The Department believes that there are three potential transfer payments from employers to workers—transfers that result from potential expenses workers would no longer need to bear—under the proposed expanded definition of agricultural labor or services. First, under the H–2A program, an employer must provide housing at no cost to all H–2A workers. The employer must also provide housing at no cost to those non-H–2A workers in corresponding employment who are not reasonably able to return to their residence within the same day.[145] Additionally, H–2A employer-provided housing must be inspected and certified, and rental and/or public accommodations must meet certain local, state, or federal standards.[146] Under the H–2B program, however, an employer is not generally required to pay for housing unless the housing is primarily for the benefit or convenience of the employer. For example, an H–2B employer is required to provide housing to itinerant workers engaged in reforestation activities at no cost to the workers due to the transient nature of the occupation.[147] In the Department's experience in the administration and enforcement of the H–2B program, itinerant workers engaged in reforestation activities are more likely to be provided with public accommodations.

The Department believes workers engaged in pine straw activities for H–2B employers tend to be local workers, and typically need not be provided with housing because they stay in their own homes. But, under the MSPA, if an employer provides housing to workers, the employer may charge the cost for housing to the workers, if properly disclosed.[148] Consequently, the Department believes that the H–2A requirement at § 655.122(d)(1) would result in transfer payments from employers to nonimmigrant workers engaged in the pine straw activities, due to a shift in the cost of such housing.

Second, the Department's H–2A regulation at § 655.122(h)(3) requires an employer to provide transportation for workers between employer-provided housing and the employer's worksite at no cost to the workers. Additionally, the employer is required to provide transportation between the employer's worksites, if there is more than one worksite, at no cost to the workers. Providing such transportation is generally not a requirement under the H–2B program. However, H–2B employers of itinerant workers, many of whom work in the reforestation industry, must provide such transportation because of the transient nature of these itinerant workers.[149] Consequently, the Department believes that the H–2A requirement at § 655.122(h)(3) would impact only employers in the pine straw industry that are currently charging their workers for the cost of transportation, since employers would pay for such transportation under this rule.[150]

Finally, the Department's H–2A regulation at § 655.122(g) requires an employer to provide each worker with three meals a day or furnish free and convenient cooking and kitchen facilities so that the workers can prepare their own meals. Where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals; the employer may deduct any disclosed allowable meal charges from the worker's pay.[151] In contrast, the employer may not pass on to the worker any additional costs that the employer incurs for the provision of meals that exceed the allowable meal charge, unless a petition for higher meal charge was submitted and granted.[152] There is no similar meal requirement under the H–2B program. Consequently, the Department believes that the H–2A requirement at § 655.122(g) would lead to transfer payments from employers to nonimmigrant workers engaged in the reforestation and pine straw activities under circumstances in which the employer spends more than the maximum allowable meal charge to provide three meals a day.

The Department is unable to quantify the estimated transfers described in this section due to a lack of data regarding the amount, if any, charged to nonimmigrant workers by employers for housing, transportation, and meals, and wide variations nationally in the costs associated with providing housing, transportation, and meals. The Department also proposes to codify existing mobile housing standards for workers engaged in animal shearing and custom combining occupations, with some modifications. The proposed modifications include removing the authority for an animal sheering contractor to lease a mobile unit owned by a crew member or other person or make some other type of ''allowance'' to the owner. The proposed standards would also limit the circumstances under which an employer's mobile housing unit can comply with range housing standards, rather than the mobile housing or standard housing regulations, to those periods when the work is performed on the range. The proposed standards would provide flexibility for employers to use existing mobile housing units that may not fully comply with the modified standards at all times by allowing the employer to supplement mobile units with required facilities (*e.g.,* access to showers at a fixed-site such as an RV park) in order to comply fully with all proposed requirements. The Department is unable to quantify the costs of these modifications because it lacks data on the number of animal shearing employers that currently lease a mobile unit or make some other ''allowance'' under the current TEGLs, the number of employers who will supplement existing mobile units with additional facilities and to what extent, as well as on the amount of time that workers engaged in these occupations spend on the range. Consequently, the Department invites comment on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible transfer effects described in this section.

b. Housing

If adopted without change, the proposed rule includes potential costs to H–2A employers that elect to secure rental and/or public accommodations for workers to meet their H–2A housing obligations. Specifically, the proposal requires that, in the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the OSHA temporary labor camp standards at 29 CFR 1910.142(b)(2) (''each room used for sleeping purposes shall contain at least 50 square feet for each occupant''), § 1910.142(b)(3) (''beds . . . shall be provided in every room used for sleeping purposes''); § 1910.142(b)(9) (''In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.''); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(c) (water supply);

[145] *See* 8 U.S.C. 1188(c)(4); 20 CFR 655.122(d)(1).

[146] *Id.*

[147] *See* 80 FR at 24063.

[148] 29 CFR 500.75–500.76 require an employer to disclose to each worker in writing any benefits, including transportation and housing, and any costs to be charged for each of them. Additionally, 29 CFR 500.130 requires that a facility or real property used as housing for any migrant agricultural worker must comply with state and federal safety and health standards applicable to such housing.

[149] *See* 80 FR 24041 at 24063.

[150] 29 CFR 500.75–500.76 require an employer to disclose to each worker in writing any benefits, including transportation and housing, and any costs to be charged for each of them.

[151] *See* 20 CFR 655.173(a).

[152] *See* 20 CFR 655.173(b).

§ 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), the relevant state standards will apply; in the absence of applicable state standards addressing such concerns, the relevant OSHA temporary labor camp standards will apply. Employers that currently provide rental and/or public accommodations that do not meet such standards will be required to provide different or additional accommodations. For example, employers that currently require workers to share beds will be required to provide each worker with a separate bed. To comply with the proposal, such employers may be required to book additional rooms or provide different housing.

The Department is unable to quantify an estimated cost due to a lack of data as to the number of employers that would be required to change current practices under this proposal. Consequently, the Department invites comment on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible costs in the final rule.

c. Requirement To File Electronically

Currently, about six percent of employers choose not to file electronically. Under the proposed rule, these employers would have two options—to file electronically or to file a request for accommodation because they are unable or limited in their ability to use or access electronic forms as result of a disability or lack of access to e-filing. The Department has not estimated costs for employers' time and travel to file electronically when they otherwise would not have. The Department believes these costs will be small.

The Department also has not estimated any costs for accommodation requests. The Department expects to receive very few mailed-in accommodation requests. In its H–1B program, which has mandatory e-filing—albeit from a very different set of industry—the Department has not received any requests for accommodation due to a disability. Of the handful of internet access requests received annually, none were approved, as the requestors had public access nearby. For those requesting an accommodation in H–2A, the Department estimates that the cost to apply would be *de minimis,* consisting of the time and cost of a letter and printing out forms.

Cost Savings

The following sections describe the cost savings of the proposed rule.

Quantifiable Cost Savings

a. Electronic Processing and Process Streamlining

The Department proposes to modernize and clarify the procedures by which an employer files a job order and an *Application for Temporary Employment Certification* for H–2A workers under §§ 655.121 and 655.130 through 655.132. The NPC will electronically share job orders with SWAs, which will result in both a material cost and a time cost savings for employers.

To ensure the most efficient processing of all applications, the Department must receive a complete application for review. Based on the Department's experience administering the H–2A program under the current rule, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. These incomplete applications create unnecessary processing delays for both the NPC and employers. In order to address this concern, the Department proposes to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator, unless the employer cannot file electronically due to disability or lack of internet access. The technology system used by the OFLC will not permit an employer to submit an application until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all required documentation, including a copy of the job order submitted in accordance with § 655.121. The Department estimates that 80 percent of applications are currently filed electronically and that this proposed rule would significantly increase the number of employers who submit electronic applications. This would result in material and time cost savings for employers. Electronic processing would also result in a time cost savings for the NPC. The Department also proposes that employers may file only one *Application for Temporary Employment Certification* for place(s) of employment contained within a single area of intended employment covering the same occupation or comparable work by an employer for each period of employment, which will reduce the number of overall applications submitted. Finally, the Department proposes to the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney or agent.

To estimate the material cost savings to employers due to electronic processing, the Department assumed that the proposed rule would result in 6 percent of H–2A employers switching to electronic processing of applications. Initially the Department reduced the number of H–2A applications processed (9,391) by the number of applications made unnecessary by the staggering rule (8,444) to determine an impacted population of H–2A applications (947). The growth rate of H–2A applications (14 percent) was then applied to determine the annual impacted number of applications. The Department then multiplied the percentage estimated to switch to electronic processing of applications (6 percent) by the annual number of impacted H–2A applications to obtain the number of employers who would no longer be submitting by mail. For each application, a material cost was calculated by summing the price of a stamp ($0.50), the price of an envelope ($0.04), and the total cost of paper. The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.02) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $304.62.

The total material cost savings from electronic processing over the 10-year period is estimated at $43,046 undiscounted, or $24,596 and $20,135 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $304.36 and $303.91 at discount rates of 3 and 7 percent, respectively.

To estimate the time cost savings to employers due to electronic processing, the Department again estimated the number of affected applications by multiplying the assumed percentage of employers that would switch to electronic applications (6 percent) by the total number of annually impacted H–2A applications. The Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This time cost savings was then multiplied by the estimated number of applications expected to switch to electronic

submission. This yields average annual undiscounted cost savings of $633.87.

The total time cost savings from electronic processing over the 10-year period is estimated at $6,339 undiscounted, or $5,403 and $4,442 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $633.34 and $632.39 at discount rates of 3 and 7 percent, respectively.

To estimate the material cost savings to employers due to the NPC sharing job orders with the SWAs electronically, the Department assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, a material cost was calculated by summing the price of a stamp ($0.50), the price of an envelope ($0.04), and the total cost of paper. The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.02) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $5,163.

The total material cost savings over the 10-year period is estimated at $51,630 undiscounted, or $44,004 and $36,178 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $5,159 and $5,151 at discount rates of 3 and 7 percent, respectively.

To estimate the time cost savings to employers resulting from the NPC electronically sharing job orders with the SWAs, the Department again assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, the Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes in hours (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($63.68 per hour). This cost savings was then multiplied by the estimated number of applications switching to electronic submission. This yields average annual undiscounted cost savings of $10,744.

The total time cost savings over the 10-year period is estimated at $107,436 undiscounted, or $91,568 and $75,283 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $10,735 and $10,719 at discount rates of 3 and 7 percent, respectively.

The Department assumes that the DOL staff will save approximately 1 hour for each application that is now submitted electronically. To calculate the time cost savings to the Federal Government due to electronic processing, the Department first calculated the number of employers that would now submit electronically by multiplying the assumed percentage (6percent) by the total number of annually impacted H–2A applications. This cost savings was then multiplied by the per-application time cost savings, calculated by multiplying the time savings (1 hour) by the hourly compensation rate for DOL staff ($88.04 per hour). This yields average annual undiscounted cost savings of $10,558.

The total time cost savings over the 10-year period is estimated at $105,585 undiscounted, or $89,990 and $73,985 at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $10,550 and $10,554 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

b. Staggering Worker Entry

The Department proposes to permit the staggered entry of H–2A workers into the United States. This proposal permits an employer that receives a temporary agricultural labor certification and an approved H–2A Petition to bring nonimmigrant workers into the United States at any time during the 120-day period after the first date of need identified on the certified *Application for Temporary Employment Certification* without filing another H–2A Petition. An employer that chooses to stagger the entry of its workers must notify the NPC electronically, or by mail if permitted to do so, of its intent to stagger and identify the period of time, up to 120 days, during which the staggering will take place. An agricultural association filing as a joint employer with its members need only make a single request on behalf of its members duly named on the application and provide the NPC with the maximum staggered entry timeframe.

Employers that wish to stagger the entry of their workers must continue to accept referrals of U.S. workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified *Application for Temporary Employment Certification,* whichever is longer. Employers must also comply with the requirement to update their recruitment reports.

The Department expects the above proposal will result in cost savings to the employer. This is because currently, an employer that needs agricultural workers at different points of a season must file separate *Applications for Temporary Employment Certification* containing a new start date for each group of job opportunities. In addition, an agricultural association filing as a joint employer with a number of its employer-members must currently coordinate the amount and timing of labor needed across numerous employer-members growing a wide array of different crops under the same start date of work. The same agricultural association must then file numerous master applications, often one every calendar month, covering substantially the same employer-members that need workers to perform work in the same occupational classification based on a different start date of work. Because the proposal will reduce the number of *Applications for Temporary Employment Certification* an employer that wishes to stagger must file and decrease the time and expense of coordinating master applications for agricultural associations, the Department expects this proposed change to produce cost savings for the employer. Some of these cost savings may be offset by the time and expense it will take for the employer to notify the NPC of its intent to stagger, but the Department expects this cost to be minimal and the overall impact of its proposal to be one of cost savings.

To estimate employer time cost savings associated with the staggered entry of workers into the United States, the Department first calculated the total number of employers eligible for staggering (4,926) and applied the annual growth rate of H–2A applications certified (14 percent) and the total number of certifications for the same SOC, state, and employer (13,370) and applied the H–2A certified employer growth rate (4 percent). The Department subtracts the number of eligible employers from the total number of duplicate certifications to estimate the total number of repeat applications annually that would no longer be necessary under the proposed rule (8,444). This number was then multiplied by the assumed net time savings (1.77 hours) and the total loaded wage rate for employers ($63.68). This yields average annual undiscounted cost savings of $726,493.

The total time cost savings to employers due over the 10-year period is estimated at $7.26 million undiscounted, or $6.52 million and $5.73 million at discount rates of 3 and

7 percent, respectively. The annualized cost savings over the 10-year period is $764,689 and $815,570 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

To estimate time cost savings to the Federal government associated with the staggered entry of workers into the United States, the Department multiplied the total number of annual repeat applications that would no longer by necessary (8,444) by the assumed time to review each repeat application (1 hour) and the loaded wage rate for Federal employees ($88.04). This yields average annual undiscounted cost savings of $567,460.

The total time cost savings to the Federal government over the 10-year period is estimated at $5.67 million undiscounted, or $5.10 million and $4.47 million at discount rates of 3 and 7 percent, respectively. The annualized cost savings over the 10-year period is $597,295 and $637,038 at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the cost savings resulting from this provision.

Non-Quantifiable Cost Savings

a. Cost Savings From Modernizing the H–2A Program To Provide Employers With Timely Access to Legal Agricultural Labors

The Department proposes to institute changes to modernize the H–2A program and eliminate inefficiencies, which will help ensure that employers can access legal agricultural labor, without undue cost or administrative burden, while maintaining the program's strong protections for the U.S. workforce. Among other proposals to achieve these goals, the Department proposes to (1) allow employers to start work within a 14 calendar day period after the anticipated start date of work and stagger the entry of H–2A workers to account for factors such as travel delays and changing climatic conditions that impact farm operations and costs; (2) facilitate employers—especially small growers who are unable to individually offer full-time work—jointly employing workers to perform the same services or labor during the same period of employment; (3) streamline application processing by providing employers who file compliant job orders with the option to begin positive recruitment of U.S. workers prior to filing the H–2A application; (4) increase the stability of any given employer's workforce by replacing the current 50 percent rule with a requirement to hire workers through 30 days of the contract period; and (5) expand the H–2A program to employers performing ''reforestation activities'' and ''pine straw activities'' to reflect how their workers share many of the same characteristics as traditional agricultural crews.

Through such changes, the rule would reduce costly workforce instability that hinders the growth and productivity of our nation's farms. The Department believes such changes will result in cost savings from a more viable and productive workforce alternative. At the same time, an H–2A program that is more functional and reliable as a whole would also reduce costs associated with available but displaced U.S. workers, or adverse effects to their wages and working conditions.

b. Cost Savings From Efficiencies Associated With Receiving More Complete and Accurate Applications

The Department proposes to modernize the process by which H–2A employers submit job orders to the SWAs and applications to the Department through e-filing and requiring the designation of a valid email address for sending and receiving official correspondence during application processing, except where the employer is unable or limited in its ability to use or access electronic forms as result of a disability, or lacks access to e-filing.

The Department believes that transitioning to electronic submissions would result in cost savings to employers and to the NPC. Currently, submissions that are incomplete or obviously inaccurate upon their receipt result in a NOD on the employer's application. As a result, employers who submit incomplete applications must start the submission process from the beginning. This can lead to costly delays for employers, as well as costly processing time for the NPC.

The requirement for electronic submissions would reduce the number of instances where incomplete applications are submitted because employers have not fully completed the form prior to submitting it. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload missing documentation. Additionally, the adoption of electronic submissions should reduce the amount of time it takes to correct errors because entries can simply be deleted, rather than requiring the production of new copies of the form after an error is detected.

For the NPC, electronic filing and communications will improve the quality of information collected from employers, reduce unnecessary costs of communicating with employers to resolve obvious errors or receive complete information, and reduce the frequency of delays related to application processing.

c. Cost Savings From Efficiencies Created by Acceptance of Electronic Signatures

The Department also proposes to enable employers, agents, and attorneys to use electronic methods to sign or certify any document required under this subpart using a valid electronic signature method. The current practice of accepting electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, and the Department believes leveraging modern technologies to accept electronic signature methods can achieve even greater efficiencies and result in cost savings to employers and the NPC.

Accepting electronic signature methods as a means of complying with original signature requirements for the H–2A program will reduce the costs for employers associated with printing, mailing, or delivering original signed paper documents or scanned copies of original signatures on documents to the NPC. Additionally, electronic signature methods provide employers and their authorized attorneys or agents with greater flexibility to conduct business with the Department—at any time and at any location with an internet connection—rather than needing to be located in a physical office. This frees valuable time for conducting other business tasks.

The NPC anticipates additional cost savings from use of electronic signature methods. The acceptance of documents containing electronic signatures will facilitate the NPC's use of a more centralized document storage capability to more efficiently access documents during application processing, saving time and expense.

d. Cost Savings From Efficiencies Created by the Use of Electronic Surety Bonds

The Department also proposes to develop a process for accepting electronic surety bonds through the iCERT system and to require the use of a standardized bond form. The Department believes that these proposed changes will result in a cost savings to H–2ALCs and the NPC. Currently all H–

2ALCs, even the majority that submit other components of their applications electronically, have to submit original paper surety bonds before the labor certifications can be issued. Accepting original electronic surety bonds will reduce the costs associated with mailing or delivering the original surety bonds to the NPC and the costs for NPC to transfer these bonds to WHD for enforcement purposes. Additionally, using a standardized bond form will reduce the likelihood of errors and the amount of time required for the NPC to review the bonds for compliance.

The Department seeks comments from the public regarding any additional non-quantifiable cost savings that are not included in this analysis.

Transfer Payments

Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to transportation and subsistence costs and the revisions to the wage structure.

a. Transportation and Subsistence Costs

The Department proposes to revise the beginning and end points from and to which an employer must provide or pay for transportation and subsistence costs for certain H–2A workers. An employer must pay a worker for the reasonable transportation and subsistence costs incurred when traveling to the employer's place of employment, provided that the worker completes at least 50 percent of the work contract period and the employer has not previously advanced or otherwise provided such transportation and subsistence. Specifically, an employer must provide or pay for transportation and daily subsistence from ''the place from which the worker has come to work for the employer.'' Under the proposed rule, for an H–2A worker that requires a visa departing to work for the employer from a location outside of the United States, ''the place from which the worker departed'' will mean the appropriate U.S. Consulate or Embassy. This change will result in transfer payments from workers to employers. The Department first calculated the transfer payment for transportation and then calculated such transfer payment for subsistence cost.

Transportation-related transfer payments were calculated by multiplying the total number of certified H–2A workers (187,740 workers) by the growth rate of H–2A certified workers (19 percent) to determine the annual number of certified workers. The annual number of certified H–2A workers was then multiplied by the number of one-way trips per worker (2 trips). This was then multiplied by the cost of a one-way bus ticket ($59.00) between Oaxaca, Mexico and Monterrey, Mexico. In the Department's enforcement experience, H–2A workers are predominantly from Mexico. Additionally, in the Department's experience, the majority of H–2A workers from Mexico arrive in Monterrey, Mexico for visa processing prior to arriving at the appropriate port of entry to seek admission to the United States. This yields average annual undiscounted transfers of $65.38 million. The total transfer over the 10-year period is estimated at $653.76 million undiscounted, or $551.35 million and $446.92 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $64.63 million and $78.50 million at discount rates of 3 and 7 percent, respectively.

Subsistence-related transfer payments were also calculated by multiplying the total annual number of certified H–2A workers (187,740 workers) by the number of one-way trips per worker (2 trips). This amount was then multiplied by the minimum daily subsistence amount for workers traveling ($12.26),[153] resulting in average annual undiscounted transfers of $13.58 million. The total transfer over the 10-year period is estimated at $135.85 million undiscounted, or $114.57 million and $92.87 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $13.43 million and $16.31 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the transfers resulting from this provision.

b. Revisions to Wage Structure

Section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1), provides that an H–2A worker is admissible only if the Secretary of Labor determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' In 20 CFR 655.120(a), the Department currently meets this statutory requirement by requiring the employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposes to maintain this general wage-setting structure with only minor revisions, but, as discussed below, proposes to modify the methodology by which it establishes the AEWRs and prevailing wages.

Specifically, the Department proposes to modify the AEWR methodology so that it is based on data more specific to the agricultural occupation of workers in the United States similarly employed. The Department currently sets the AEWR at the annual average hourly gross wage for field and livestock workers (combined) for the State or region from the FLS conducted by the USDA's NASS, which results in a single AEWR for all agricultural workers in a State or region. As discussed in depth in the preamble, the Department is concerned that the current AEWR methodology may have an adverse effect on the wages of workers in higher paid agricultural occupations, such as supervisors of farmworkers and construction laborers on farms, whose wages may be inappropriately lowered by an AEWR established from the wages of field and livestock workers (combined), an occupational category from the FLS that does not include those workers. In addition, the use of generalized data for other agricultural occupations could produce a wage rate that is not sufficiently tailored to the occupation, as necessary to protect against adverse effect for those occupations.

The Department proposes to set the AEWR at the annual average hourly gross wage for the State or region and particular SOC applicable to the work performed from the USDA's FLS. The Department proposes to use the FLS to establish the AEWR for the SOC, where such a wage is available, rather than an alternative wage source, because the FLS is the only comprehensive wage survey of wages paid by farmers and ranchers. When FLS State or regional data is not available for the SOC, however, the Department proposes to set the AEWR based on BLS's OES average wage for the SOC and the State because the OES is a comprehensive and valid source of wage data that can be useful when USDA cannot produce valid FLS wage data for the agricultural occupation and geographic area. Next, if OES State data is not available, the Department would be set the AEWR based on FLS national data for the SOC. Lastly, if all prior data sources do not

[153] Department of Labor, Employment and Training Administration, Allowable Meal Charges and Reimbursements for Daily Subsistence (Mar. 21, 2018), *https://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm.*

have an hourly wage available, then the AEWR would be determined by OES National data.

The Department calculated the impact on wages that would occur from the implementation of the proposed AEWR methodology. For each H–2A Certification in 2016 and 2017, the Department used the difference between the projected AEWR under the proposed rule and estimated wages under the current AEWR baseline to establish the wage impact of the proposed AEWR methodology.

For an illustrative example in Exhibit 5, to calculate projected AEWRs under the proposed rule, the Department multiplied the number of certified workers by the number of hours worked each week, the number of weeks in a given year that the employees worked, and the annual average hourly gross wage for the State or region and particular SOC applicable to the work performed from the USDA FLS (FLS regional SOC wage).[154] This example sets forth how the Department calculated the proposed wage impact for an individual case.

EXHIBIT 5—AEWR WAGE UNDER THE PROPOSED RULE

[Example case]

Number of certified workers	Basic number of hours	Number of days worked in 2016	Number of days worked in 2017	FLS regional SOC wage 2016	FLS regional SOC wage 2017	Total AEWR wages 2016	Total AEWR wages 2017
(a)	(b)	(c)	(d)	(e)	(f)	(a * b * (c/7) * e)	(a * b * (d/7) * f)
14	35	306	1	$10.43	$10.44	$223,410.60	$730.80

After the total AEWR for the proposed rule was determined, the wage calculation under the current AEWR was calculated. The methodology is similar to that used to estimate the projected AEWR under the proposed rule: The number of workers certified is multiplied by the number of hours worked each week, the number of weeks in a given year that the employees worked, and the AEWR baseline for the year(s) in which the work occurred (Exhibit 6 provides an example of the calculation of the AEWR baseline for the same case as in Exhibit 5).

EXHIBIT 6—CURRENT AEWR

(Example Case)

Number of certified workers	Basic number of hours	Number of days worked in 2016	Number of days worked in 2017	AEWR (baseline) 2016	AEWR (baseline) 2017	AEWR wages 2016	AEWR wages 2017
(a)	(b)	(c)	(d)	(e)	(f)	(a * b * (c/7) * e)	(a * b * (d/7) * f)
14	35	306	1	$10.69	$10.38	$228,979.80	$726.60

Once the wage for the AEWR baseline was obtained, the Department estimated the wage impact of the new proposed AEWR by subtracting the baseline AEWR wage for 2016 from the proposed wage for 2016 to determine the AEWR wage impact ($223,410.60 − $228,979,80 = − $5,569.20). This was repeated for 2017 ($730.80 − $726.60 = $4.20). The Department also applied the growth rate of certified H–2A workers (19 percent) to determine the annual transfer.

Forestry and conservation workers (45–4011) previously classified as H–2B workers were segregated in the analysis from all other H–2A workers. For these workers, a proposed AEWR was determined using the BLS' OES average wage by SOC and State, where available, or OES national Data if a State wage was not available for the SOC because there is no FLS State or regional data available for SOC 45–4011. Unfortunately, no baseline data was available to compare the proposed wages to for these forestry workers. Because of this, the Department was unable to determine wage impacts of the proposed rule for forestry workers, and they are not included in the total impact for FY 2016 or 2017.[155]

The Department determined the total impact of the proposed AEWR for each year, excluding forest and conservation workers, by summing the AEWR impacts for all certifications in each year and these totals were then averaged to produce an annual estimate of the proposed AEWR impacts.

The changes in AEWR rates constitute a transfer payment from employers to employees. The Department estimates average annual undiscounted transfers of $16.32 million. The total transfer over the 10-year period is estimated at $163.22 million undiscounted, or $137.65 million and $111.58 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $16.14 million and $19.60 million at discount rates of 3 and 7 percent, respectively. The Department invites comments regarding the assumptions and data sources used to estimate the transfers resulting from this provision.

In addition to the proposed changes to the AEWR methodology discussed above, the Department also proposes to modernize the methodology currently set in sub-regulatory guidance for state-conducted prevailing wage surveys. This proposal would likely result in a transfer from employers to workers. The Department expects the proposal to allow SWAs and other state agencies to conduct prevailing wage surveys using standards that are realistic in a modern budget environment would allow the

[154] When the USDA survey did not produce an FLS regional SOC wage, the Department utilized a wage determination hierarchy of OES State data followed by FLS national SOC data, then OES national SOC data in the event that the previously mentioned wage sources were not available.

[155] In FY 2016 and FY 2017 there were 12,638 forestry workers, compared to 375,480 H–2A workers overall. While the Department expects their wages to go up, the Department does not expect a significant impact relative to the total overall impacts of the proposed rule.

Department to establish a greater number of reliable and accurate prevailing wage rates for workers and employers. However, under the proposal, the Department would require an employer to pay a prevailing wage rate only if a prevailing wage rate published by the OFLC Administrator is the highest applicable wage. Because the Department cannot estimate the extent of the increase in the number of prevailing wage determinations that would be issued as the highest applicable wage under the proposed methodology, the Department is not able to quantify these transfer payments. The Department invites comments on the economic impacts of these proposals.

Unquantifiable Transfer Payments

a. Revisions to Wage Structure

The increase (or decrease) in the wage rates for H–2A workers represents an important transfer from agricultural employers to corresponding U.S. workers, not just H–2A workers. The higher (or lower) wages for H–2A workers associated with the proposed rule's methodology for determining the monthly AEWR will also result in wage changes to corresponding U.S. workers. However, the Department does not have sufficient information about the number of corresponding U.S. workers affected and their wage structure to reasonably measure the wage transfer to corresponding U.S workers. The Department invites comments regarding how this impact can be calculated.

Qualitative Benefits Discussion

a. Housing

In association with the [benefits/savings] outlined above, the proposed rule has unquantifiable benefits as well. First, if finalized as proposed, the proposed rule would authorize the SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for a period of up to 24 months.[156] The SWAs and other appropriate authorities would thus be required to conduct fewer inspections of H–2A employer-provided housing annually, permitting these authorities to more efficiently allocate and prioritize resources. Moreover, the proposal would result in more timely certifications of employer-provided housing, reducing delays in the H–2A labor certification process. The Federal Government, employers, and workers alike would benefit from such reduction in delays.

The Department is unable to quantify these estimated benefits, given the discretion afforded the SWAs (or other appropriate authorities) under the proposed rule to determine the exact length of a housing inspection certification. Consequently, the Department invites comments on this analysis, including any relevant data or information that might allow for a quantitative analysis of possible benefits in the final rule resulting from the housing inspection proposals.

b. Thirty-Day Rule

The Department's analysis of recruitment report data indicate that many U.S. workers hired pursuant to the 50 percent rule voluntarily resigned or abandoned the job shortly after beginning work; therefore, employers who choose to displace an H–2A worker when hiring a U.S. worker may find themselves without enough workers to fulfill their staffing needs. However, employers who choose to retain both the H–2A worker and the U.S. worker to prevent potential disruption to work flow must incur the expense of doing so.

The changes proposed in this NPRM would improve the process of submitting and reviewing H–2A applications, which would directly enhance WHD's enforcement capabilities. This would result in the reduction of workforce instability that hinders the growth and productivity of our nation's farms while allowing aggressive enforcement against program fraud and abuse that undermine the interests of U.S. workers.

c. Surety Bonds

The proposed changes to the surety bond requirement, including the use of electronic surety bonds and a standardized bond form, will also result in unquantifiable benefits to the H–2ALCs in the form of a more streamlined application process with fewer delays. Accepting electronic surety bonds will mean that the NPC receives the required original bond with the rest of the application and it will no longer be necessary to wait for the bond to arrival via mail or other delivery before issuing the certification.

Further, these changes and the changes to the required bond amounts will enhance WHD's enforcement capabilities by making it more certain that there will be a sufficient, compliant bond available to redress potential violations. This will advance the Department's goal of aggressively enforcing against program fraud and abuse that undermine the interests of U.S. workers.

4. Summary of the Analysis

Exhibit 4 summarizes the estimated total costs, cost savings, and transfer payments of the proposed rule over the 10-year analysis period. The transportation and daily subsistence has the largest effect as a transfer cost.

EXHIBIT 4—ESTIMATED 10-YEAR MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE BY PROVISION

[2017 $millions]

Provision	Total cost	Total cost savings	Total transfer
Transportation and Daily Subsistence	.....	.....	$789.61
Proposed Wage Option	.....	.....	163.22
Surety Bond	$37.36	.....	.....
Record Keeping	0.51	.....	.....
Rule Familiarization	1.05	.....	.....
Reforestation Applications	1.18	.....	.....
Electronic Processing and Process Streamlining Cost Savings	.....	$0.27	.....
Staggered Entry	.....	12.94	.....
Undiscounted 10-Year Total	40.11	13.21	952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	803.57

[156] As described above, 24-month certification would be subject to appropriate criteria and prior notice to the Department by the certifying authority.

EXHIBIT 4—ESTIMATED 10-YEAR MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE BY PROVISION—Continued

[2017 $millions]

Provision	Total cost	Total cost savings	Total transfer
10-Year Total with a Discount Rate of 7%	28.18	10.39	673.07

Exhibit 5 summarizes the estimated total costs, cost savings, and transfer payments of the proposed rule over the 10-year analysis period.

The Department estimates the annualized costs of the proposed rule at $4.01 million, the annualized cost savings at $1.48 million, and the annualized transfer payments (from H–2A employers to workers) at $114.41 million, at a discount rate of 7 percent. For the purpose of E.O. 13771, even though the annualized net quantifiable cost, when perpetuated, is $3.24 million at a discount rate of 7 percent, the Department expects that the total annualized cost-savings of this proposed rule would outweigh the total annualized costs, resulting in a net cost savings due to large non-quantifiable cost savings. The Department seeks comment on this expectation.

The Department estimates the total net cost of the proposed rule at $17.79 million at a discount rate of 7 percent.

EXHIBIT 5—ESTIMATED MONETIZED COSTS, COST SAVINGS, NET COSTS, AND TRANSFER PAYMENTS OF THE PROPOSED RULE

[2017 $millions]

	Costs	Cost savings	Net costs*	Transfer payments
2020	$2.94	$1.69	$1.25	$38.44
2021	2.18	1.66	0.51	45.77
2022	2.51	1.62	0.89	54.50
2023	2.89	1.56	1.33	64.88
2024	3.34	1.48	1.86	77.25
2025	3.85	1.37	2.48	91.98
2026	4.45	1.24	3.21	109.51
2027	5.14	1.08	4.06	130.39
2028	5.94	0.87	5.06	155.25
2029	6.87	0.63	6.24	184.84
Undiscounted 10-Year Total	40.11	13.21	26.89	952.83
10-Year Total with a Discount Rate of 3%	34.21	11.85	22.36	803.57
10-Year Total with a Discount Rate of 7%	28.18	10.39	17.79	673.07
10-Year Average	4.01	1.32	2.69	95.28
Annualized with a Discount Rate of 3%	4.01	1.39	2.62	94.20
Annualized with a Discount Rate of 7%	4.01	1.48	2.53	114.41
Perpetuated Net Costs with a Discount Rate of 7%			$3.24	

5. Regulatory Alternatives

The Department considered two alternatives to the proposal to establish the AEWR at the annual average hourly gross wage for the State or region and SOC from the FLS where USDA reports such a wage. First, the Department considered using the current FLS occupational classifications of field and livestock workers for each State or region to set a separate AEWR for field workers and another AEWR for livestock workers at the annual average hourly gross wage from the FLS for workers covered by those classifications. Under this alternative, the Department would use the OES average hourly wage for the SOC and State if either: (1) The occupation covered by the job order is not included in the current FLS occupational classifications of field or livestock workers; [157] or (2) workers within the occupations classifications of field or livestock workers but in a region or State where USDA cannot produce a wage for that classification, which is expected to occur only in Alaska. Finally, under this alternative where both OES State data is not available, and the work performed is not covered by the field or livestock worker categories of the FLS, the Department would use the OES national average hourly wage for the SOC.

The total impact of the first regulatory alternative was calculated in the same manner as the proposed wage. The Department estimated average annual undiscounted transfers of $23.88 million. The total transfer over the 10-year period was estimated at $238.76 million undiscounted, or $201.36 million and $163.23 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $23.61 million and $28.67 million at discount rates of 3 and 7 percent, respectively.

Under the second regulatory alternative considered by the Department, the Department would set the AEWR using the OES average hourly wage for the SOC and State. When OES State data is not available, the Department would set the AEWR at the OES national average hourly wage for the SOC under this alternative. The Department again used the same method to calculate the total impact of the proposed regulatory alternative. The

[157] Among the workers excluded from the field and livestock worker categories of the FLS are workers in the following SOCs: Farmers, Ranchers and Other Agricultural Managers (SOC 11–9013) and First Line Supervisors of Farm Workers (SOC 45–1011), Forest and Conservation Workers (SOC 45–4011), Logging Workers (SOC 45–4020), and Construction Laborers (SOC 47–2061).

Department estimated average annual undiscounted transfers of $106.20 million. The total transfer over the 10-year period was estimated at $1.06 billion undiscounted, or $895.61 million and $725.98 million at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period was $104.99 million and $127.51 million at discount rates of 3 and 7 percent, respectively.

Exhibit 6 summarizes the estimated transfer payments associated with the three considered revised wage structrues over the 10-year analysis period. The Department prefers the proposed methodology, under which the Department would establish the AEWR at the annual average hourly gross wage for the State or region and SOC from the FLS where the FLS produces such a wage, to the two regulatory alternatives for the reasons discussed more fully in the preamble. Among those reasons, the Department prefers the proposal to the first regulatory alternative because the proposal provides data that is more specific to the agricultural occupation and does not combine workers performing dissimilar duties, as might be the case if the Department used the more general categories of field and livestock workers from the FLS to establish the AEWR. The Department prefers the proposal to the second regulatory alternative because the Department generally finds the FLS to be a superior wage source to the OES for establishing the AEWR where both surveys produce an occupation-specific wage because only the FLS directly surveys farmers and ranchers and the FLS is recognized by the BLS as the authoritative source for data on agricultural wages.

EXHIBIT 6—ESTIMATED MONETIZED WAGE STRUCTURE TRANSFER PAYMENTS AND COSTS OF THE PROPOSED RULE, UNDISCOUNTED

[2017 $millions]

	Proposed rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Transfer	$163.22	$238,76	$1,061.96
Total with 3% Discount	137.65	201.36	895.61
Total with 7% Discount	111.58	163.23	725.98
Annualized Undiscounted Transfer	16.32	23.88	106.20
Annualized Transfer with 3% Discount	16.14	26.61	105.00
Annualized Transfer with 7% Discount	19.60	28.67	127.51
Costs for Regulatory Alternative 3			
Total 10-Year Cost	$587.72		
Total with 3% Discount	498.51		
Total with 7% Discount	407.22		
Annualized Undiscounted Cost	58.77		
Annualized Cost with 3% Discount	58.44		
Annualized Cost with 7% Discount	57.98		

The Department also considered a third regulatory alternative regarding required surety bond amounts that relied on the proposed revisions to the wage structure. Under this regulatory alternative, the revisions to the wage structure would be the same as the proposed rule and would be used in the formula to calculate bond amounts. This formula is the most specific to factors that affect the likely amount of back wages owed, including crew size and duration of certification and therefore produces the most variability in bond amounts. It was calculated based on information already required on the job offer: The number of H–2A workers (''Workers''), the applicable AEWR from the proposed wage structure, the number of hours to be worked per week (''Hours''), and the duration of the certification (''Weeks''). Each of these variables were multiplied to get the bond amount required for certification. The total cost to the employer was calculated by multiplying the required bond amount by the assumed bond premium (0.04). This formula is the simplest for the employer because the values are readily accessible. Because the current bond amounts increase based on crew size in a non-linear fashion, switching to this formula will mean the certifications for certain crew sizes will be affected differently, with certifications for 25 to 74 workers having the biggest increases.

The Department used the OFLC certification data to calculate required bond amounts under this alternative for all certified H–2A employers for FYs 2016 and 2017. These amounts were then multiplied by the assumed bond premium (0.04) and the growth rate of H–2A certified labor contractors (16 percent), summed by year, and averaged to generate an estimated undiscounted annual cost due to bond amount increases of $58.77 million. The total cost from the alternative required bond amounts over the 10-year period is estimated at $587.72 million undiscounted, or $498.51 million and $407.22 million at discount rates of 3 and 7 percent, respectively. The annualized cost of the 10-year period is $58.44 million and $57.98 million at discount rates of 3 and 7 percent, respectively.

The Department prefers the proposed methodology for surety bonds because the proposal is easier to understand and administer and is likely to result in less variability in the bond amounts than the regulatory alternatives.

A. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small

governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. Despite this, it is the Department's view that due to stakeholder interest in this proposed rule an initial regulatory flexibility analysis should be published to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the following estimates, including the number of small entities affected by the proposed rule, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

1. Why the Department Is Considering Action

The Department has concluded that efforts to protect workers and enforce laws governing the administration of nonimmigrant visa programs requires additional notice and comment rulemaking regarding the certification of temporary employment of nonimmigrant workers through the H–2A program, and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The Department also seeks to further the goals of E.O. 13788, Buy American and Hire American, by rigorously enforcing applicable laws in order to create higher wages and employment rates for workers in the U.S. and protect their economic interests. As a result, the Department publishes this NPRM developing standards related to mandatory electronic filing and electronic signatures, revising the adverse effect wage rate and prevailing wage methodologies, incorporating certain training and employment guidance letters into the H–2A regulatory structure, and expanding the definition of agriculture under the H–2A program, and seeks public input on all aspects of the proposals presented here.

2. Objectives of and Legal Basis for the Proposed Rule

The Department is proposing to amend current regulations related to the H–2A program in a manner that modernizes and eliminates inefficiencies in the process by which employers obtain a temporary agricultural labor certification for use in petitioning DHS to employ a nonimmigrant worker in H–2A status. Sections 101(a)(15)(H)(ii)(a) and 218(a)(1) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 1188(a)(1), establish the H–2A nonimmigrant worker visa program which enables U.S. agricultural employers to employ foreign workers to perform temporary or seasonal agricultural labor or services where the Secretary of DOL certifies (1) there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. The standard and procedures for the certification and employment of workers under the H–2A program are found in 20 CFR part 655 and 29 CFR part 501.

The Secretary has delegated his authority to issue temporary agricultural labor certifications to the Assistant Secretary, ETA, who in turn has delegated that authority to ETA's OFLC. Secretary's Order 06–2010 (Oct. 20, 2010). In addition, the Secretary has delegated to WHD the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H–2A program. Secretary's Order 01–2014 (Dec. 19, 2014).

3. Estimating the Number of Small Businesses Affected by the Rulemaking

The Department collected employment and annual revenue data from the business information provider InfoUSA and merged those data into the H–2A disclosure data for FYs 2015, 2016, and 2017. Disclosure data for 2015 was included for cases that have certified workers in both 2015 and 2016. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues. The Department was able to obtain data matches for 5,329 H–2A cases with work in 2016 and 2017, including employers of reforestation workers that would be classified as H–2A employers under the proposed rule.[158] Next, the Department used the SBA size standards to classify 4,320 of these employers (or 81.1 percent) as small.[159] Labor contractors determined to be small entities were removed from the RFA analysis because their revenue is not related to the number of temporary H–2A workers certified. This resulted in 3,600 small, certified cases. Because a single employer can apply for temporary H–2A workers multiple times, unique employers had to be identified. Additionally, duplicate cases that appeared multiple times within the dataset were removed (*i.e.,* the same employer applying for the same number of workers in the same occupation, in the same state, during the same work period). Based on employer name, city, and state, the Department determined that there were 2,514 unique employers with work in 2016 and 2017. These unique small employers had an average of 12 employees and average annual revenue of approximately $3.54 million. Of these unique employers, 2,465 of them had revenue data available from InfoUSA. The Department's analysis of the impact of this proposed rule on small businesses is based on the number of small unique employers (2,465 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, exhibit 7 shows the number of unique H–2A small entity employers[160] with certifications in 2016 and 2017 within each NAICS code at the 6-digit and 4-digit level.

[158] Of the 2,514 small H–2A unique employers in 2016 and 2017, 20 entities are employers of reforestation and pinestraw workers that are currently under the H–2B program and would be reclassified under the H–2A program in this proposal.

[159] Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Oct. 2017), *https://www.naics.com/wp-content/uploads/2017/10/SBA_Size_Standards_Table.pdf.*

[160] This table is not inclusive of H–2B employers reclassificed as H–2A employers. There are 18 unique small entity H–2B employers in 2017.

EXHIBIT 7—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

2016				2017			
6-Digit NAICS	Description	Number of employers	Percent	6-Digit NAICS	Description	Number of employers	Percent
111421	Nursery and Tree Production	134	12	111421	Nursery and Tree Production	136	11
111998	All Other Miscellaneous Crop Farming ..	103	9	111998	All Other Miscellaneous Crop Farming ..	102	8
111219	Other Vegetable (except Potato) and Melon Farming.	68	6	115113	Crop Harvesting, Primarily by Machine	72	6
111331	Crop Harvesting, Primarily by Machine	59	5	111331	Apple Orchards	65	5
115113	Apple Orchards	58	5	111219	Other Vegetable (except Potato) and Melon Farming.	65	5
112111	Beef Cattle Ranching and Farming	42	4	112111	Beef Cattle Ranching and Farming	41	3
111191	Oilseed and Grain Combination Farming	27	2	111191	Oilseed and Grain Combination Farming	32	3
813910	Business Associations	25	2	111339	Other Noncitrus Fruit Farming	26	2
111339	Other Noncitrus Fruit Farming	23	2	115112	Soil Preparation, Planting, and Cultivating.	23	2
115112	Soil Preparation, Planting, and Cultivating.	18	2	111211	Potato Farming	19	2
Other NAICS codes		573	51	Other NAICS codes		603	49
No NAICS code available		4	0.4	No NAICS code available		51	4
4-Digit NAICS	Description	Number of employers	Percent	4-Digit NAICS	Description	Number of employers	Percent
1119	Other Crop Farming	385	34	1119	Other Crop Farming	408	33
1114	Greenhouse, Nursery, and Floriculture Production.	152	13	1114	Greenhouse, Nursery, and Floriculture Production.	156	13
1113	Vegetable and Melon Farming	121	11	1113	Fruit and Tree Nut Farming	149	12
1112	Fruit and Tree Nut Farming	121	11	1112	Vegetable and Melon Farming	127	10
1151	Support Activities for Crop Production ...	99	9	1151	Support Activities for Crop Production ...	110	9
1111	Oilseed and Grain Farming	68	6	1111	Oilseed and Grain Farming	67	5
1121	Cattle Ranching and Farming	61	5	1121	Cattle Ranching and Farming	55	4
1129	Other Animal Production	33	3	1129	Other Animal Production	34	3
1125	Aquaculture	29	3	1125	Aquaculture	24	2
8139	Business, Professional, Labor, Political, and Similar Organizations.	25	2	3331	Agriculture, Construction, and Mining Machinery Manufacturing.	14	1
Other NAICS codes		36	3	Other NAICS codes		40	3
No NAICS code available		4	0	No NAICS code available		51	4

Exhibit 8 shows the number of H–2B small entity employers that would be classified as H–2A employers under the proposed rule. These employers are classified as support activities for forestry under the 4-digit NAICS code 1153.

EXHIBIT 8—NUMBER OF H–2B SMALL EMPLOYERS BY NAICS CODE

NAICS code	NAICS description	2016 number of employers	2017 number of employers	Percent
115310	Support Activities for Forestry	2	18	100
1153	Support Activities for Forestry	2	18	100

4. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

The Department has estimated the incremental costs for small businesses from the baseline (*i.e.,* the 2010 Final Rule: T*emporary Agricultural Employment of H–2A Aliens in the United States;* TEGL 17–06, Change 1; TEGL 33–10, and TEGL 16–06, Change 1) to this proposed rule. We estimated the costs of (a) new surety bond amounts required for H–2A labor contractors based on the number of H–2A employees as well as the proportional adjustment of surety bond rates on an annual basis; (b) recordkeeping costs associated with maintaining records of employee's home address in their respective home countries; (c) recordkeeping costs incurred by the abandonment or dismissal with cause of employees; (d) time to read and review the proposed rule; (e) reforestation applications; and (f) wage costs (or cost-savings). The cost estimates included in this analysis for the provisions of the proposed rule are consistent with those presented in the E.O. 12866 section.

The Department identified the following provisions of the proposed rule to have an impact on industry but was not able to quantify the impacts due to data limitations: An expansion of the regulatory definition of agriculture as to include reforestation and pine straw workers; and housing requirements (securing rentals or public accommodations for H–2A employees).

5. Calculating the Impact of the Proposed Rule on Small Business Firms

The Department estimates that small businesses not classified as H–2ALCs, 2,514 unique employers,[161] would incur a one-time cost of $127.36 to familiarize themselves with the rule and an annual cost of $5.67 associated with

[161] The 2,514 unique small employers includes employers of reforestation and pine straw workers that would be classified as H–2A employers under the proposed rule, and excludes all labor contractors.

recordkeeping requirements.[162] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that small businesses not classified as labor contractors will incur a total first-year cost of $133.03 (= $127.36 + $5.67). The Department uses the first-year cost estimate because it is the highest cost incurred by businesses over the analysis timeframe. Additionally, employers of reforestation and pine straw workers (currently under the H–2B program) that would be classified as H–2A employers under the proposed rule will incur H–2A labor certification filing fee costs, not applicable under the H–2B program. The Department estimates this cost to be $551.70 per employer, and is incurred annually. Therefore, for reforestation and pine straw employers, the total first-year cost is $684.73, and total second-year cost is $551.70.

The proposed rule includes the provision pertaining to surety bonds that applies to only H–2ALCs, so the Department estimates the impact on those entities separately. *See* 20 CFR 655.132(c). To estimate the impact of the proposed rule on these entities, the Department used the SBA size standards to classify an average of 81 H–2ALCs as small employers. These small entities had an average of 54 employees and average annual revenues of approximately $12.09 million in FYs 2016 and 2017.

The Department estimates that the average small H–2A labor contractor would incur a one-time cost of $127.36 to familiarize themselves with the rule, annual costs of $5.67 associated with recordkeeping requirements, and $255.14 associated with an increase in the required surety bond amounts.[163] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that small businesses classified as H–2ALCs will incur a total first-year cost of $388.17 (= $127.36 + $5.67 + $255.14).

In addition to the total first- and second-year costs above, each small entity will have an increase (or decrease) in the wage costs (or cost-savings) due to the revisions to the wage structure. For each small business, the estimated wage cost (or cost-savings) was calculated as the sum of the proposed total wage minus the total baseline wage for each small business identified from the H–2A disclosure data in FYs 2016 and 2017. This change in the wage costs was added to the total first-year costs to measure the total impact of the proposed rule on the small business.

The Department determined the proportion of each small entities' total revenue that would be impacted by the costs of the proposed rule to determine if the proposed rule would have a significant and substantial impact on small business. The cost impacts included estimated first year costs and the wage burden cost introduced by the proposed rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small businesses incurring a significant impact as the threshold for a substantial impact on small business.

A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. See, *e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex). This threshold is also consistent with that sometimes used by other agencies. See, *e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant). The Department also believes that its use of a 20 percent of affected small business entities substantiality criterion is appropriate. The Department has used a threshold of 15 percent of small entities in prior rulemakings for the definition of substantial number of small entities. *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors).

Of the 2,514 unique small employers with work occurring in 2016 and 2017 and revenue data,[164] 94.4 percent of employers had less than 3 percent of their total revenue impacted. Exhibit 9 provides a breakdown of small employers by the proportion of revenue affected by the costs of the proposed rule.

EXHIBIT 9—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2016 Employers	2016 Percentage	2017 Employers	2017 Percentage
<1%	2,182	89	2,182	89
1%–2%	101	4	101	4
2%–3%	43	2	42	2
3%–4%	27	1	31	1
4%–5%	14	1	27	1
>5%	98	4	82	3

[162] $127.36 = 2 hrs × $63.68, where $63.68 = $31.84 + ($31.84 × 44%) + ($31.84 × 56%). These recordkeeping requirements include the following: $2.12 to collect and maintain records of workers' email address and phone number(s) home, $2.12 to maintain records for the self-certification of housing, and $2.12 to maintain records of notification to the NPC (and DHS) of employment abandonment or termination for cause.

[163] $255.14 is the annual incremental cost per H–2ALC with additional 50 to 75 workers.

[164] The 2,514 unique small employers includes employers of reforestation workers that would be classified as H–2A employers under the proposed rule, and excludes all labor contractors.

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

7. Alternative to the Proposed Rule

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. Accordingly, the Department considered two regulatory alternatives related to the third cost component: Employers' recordkeeping for abandonment of employment or termination for cause. *See* proposed 20 CFR 655.122(n) and 655.167(c)(7). Under the first alternative, small businesses would not need to provide notice to the NPC within two working days of each occurrence of abandonment of employment or termination for cause during the certification period in order to be relieved of certain H–2A obligations (*i.e.,* return transportation and subsistence costs for the worker; three-fourths guarantee to the worker; and, for U.S. workers, contact in subsequent seasons to solicit the worker's return to the job). Rather, these small businesses could wait until the end of the certification period to provide this notice; the employer could amass all such notifications into one package to submit to the NPC at the end of the certification period. This alternative differs from the Department's proposal related to § 655.122(n) by providing flexibility in the timing of the notice to the NPC. This first alternative would slightly decrease the burden of small businesses having to potentially prepare and submit multiple notifications to NPC throughout the certification period.

The Department decided not to pursue this alternative for two reasons. First, DHS regulations require employers to notify DHS within two work days if an H–2A worker: Fails to report to work within 5 workdays of the employment start date; absconds from the worksite (*i.e.,* fails to report for work for a period of 5 consecutive workdays without the consent of the employer; [165]) or is terminated prior to the completion of agricultural labor or services for which he or she was hired. Under this first regulatory alternative, small businesses would need to submit the same notification to two different agencies at two different reporting cycles, rather than on the same reporting cycle. The employer would have to submit potentially multiple notifications to DHS regarding H–2A workers, each within two work days of a triggering event, while separately amassing all notifications regarding both H–2A workers and U.S. workers in corresponding employment for a single submission to ETA's NPC at a later date.

This bifurcation of the reporting cycle would not relieve employers of a contemporaneous notification requirement for H–2A workers to one agency (*i.e.,* DHS) and could create confusion, which could negatively impact employers' compliance with DHS notification requirements, thereby undermining DHS' ability to identify of H–2A workers who had been, but may no longer be in the United States legally, as discussed above in the section-by-section analysis of this notification requirement. Second, in its experience of administering and enforcing the H–2A program, the Department has found that employers are better able to prepare such notification contemporaneous to the triggering event. Notification that does not occur contemporaneously is more likely to be less detailed, possibly inaccurate and incomplete, as employers' recollections and memories of specific circumstances for abandonment of employment or termination for cause may diminish over a period of time, even as short as a few weeks or months. The quality of such notifications is important to the employer, not only the Department. The notifications both support program integrity and serve to relieve the employer of financial burdens, if they provide adequate information. While potentially reducing burden for compliance with DOL regulations, this first regulatory alternative would not be less burdensome for small businesses because they still have to meet DHS requirements for timely notification regarding abandonment of employment or termination for cause for H–2A workers and could increase confusion and overall burden by imposing disparate reporting cycles.

Under the second regulatory alternative related to the third cost component, employers' recordkeeping for abandonment of employment or termination for cause, the Department would not require employers to submit to the NPC the notice described in § 655.122(n) with regard to U.S. workers who abandoned employment or were terminated for cause within two working days of the triggering event. Rather, the employers would only need to prepare and maintain records of these notices for not less than 3 years from the date of the certification, as proposed in § 655.167(c)(7).

This alternative would reduce small businesses' cost and burden of preparing and submitting this documentation to the NPC. The Department decided not to pursue this alternative because the reduction of cost and burden to small businesses is negligible, as it would not affect such notifications for H–2A workers and would relieve the employer only of notice submission to the Department, not preparation, for U.S. workers in corresponding employment. As with the alternative discussed above, bifurcating notice requirements into separate categories (*i.e.,* notification prepared and submitted within two working days for H–2A workers, but prepared and retained for U.S. workers in corresponding employment) is ripe for confusion and allowing delayed notification preparation may result in less detailed, accurate, and complete notification documentation, to the employer's detriment. Further, the negligible reduction of cost and burden is outweighed by the value of affirmative, contemporaneous notification to maintaining program integrity. Absent timely notification, the Department would only be made aware of U.S. worker abandonment under limited circumstances (*e.g.,* an audit), not in all cases. This would limit the Department's ability to identify patterns of U.S. worker abandonment, which could suggest involuntary abandonment, as discussed in the section-by-section analysis of proposed changes. The Department's ability to assure program integrity would be greatly diminished in exchange for a relatively minor reduction reporting requirements.

The Department invites public comment on these alternatives and whether other alternatives exist that would reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

B. Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification, which allow employers to bring foreign labor to the United States on a seasonal or other temporary basis under the H–2A program. The Department uses the collected information to determine if employers are meeting their statutory and regulatory obligations. This information collection is subject to the PRA, 44 U.S.C. 3501 *et seq.* A Federal agency

[165] 8 CFR 214.2(h)(5)(vi)(E).

generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a), 1320.6. The Department obtained OMB approval for this information collection under Control Number 1205–0466.

This information collection request (ICR), concerning OMB Control No. 1205–0466, includes the collection of information related to the Department's temporary agricultural labor certification determination process in the H–2A program. The PRA helps ensure that requested data is provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

On October 25, 2018, the Department published a 60-day notice announcing its proposed revisions to the collection of information under OMB Control Number 1205–0466 in the **Federal Register** as part of its ongoing effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater oversight in the H–2A program. *See* 83 FR 53911. In accordance with the PRA, the Department provided the public with a notice and the opportunity to comment on proposed revisions to the application (Form ETA–9142A, *H–2A Application for Temporary Employment Certification;* Form ETA–9142A, *Appendix A;* and the general instructions to those forms); to the method of issuing temporary agricultural labor certifications, from paper-based issuance to a new one-page electronically-issued Form ETA–9142A, *H–2A Approval Final Determination: Temporary Labor Certification Approval;* and to the agricultural clearance order.[166] The Department instructed the public to submit written comments on those proposed revisions following the instructions provided in that **Federal Register** notice on or before December 24, 2018.

The Department now proposes additional revisions to this information collection, covered under OMB Control No. 1205–0466, to further revise the information collection tools, based on regulatory changes proposed in this NPRM. The additional proposed revisions to Forms ETA–9142A and appendices and Form ETA–790/790A and addenda will align information collection requirements with the Department's proposed regulatory framework and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, and promote greater efficiency and transparency in the review and issuance of labor certification decisions under the H–2A visa program. For example, the Department proposes a new Form ETA–9142A, Appendix B, *H–2A Labor Contractor Surety Bond,* to facilitate satisfaction of this filing requirement for H–2A Labor Contractor employers and a field for an employer to indicate it conducted pre-filing recruitment under proposed § 655.123. The Department also proposes to implement a revised ETA–232, *Domestic Agricultural In-Season Wage Report,* and eliminate the current ETA–232A, *Wage Survey Interview Record,* for SWA use to modernize the survey process and to reflect the prevailing wage survey methodology proposed in this proposed rule at § 655.120(c).[167]

Overview of Information Collection Proposed by This NPRM

Title: H–2A Temporary Agricultural Employment Certification Program.

Type of Review: Revision of a Currently Approved Information Collection.

OMB Number: 1205–0466.

Affected Public: Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local and Tribal Governments.

Form(s): ETA–9142A, *H–2A Application for Temporary Employment Certification;* ETA–9142A—*Appendix A;* ETA–9142A—*Appendix B, H–2A Labor Contractor Surety Bond;* ETA–9142A—*H–2A Approval Final Determination: Temporary Agricultural Labor Certification;* ETA–790/790A, *H–2A Agricultural Clearance Order;* ETA–790/790A—*Addendum A;* ETA–790/790A—*Addendum B;* ETA–790/790A—*Addendum C;* ETA–232, *Domestic Agricultural In-Season Wage Report.*

Total Annual Respondents: 8,982.

Annual Frequency: On Occasion.

Total Annual Responses: 290,824.45.

Estimated Time per Response (averages):

—Forms ETA 9142A, Appendix A, Appendix B—3.68 hours per response.

—Forms ETA 790/790A/790B—.75 hours per response.

—Form ETA–232—3.30 hours per response.

—Administrative Appeals—18.48 hours per response.

Estimated Total Annual Burden Hours: 56,862.86.

Total Annual Burden Cost for Respondents: $0.

The Department invites comments on all aspects of the PRA analysis. Comments that are related to a specific form or a specific form's instructions should identify the form or form's instructions using the form number, *e.g.,* ETA–9142A or Form ETA–790/790A, and should identify the particular area of the form for comment. A copy of the proposed revised information collection tools can be obtained by contacting the office listed below in the addresses section of this notice. Written comments must be submitted on or before September 24, 2019.

The Department 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, and the agency's estimates associated with the annual burden cost incurred by respondents and the government cost associated with this collection of information;

[166] The proposed Form ETA–790/790A, *H–2A Agricultural Clearance Order,* and addenda, provide language to employers to disclose necessary information regarding the material terms and conditions of the job opportunity. A copy of Form ETA–790/790A will be integrated with the Form ETA–9142A for purposes of the Department's temporary agricultural labor certification determination; the CO will review the Form ETA–790/790A in combination with Form ETA–9142A, when the employer submits Form ETA–9142A to the NPC. This proposal will consolidate information collected through the agricultural clearance order Form ETA–790, which is currently authorized under OMB Control Number 1205–0134, into the agency's primary H–2A information collection requirements under OMB Control Number 1205–0466. This consolidation and revision will align all data collection for the H–2A program under a single OMB-approved ICR.

[167] This is a collection of information from SWAs, not employers, that is separately authorized under OMB Control Number 1205–0017. The Department proposes to revise and consolidate the collection under OMB Control Number 1205–0466. The SWAs will use the new Form ETA–232, *Domestic Agricultural In-Season Wage Report,* to report to OFLC the results of wage surveys in compliance with the revised prevailing wage determination methodology in the proposed rule, which OFLC will use to establish prevailing wage rates for the H–2A program.

• enhance the quality, utility, and clarity of the information to be collected; and

• minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Comments submitted in response to this notice will be considered, summarized and/or included in the ICR the Department will submit to OMB for approval; they will also become a matter of public record. Commenters are encouraged not to submit sensitive information (*e.g.,* confidential business information or personally identifiable information such as a social security number).

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumer (CPI–U) is $161 million.

This NPRM, if finalized as proposed, does not exceed the $100 million expenditure in any 1 year when adjusted for inflation ($161 million in 2017 dollars), and this rulemaking does not contain such a mandate. The requirements of Title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

D. Executive Order 13132: Federalism

This NPRM, if finalized as proposed, does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further agency action or analysis.

E. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This NPRM, if finalized as proposed, does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175 requires no further agency action or analysis.

Appendix A

TABLE 1—HOURLY AEWRS BY REGION OR STATE UNDER CURRENT REGULATION

Region or state	2016	2017	2018
Appalachian I	$10.72	$11.27	$11.46
Appalachian II	10.85	10.92	11.19
California	11.89	12.57	13.18
Cornbelt I	12.07	13.01	12.93
Cornbelt II	12.17	13.12	13.42
Delta	10.69	10.38	10.73
Florida	10.70	11.12	11.29
Hawaii	12.64	13.14	14.37
Lake	12.02	12.75	13.06
Mountain I	11.75	11.66	11.63
Mountain II	11.27	11.00	10.69
Mountain III	11.20	10.95	10.46
Northeast I	11.74	12.38	12.83
Northeast II	11.66	12.19	12.05
Northern Plains	13.80	13.79	13.64
Pacific	12.69	13.38	14.12
Southeast	10.59	10.62	10.95
Southern Plains	11.15	11.59	11.87

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Appalachian I	NC	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	$27.93	OES State	$31.43	OES State	$45.08	OES State.
Appalachian I	NC	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.73	OES State	28.10	OES State	30.90	OES State.
Appalachian I	NC	45–2041	Graders and Sorters, Agricultural Products.	10.55	FLS Regional	13.29	FLS Regional	11.07	FLS Regional.
Appalachian I	NC	45–2091	Agricultural Equipment Operators	11.30	OES State	12.42	OES State	12.34	FLS Regional.
Appalachian I	NC	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.46	FLS Regional	10.96	FLS Regional	11.48	FLS Regional.
Appalachian I	NC	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.46	OES State	12.94	OES State	13.22	OES State.
Appalachian I	NC	45–2099	Agricultural Workers, All Other	13.13	OES State	12.42	OES State	12.53	OES State.
Appalachian I	NC	53–7064	Packers and Packagers, Hand	9.67	FLS Regional	11.00	FLS Regional	10.29	FLS Regional.
Appalachian I	VA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	35.16	OES State	40.07	OES State.
Appalachian I	VA	35–2012	Cooks, Institution and Cafeteria	12.80	OES State	13.49	OES State	13.67	OES State.
Appalachian I	VA	35–2015	Cooks, Short Order	10.66	OES State	10.88	OES State	10.72	OES State.
Appalachian I	VA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	27.13	OES State	26.03	OES State	25.93	OES State.
Appalachian I	VA	45–2041	Graders and Sorters, Agricultural Products.	10.55	FLS Regional	13.29	FLS Regional	11.07	FLS Regional.
Appalachian I	VA	45–2091	Agricultural Equipment Operators	12.20	OES State	12.89	OES State	12.34	FLS Regional.
Appalachian I	VA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.46	FLS Regional	10.96	FLS Regional	11.48	FLS Regional.
Appalachian I	VA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.41	OES State	12.25	OES State	12.90	OES State.
Appalachian I	VA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Appalachian I	VA	53–7064	Packers and Packagers, Hand	9.67	FLS Regional	11.00	FLS Regional	10.29	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Appalachian II	KY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.32	OES State	37.75	OES State	41.50	OES State.
Appalachian II	KY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.87	OES State	23.97	OES State	22.83	OES State.
Appalachian II	KY	45–2021	Animal Breeders	17.97	OES State	24.45	OES State	20.89	OES National.
Appalachian II	KY	45–2041	Graders and Sorters, Agricultural Products.	11.42	OES State	11.64	OES State	10.02	FLS Regional.
Appalachian II	KY	45–2091	Agricultural Equipment Operators	10.78	OES State	10.85	OES State	12.10	FLS Regional.
Appalachian II	KY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.43	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	KY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.03	OES State	12.75	OES State	11.10	FLS Regional.
Appalachian II	KY	45–2099	Agricultural Workers, All Other	14.73	OES State	15.06	OES State	15.36	OES State.
Appalachian II	KY	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	12.13	OES State.
Appalachian II	TN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	22.14	OES State	25.57	OES State	29.28	OES State.
Appalachian II	TN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.93	OES State	20.61	OES State	20.14	OES State.
Appalachian II	TN	45–2041	Graders and Sorters, Agricultural Products.	12.27	OES State	11.65	FLS National	10.02	FLS Regional.
Appalachian II	TN	45–2091	Agricultural Equipment Operators	12.12	OES State	13.26	OES State	12.10	FLS Regional.
Appalachian II	TN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.14	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	TN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.56	OES State	10.90	OES State	11.10	FLS Regional.
Appalachian II	TN	45–2099	Agricultural Workers, All Other	15.31	OES National	18.57	OES State	14.54	OES State.
Appalachian II	TN	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	11.46	OES State.
Appalachian II	WV	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Appalachian II	WV	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.09	OES State	23.39	OES State	24.66	OES State.
Appalachian II	WV	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	10.02	FLS Regional.
Appalachian II	WV	45–2091	Agricultural Equipment Operators	12.38	FLS National	12.85	FLS National	12.10	FLS Regional.
Appalachian II	WV	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.10	OES State	10.44	FLS Regional	10.77	FLS Regional.
Appalachian II	WV	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.06	OES State	14.17	OES State	11.10	FLS Regional.
Appalachian II	WV	45–2099	Agricultural Workers, All Other	11.73	OES State	13.22	OES State	13.36	FLS National.
Appalachian II	WV	53–7064	Packers and Packagers, Hand ...	10.53	FLS Regional	10.50	FLS Regional	11.51	OES State.
California	CA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	26.01	FLS Regional	27.05	FLS Regional	30.18	FLS Regional.
California	CA	19–4011	Agricultural and Food Science Technicians.	20.07	OES State	20.40	OES State	20.80	OES State.
California	CA	35–2012	Cooks, Institution and Cafeteria ..	14.99	OES State	15.75	OES State	16.61	OES State.
California	CA	35–2021	Food Preparation Workers	11.17	OES State	12.19	OES State	12.82	OES State.
California	CA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.48	FLS Regional	20.38	FLS Regional	22.11	FLS Regional.
California	CA	45–2041	Graders and Sorters, Agricultural Products.	12.34	FLS Regional	12.37	FLS Regional	13.53	FLS Regional.
California	CA	45–2091	Agricultural Equipment Operators	12.27	FLS Regional	12.95	FLS Regional	13.53	FLS Regional.
California	CA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.49	FLS Regional	12.33	FLS Regional	12.92	FLS Regional.
California	CA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.74	FLS Regional	13.15	FLS Regional	13.96	FLS Regional.
California	CA	45–2099	Agricultural Workers, All Other	12.08	FLS Regional	12.93	FLS Regional	14.40	FLS Regional.
California	CA	53–7064	Packers and Packagers, Hand ...	11.72	FLS Regional	11.79	FLS Regional	12.85	FLS Regional.
Cornbelt I	IL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.92	OES State	33.27	OES State	32.66	OES State.
Cornbelt I	IL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.01	OES State	20.29	OES State	20.45	OES State.
Cornbelt I	IL	45–2021	Animal Breeders	21.47	OES National	20.35	OES National	20.89	OES National.
Cornbelt I	IL	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	IL	45–2091	Agricultural Equipment Operators	15.83	OES State	16.60	OES State	14.76	FLS Regional.
Cornbelt I	IL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	IL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.85	OES State	12.27	OES State	13.80	OES State.
Cornbelt I	IL	45–2099	Agricultural Workers, All Other	14.51	OES State	14.14	OES State	14.19	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Cornbelt I	IL	47–2061	Construction Laborers	25.07	OES State	27.01	OES State	27.55	OES State.
Cornbelt I	IL	53–7064	Packers and Packagers, Hand	12.31	OES State	11.91	OES State	12.31	OES State.
Cornbelt I	IN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.54	OES State	21.98	FLS National	30.10	OES State.
Cornbelt I	IN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.98	OES State	22.70	OES State	22.46	OES State.
Cornbelt I	IN	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	IN	45–2091	Agricultural Equipment Operators	17.41	OES State	17.42	OES State	14.76	FLS Regional.
Cornbelt I	IN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	IN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.90	OES State	12.31	OES State	12.29	OES State.
Cornbelt I	IN	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	10.12	OES State.
Cornbelt I	IN	53–7064	Packers and Packagers, Hand	11.36	OES State	11.31	OES State	11.96	OES State.
Cornbelt I	OH	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	32.14	OES State	40.03	OES State	39.74	OES State.
Cornbelt I	OH	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.27	OES State	25.33	OES State	23.15	OES State.
Cornbelt I	OH	45–2041	Graders and Sorters, Agricultural Products.	13.08	FLS Regional	13.55	FLS Regional	10.43	FLS Regional.
Cornbelt I	OH	45–2091	Agricultural Equipment Operators	16.22	OES State	16.76	OES State	14.76	FLS Regional.
Cornbelt I	OH	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.93	FLS Regional	12.80	FLS Regional	11.53	FLS Regional.
Cornbelt I	OH	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.84	OES State	13.68	OES State	13.92	OES State.
Cornbelt I	OH	45–2099	Agricultural Workers, All Other	13.65	OES State	16.88	OES National	13.36	FLS National.
Cornbelt I	OH	47–2061	Construction Laborers	18.93	OES State	19.20	OES State	20.27	OES State.
Cornbelt I	OH	53–7064	Packers and Packagers, Hand	11.46	OES State	11.66	OES State	11.99	OES State.
Cornbelt II	IA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	37.05	OES State	37.28	OES State	34.50	OES State.
Cornbelt II	IA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.09	OES State	27.52	OES State	27.02	OES State.
Cornbelt II	IA	45–2021	Animal Breeders	15.74	OES State	15.52	OES State	14.86	OES State.
Cornbelt II	IA	45–2041	Graders and Sorters, Agricultural Products.	13.73	OES State	13.56	OES State	14.24	OES State.
Cornbelt II	IA	45–2091	Agricultural Equipment Operators	17.08	OES State	17.07	OES State	16.93	OES State.
Cornbelt II	IA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.73	OES State	13.12	OES State	11.82	FLS Regional.
Cornbelt II	IA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.55	FLS Regional	13.24	FLS Regional	13.57	FLS Regional.
Cornbelt II	IA	45–2099	Agricultural Workers, All Other	13.37	OES State	14.70	OES State	15.56	OES State.
Cornbelt II	IA	53–7064	Packers and Packagers, Hand	11.14	OES State	11.72	OES State	12.38	FLS Regional.
Cornbelt II	MO	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	27.68	OES State	30.33	OES State	28.72	OES State.
Cornbelt II	MO	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.63	OES State	22.34	OES State	23.37	OES State.
Cornbelt II	MO	45–2041	Graders and Sorters, Agricultural Products.	11.25	OES State	12.63	OES State	13.35	OES State.
Cornbelt II	MO	45–2091	Agricultural Equipment Operators	13.51	OES State	14.10	OES State	15.46	OES State.
Cornbelt II	MO	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.59	OES State	11.80	OES State	11.82	FLS Regional.
Cornbelt II	MO	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.55	FLS Regional	13.24	FLS Regional	13.57	FLS Regional.
Cornbelt II	MO	45–2099	Agricultural Workers, All Other	13.09	OES State	14.64	OES State	14.44	OES State.
Cornbelt II	MO	47–2061	Construction Laborers	19.86	OES State	20.51	OES State	21.90	OES State.
Cornbelt II	MO	53–7064	Packers and Packagers, Hand	11.42	OES State	11.36	OES State	12.38	FLS Regional.
Delta	AR	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	42.35	OES State	41.44	OES State	17.95	FLS Regional.
Delta	AR	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.05	OES State	21.37	OES State	16.25	FLS Regional.
Delta	AR	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	11.57	OES State.
Delta	AR	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	AR	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	AR	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	AR	45–2099	Agricultural Workers, All Other	12.37	OES State	15.29	OES State	15.38	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Delta	AR	49–3041	Farm Equipment Mechanics and Service Technicians.	16.42	OES State	16.33	OES State	17.20	OES State.
Delta	AR	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Delta	LA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	30.80	OES State	30.70	OES State	17.95	FLS Regional.
Delta	LA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.52	OES State	27.24	OES State	16.25	FLS Regional.
Delta	LA	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	16.15	OES State.
Delta	LA	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	LA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	LA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	LA	45–2099	Agricultural Workers, All Other	20.04	OES State	26.79	OES State	24.13	OES State.
Delta	LA	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Delta	MS	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.51	OES State	21.98	FLS National	17.95	FLS Regional.
Delta	MS	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.15	OES State	20.71	OES State	16.25	FLS Regional.
Delta	MS	45–2041	Graders and Sorters, Agricultural Products.	10.61	FLS Regional	9.19	FLS Regional	11.41	OES State.
Delta	MS	45–2091	Agricultural Equipment Operators	10.61	FLS Regional	10.27	FLS Regional	10.77	FLS Regional.
Delta	MS	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.43	FLS Regional	10.44	FLS Regional	10.40	FLS Regional.
Delta	MS	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	10.27	FLS Regional	10.33	FLS Regional	11.41	FLS Regional.
Delta	MS	45–2099	Agricultural Workers, All Other	11.38	OES State	14.54	OES State	13.36	FLS National.
Delta	MS	53–7064	Packers and Packagers, Hand	10.19	FLS Regional	10.21	FLS Regional	10.61	FLS Regional.
Florida	FL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	46.15	OES State	50.97	OES State	41.57	OES State.
Florida	FL	13–1074	Farm Labor Contractors	20.26	OES State	22.74	OES National	11.51	OES State.
Florida	FL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.67	OES State	22.56	OES State	22.95	OES State.
Florida	FL	45–2041	Graders and Sorters, Agricultural Products.	10.75	FLS Regional	10.91	FLS Regional	9.29	OES State.
Florida	FL	45–2091	Agricultural Equipment Operators	13.09	OES State	14.50	OES State	11.75	FLS Regional.
Florida	FL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.66	FLS Regional	10.95	FLS Regional	11.21	FLS Regional.
Florida	FL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.71	FLS Regional	12.80	FLS Regional	11.98	FLS Regional.
Florida	FL	45–2099	Agricultural Workers, All Other	15.31	OES National	16.48	OES State	10.40	FLS Regional.
Florida	FL	49–3041	Farm Equipment Mechanics and Service Technicians.	17.42	OES State	18.27	OES State	19.28	OES State.
Florida	FL	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.19	OES State	18.91	OES State	19.78	OES State.
Florida	FL	53–7064	Packers and Packagers, Hand	9.59	FLS Regional	9.92	FLS Regional	10.87	OES State.
Hawaii	HI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Hawaii	HI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.71	OES State	24.83	OES State	24.60	OES State.
Hawaii	HI	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	12.43	FLS National.
Hawaii	HI	45–2091	Agricultural Equipment Operators	14.94	FLS Regional	15.92	FLS Regional	12.86	FLS National.
Hawaii	HI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.37	FLS Regional	12.44	FLS Regional	15.13	OES State.
Hawaii	HI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.99	FLS Regional	16.54	FLS Regional	16.16	OES State.
Hawaii	HI	45–2099	Agricultural Workers, All Other	18.56	OES State	18.17	OES State	19.17	OES State.
Hawaii	HI	53–7064	Packers and Packagers, Hand	11.90	OES State	12.00	OES State	12.31	OES State.
Lake	MI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	28.73	OES State	31.75	OES State	31.02	OES State.
Lake	MI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.34	OES State	20.83	OES State	21.27	OES State.
Lake	MI	45–2041	Graders and Sorters, Agricultural Products.	11.34	OES State	10.85	OES State	11.34	OES State.
Lake	MI	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	MI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Lake	MI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	MI	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	14.87	OES State.
Lake	MI	47–2061	Construction Laborers	18.15	OES State	18.31	OES State	18.56	OES State.
Lake	MI	53–7064	Packers and Packagers, Hand	11.86	OES State	12.27	OES State	11.30	FLS Regional.
Lake	MN	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	35.92	OES State	38.70	OES State	38.56	OES State.
Lake	MN	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.51	OES State	25.19	OES State	29.18	OES State.
Lake	MN	45–2041	Graders and Sorters, Agricultural Products.	14.84	OES State	15.44	OES State	16.26	OES State.
Lake	MN	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	MN	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.
Lake	MN	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	MN	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	23.52	OES State.
Lake	MN	53–7064	Packers and Packagers, Hand	11.91	OES State	12.58	OES State	11.30	FLS Regional.
Lake	WI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.18	OES State	31.01	OES State	35.25	OES State.
Lake	WI	35–1011	Chefs and Head Cooks	18.95	OES State	22.71	OES State	22.85	OES State.
Lake	WI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.99	OES State	24.88	OES State	25.20	OES State.
Lake	WI	45–2041	Graders and Sorters, Agricultural Products.	13.41	OES State	13.77	OES State	14.54	OES State.
Lake	WI	45–2091	Agricultural Equipment Operators	12.94	FLS Regional	16.33	FLS Regional	15.37	FLS Regional.
Lake	WI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.55	FLS Regional	11.43	FLS Regional	12.47	FLS Regional.
Lake	WI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.80	FLS Regional	12.23	FLS Regional	12.56	FLS Regional.
Lake	WI	45–2099	Agricultural Workers, All Other	11.53	FLS Regional	13.18	FLS Regional	13.36	FLS National.
Lake	WI	53–7064	Packers and Packagers, Hand	12.43	OES State	12.99	OES State	11.30	FLS Regional.
Mountain I	ID	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	37.97	OES State	35.39	OES State	35.37	OES State.
Mountain I	ID	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.60	OES State	20.49	OES State	21.61	OES State.
Mountain I	ID	45–2021	Animal Breeders	21.47	OES National	20.35	OES National	20.89	OES National.
Mountain I	ID	45–2041	Graders and Sorters, Agricultural Products.	9.77	OES State	10.45	OES State	11.21	FLS Regional.
Mountain I	ID	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	15.38	OES State.
Mountain I	ID	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.
Mountain I	ID	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.99	OES State	13.39	OES State	11.92	FLS Regional.
Mountain I	ID	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	14.77	OES State.
Mountain I	ID	49–9071	Maintenance and Repair Workers, General.	16.81	OES State	17.15	OES State	17.17	OES State.
Mountain I	ID	53–7064	Packers and Packagers, Hand	11.39	OES State	11.80	OES State	12.40	OES State.
Mountain I	MT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Mountain I	MT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.78	OES State	17.33	OES State	18.69	OES State.
Mountain I	MT	45–2041	Graders and Sorters, Agricultural Products.	12.22	OES State	13.10	OES State	11.21	FLS Regional.
Mountain I	MT	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	12.86	FLS National.
Mountain I	MT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.
Mountain I	MT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.54	OES State	13.08	OES State	11.92	FLS Regional.
Mountain I	MT	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	17.77	OES State.
Mountain I	MT	53–7064	Packers and Packagers, Hand	10.47	OES State	11.48	OES State	11.68	OES State.
Mountain I	WY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Mountain I	WY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.10	FLS National.
Mountain I	WY	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	11.21	FLS Regional.
Mountain I	WY	45–2091	Agricultural Equipment Operators	12.41	FLS Regional	12.60	FLS Regional	12.86	FLS National.
Mountain I	WY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.51	FLS Regional	12.05	FLS Regional	10.82	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Mountain I	WY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.10	OES State	14.13	OES State	11.92	FLS Regional.
Mountain I	WY	45–2099	Agricultural Workers, All Other	11.27	FLS Regional	11.84	FLS Regional	13.36	FLS National.
Mountain I	WY	53–7064	Packers and Packagers, Hand	13.68	OES State	13.48	OES State	10.94	OES State.
Mountain II	CO	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	21.24	OES State	27.99	OES State	16.62	FLS Regional.
Mountain II	CO	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.95	OES State	24.63	OES State	25.47	OES State.
Mountain II	CO	45–2041	Graders and Sorters, Agricultural Products.	9.48	OES State	9.56	OES State	10.60	FLS Regional.
Mountain II	CO	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	CO	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	CO	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	15.14	OES State.
Mountain II	CO	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	18.77	OES State.
Mountain II	CO	53–7064	Packers and Packagers, Hand	11.26	OES State	11.56	OES State	12.29	OES State.
Mountain II	NV	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	44.22	OES State	16.62	FLS Regional.
Mountain II	NV	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.28	OES State	23.46	OES State	23.93	OES State.
Mountain II	NV	45–2041	Graders and Sorters, Agricultural Products.	12.66	OES State	11.65	FLS National	12.43	FLS National.
Mountain II	NV	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	NV	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	NV	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	15.09	OES State.
Mountain II	NV	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	19.27	OES State.
Mountain II	NV	53–7064	Packers and Packagers, Hand	11.08	OES State	10.68	OES State	10.81	OES State.
Mountain II	UT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	16.62	FLS Regional.
Mountain II	UT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.76	OES State	22.51	OES State	22.98	OES State.
Mountain II	UT	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	12.43	FLS National.
Mountain II	UT	45–2091	Agricultural Equipment Operators	12.06	FLS Regional	11.40	FLS Regional	10.85	FLS Regional.
Mountain II	UT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	FLS Regional	11.14	FLS Regional	10.02	FLS Regional.
Mountain II	UT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	9.84	FLS Regional	10.71	FLS Regional	13.22	OES State.
Mountain II	UT	45–2099	Agricultural Workers, All Other	11.94	FLS Regional	12.64	FLS Regional	13.36	FLS National.
Mountain II	UT	53–7064	Packers and Packagers, Hand	10.77	OES State	11.17	OES State	11.74	OES State.
Mountain III	AZ	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	31.37	OES State	39.04	OES State	17.17	FLS Regional.
Mountain III	AZ	35–2021	Food Preparation Workers	10.33	OES State	10.63	OES State	11.42	OES State.
Mountain III	AZ	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.32	OES State	23.48	OES State	24.14	OES State.
Mountain III	AZ	45–2041	Graders and Sorters, Agricultural Products.	11.33	OES State	11.99	OES State	11.29	OES State.
Mountain III	AZ	45–2091	Agricultural Equipment Operators	11.10	FLS Regional	11.06	FLS Regional	10.65	FLS Regional.
Mountain III	AZ	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.17	OES State	9.97	OES State	10.23	FLS Regional.
Mountain III	AZ	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.57	FLS Regional	11.10	FLS Regional	15.83	OES State.
Mountain III	AZ	45–2099	Agricultural Workers, All Other	12.90	FLS Regional	12.02	FLS Regional	17.79	OES State.
Mountain III	AZ	53–7064	Packers and Packagers, Hand	10.99	OES State	11.35	OES State	10.02	FLS Regional.
Mountain III	NM	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	21.63	OES State	22.44	OES State	17.17	FLS Regional.
Mountain III	NM	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	19.54	OES State	17.69	OES State	20.71	OES State.
Mountain III	NM	45–2041	Graders and Sorters, Agricultural Products.	14.19	OES State	14.54	OES State	12.32	OES State.
Mountain III	NM	45–2091	Agricultural Equipment Operators	11.10	FLS Regional	11.06	FLS Regional	10.65	FLS Regional.
Mountain III	NM	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.64	OES State	10.41	OES State	10.23	FLS Regional.
Mountain III	NM	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.57	FLS Regional	11.10	FLS Regional	12.03	OES State.
Mountain III	NM	45–2099	Agricultural Workers, All Other	12.90	FLS Regional	12.02	FLS Regional	15.54	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Mountain III	NM	47–2073	Operating Engineers and Other Construction Equipment Operators.	20.93	OES State	21.05	OES State	20.77	OES State.
Mountain III	NM	53–7062	Laborers and Freight, Stock, and Material Movers, Hand.	12.76	OES State	13.08	OES State	13.39	OES State.
Mountain III	NM	53–7064	Packers and Packagers, Hand	9.86	OES State	10.21	OES State	10.02	FLS Regional.
North Plains	KS	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
North Plains	KS	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.30	OES State	24.91	OES State	25.13	OES State.
North Plains	KS	45–2041	Graders and Sorters, Agricultural Products.	15.04	OES State	15.70	OES State	16.25	OES State.
North Plains	KS	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	17.45	OES State.
North Plains	KS	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.89	OES State	12.58	OES State	12.83	OES State.
North Plains	KS	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	KS	45–2099	Agricultural Workers, All Other	15.31	OES National	15.15	OES State	16.31	OES State.
North Plains	KS	53–7064	Packers and Packagers, Hand	10.80	OES State	11.58	OES State	12.61	OES State.
North Plains	ND	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	36.04	OES State	21.98	FLS National	22.67	FLS National.
North Plains	ND	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.04	OES State	25.40	OES State	20.10	FLS National.
North Plains	ND	45–2041	Graders and Sorters, Agricultural Products.	14.50	OES State	17.07	OES State	19.15	OES State.
North Plains	ND	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	18.16	OES State.
North Plains	ND	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.82	OES State	12.89	OES State	14.11	OES State.
North Plains	ND	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	ND	45–2099	Agricultural Workers, All Other	15.36	OES State	18.91	OES State	13.36	FLS National.
North Plains	ND	53–7064	Packers and Packagers, Hand	11.46	OES State	12.18	OES State	12.80	OES State.
North Plains	NE	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	24.38	OES State.
North Plains	NE	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.23	OES State	24.85	OES State	26.68	OES State.
North Plains	NE	45–2041	Graders and Sorters, Agricultural Products.	14.47	OES State	14.52	OES State	15.15	OES State.
North Plains	NE	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	18.01	OES State.
North Plains	NE	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	15.67	OES State	16.01	OES State	17.59	OES State.
North Plains	NE	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	NE	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
North Plains	NE	53–7064	Packers and Packagers, Hand	11.30	OES State	11.65	OES State	12.41	OES State.
North Plains	SD	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
North Plains	SD	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.14	OES State.
North Plains	SD	45–2021	Animal Breeders	21.19	OES State	20.35	OES National	17.35	OES State.
North Plains	SD	45–2041	Graders and Sorters, Agricultural Products.	12.62	OES State	13.18	OES State	13.23	OES State.
North Plains	SD	45–2091	Agricultural Equipment Operators	14.43	FLS Regional	14.91	FLS Regional	15.62	OES State.
North Plains	SD	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.96	OES State	10.79	OES State	12.59	OES State.
North Plains	SD	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.83	FLS Regional	12.43	FLS Regional	12.41	FLS Regional.
North Plains	SD	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
North Plains	SD	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.83	OES State	19.27	OES State	19.64	OES State.
North Plains	SD	53–7064	Packers and Packagers, Hand	11.11	OES State	11.41	OES State	11.76	OES State.
Northeast I	CT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	36.43	OES State.
Northeast I	CT	35–2012	Cooks, Institution and Cafeteria	16.41	OES State	16.73	OES State	17.57	OES State.
Northeast I	CT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.97	OES State	22.81	OES State	23.79	OES State.
Northeast I	CT	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	CT	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast I	CT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.01	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	CT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	14.35	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	CT	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	CT	49–3041	Farm Equipment Mechanics and Service Technicians.	19.87	OES State	20.19	OES State	20.33	OES State.
Northeast I	CT	51–9012	Separating, Filtering, Clarifying, Precipitating, and Still Machine Setters, Operators, and Tenders.	12.92	OES State	15.12	OES State	15.88	OES State.
Northeast I	CT	53–3032	Heavy and Tractor-Trailer Truck Drivers.	22.37	OES State	22.80	OES State	23.33	OES State.
Northeast I	CT	53–7064	Packers and Packagers, Hand	13.72	OES State	14.53	OES State	15.43	OES State.
Northeast I	MA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	31.23	OES State.
Northeast I	MA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.91	OES State	26.35	OES State	25.45	OES State.
Northeast I	MA	45–2041	Graders and Sorters, Agricultural Products.	10.70	OES State	11.96	OES State	13.38	FLS Regional.
Northeast I	MA	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	MA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.82	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	MA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.56	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	MA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	MA	53–7064	Packers and Packagers, Hand	11.89	OES State	12.52	OES State	13.15	OES State.
Northeast I	ME	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	ME	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.27	OES State	25.77	OES State	25.85	OES State.
Northeast I	ME	45–2041	Graders and Sorters, Agricultural Products.	11.69	OES State	13.56	OES State	13.38	FLS Regional.
Northeast I	ME	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	ME	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.72	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	ME	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.04	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	ME	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	ME	45–4022	Logging Equipment Operators	17.70	OES State	17.91	OES State	18.00	OES State.
Northeast I	ME	47–2073	Operating Engineers and Other Construction Equipment Operators.	17.70	OES State	18.53	OES State	19.13	OES State.
Northeast I	ME	49–3041	Farm Equipment Mechanics and Service Technicians.	15.34	OES State	18.26	OES State	19.60	OES State.
Northeast I	ME	49–3042	Mobile Heavy Equipment Mechanics, Except Engines.	21.26	OES State	21.31	OES State	20.98	OES State.
Northeast I	ME	51–7041	Sawing Machine Setters, Operators, and Tenders, Wood.	14.20	OES State	15.32	OES State	16.06	OES State.
Northeast I	ME	51–9021	Crushing, Grinding, and Polishing Machine Setters, Operators, and Tenders.	19.17	OES State	20.67	OES State	18.49	OES State.
Northeast I	ME	53–3032	Heavy and Tractor-Trailer Truck Drivers.	18.53	OES State	19.29	OES State	19.55	OES State.
Northeast I	ME	53–7041	Hoist and Winch Operators	24.37	OES National	24.05	OES National	26.40	OES National.
Northeast I	ME	53–7064	Packers and Packagers, Hand	10.99	OES State	11.43	OES State	12.36	OES State.
Northeast I	NH	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	NH	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.78	OES State	25.44	OES State	25.68	OES State.
Northeast I	NH	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	NH	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	NH	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.15	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	NH	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.80	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	NH	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	NH	53–7064	Packers and Packagers, Hand	11.58	OES State	11.26	OES State	11.82	OES State.
Northeast I	NY	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	32.90	OES State	36.23	OES State	41.46	OES State.
Northeast I	NY	35–2012	Cooks, Institution and Cafeteria	15.14	OES State	15.70	OES State	16.09	OES State.
Northeast I	NY	35–2019	Cooks, All Other	13.66	OES State	13.44	OES State	15.08	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast I	NY	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	27.53	OES State	27.70	OES State	28.82	OES State.
Northeast I	NY	45–2041	Graders and Sorters, Agricultural Products.	10.74	OES State	11.35	OES State	13.38	FLS Regional.
Northeast I	NY	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	NY	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.56	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	NY	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	15.11	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	NY	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	NY	53–7064	Packers and Packagers, Hand	12.20	OES State	12.19	OES State	12.80	OES State.
Northeast I	RI	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	RI	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	20.49	FLS National	19.55	FLS National	20.10	FLS National.
Northeast I	RI	45–2041	Graders and Sorters, Agricultural Products.	11.18	OES National	11.65	FLS National	13.38	FLS Regional.
Northeast I	RI	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	RI	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	12.91	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	RI	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.81	FLS National	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	RI	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	RI	53–7064	Packers and Packagers, Hand	10.83	OES State	12.06	OES State	12.35	OES State.
Northeast I	VT	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast I	VT	35–2012	Cooks, Institution and Cafeteria	14.00	OES State	14.57	OES State	14.65	OES State.
Northeast I	VT	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	22.00	OES State	21.17	OES State	23.81	OES State.
Northeast I	VT	45–2041	Graders and Sorters, Agricultural Products.	11.70	OES State	12.66	OES State	13.38	FLS Regional.
Northeast I	VT	45–2091	Agricultural Equipment Operators	13.07	FLS Regional	12.97	FLS Regional	13.85	FLS Regional.
Northeast I	VT	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.35	OES State	13.19	FLS Regional	13.11	FLS Regional.
Northeast I	VT	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	15.64	OES State	11.17	FLS Regional	11.81	FLS Regional.
Northeast I	VT	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast I	VT	51–3022	Meat, Poultry, and Fish Cutters and Trimmers.	14.56	OES State	15.23	OES State	16.28	OES State.
Northeast I	VT	53–7064	Packers and Packagers, Hand	12.07	OES State	12.39	OES State	13.22	OES State.
Northeast II	DE	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast II	DE	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.75	OES State	25.70	OES State	27.07	OES State.
Northeast II	DE	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	DE	45–2091	Agricultural Equipment Operators	13.27	OES State	12.85	FLS National	12.86	FLS National.
Northeast II	DE	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	DE	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.82	OES State	13.28	OES State	11.36	FLS Regional.
Northeast II	DE	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast II	DE	53–7064	Packers and Packagers, Hand	12.55	OES State	11.47	OES State	11.68	OES State.
Northeast II	MD	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Northeast II	MD	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	24.95	OES State	27.22	OES State	25.64	OES State.
Northeast II	MD	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	MD	45–2091	Agricultural Equipment Operators	18.40	OES State	20.31	OES State	20.30	OES State.
Northeast II	MD	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	MD	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	14.10	OES State	13.34	OES State	11.36	FLS Regional.
Northeast II	MD	45–2099	Agricultural Workers, All Other	17.44	OES State	17.92	OES State	13.36	FLS National.
Northeast II	MD	53–7064	Packers and Packagers, Hand	11.19	OES State	11.85	OES State	12.20	OES State.
Northeast II	NJ	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	40.26	OES State	39.45	OES State	39.49	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Northeast II	NJ	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	21.24	OES State	21.37	OES State	21.23	OES State.
Northeast II	NJ	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	NJ	45–2091	Agricultural Equipment Operators	16.33	OES State	12.85	FLS National	11.27	OES State.
Northeast II	NJ	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	NJ	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.43	OES State	13.53	OES State	11.36	FLS Regional.
Northeast II	NJ	45–2099	Agricultural Workers, All Other	13.09	OES State	13.11	OES State	11.88	OES State.
Northeast II	NJ	53–7064	Packers and Packagers, Hand	10.72	OES State	11.15	OES State	11.64	OES State.
Northeast II	PA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	42.44	OES State	41.83	OES State	43.16	OES State.
Northeast II	PA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.48	OES State	24.83	OES State	26.49	OES State.
Northeast II	PA	45–2041	Graders and Sorters, Agricultural Products.	11.09	FLS Regional	12.18	FLS Regional	13.89	FLS Regional.
Northeast II	PA	45–2091	Agricultural Equipment Operators	13.60	OES State	15.43	OES State	18.81	OES State.
Northeast II	PA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.90	FLS Regional	11.91	FLS Regional	12.05	FLS Regional.
Northeast II	PA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	13.56	OES State	13.19	OES State	11.36	FLS Regional.
Northeast II	PA	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Northeast II	PA	53–7064	Packers and Packagers, Hand	12.13	OES State	12.53	OES State	13.32	OES State.
Pacific	OR	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	28.68	OES State	26.10	OES State	29.89	OES State.
Pacific	OR	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.95	OES State	25.50	OES State	24.49	OES State.
Pacific	OR	45–2041	Graders and Sorters, Agricultural Products.	10.84	OES State	11.43	OES State	11.90	OES State.
Pacific	OR	45–2091	Agricultural Equipment Operators	15.12	FLS Regional	14.55	FLS Regional	14.38	FLS Regional.
Pacific	OR	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.08	FLS Regional	13.30	FLS Regional	14.32	FLS Regional.
Pacific	OR	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.08	FLS Regional	13.71	FLS Regional	14.47	FLS Regional.
Pacific	OR	45–2099	Agricultural Workers, All Other	15.38	OES State	16.40	OES State	18.08	OES State.
Pacific	OR	53–7064	Packers and Packagers, Hand	12.84	FLS Regional	11.26	FLS Regional	13.48	OES State.
Pacific	WA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	34.58	OES State	38.36	OES State	41.15	OES State.
Pacific	WA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	26.75	OES State	27.55	OES State	25.34	OES State.
Pacific	WA	45–2041	Graders and Sorters, Agricultural Products.	13.60	OES State	14.40	OES State	14.22	OES State.
Pacific	WA	45–2091	Agricultural Equipment Operators	15.12	FLS Regional	14.55	FLS Regional	14.38	FLS Regional.
Pacific	WA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	13.08	FLS Regional	13.30	FLS Regional	14.32	FLS Regional.
Pacific	WA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	12.08	FLS Regional	13.71	FLS Regional	14.47	FLS Regional.
Pacific	WA	45–2099	Agricultural Workers, All Other	16.06	OES State	17.36	OES State	15.78	OES State.
Pacific	WA	53–7064	Packers and Packagers, Hand	12.84	FLS Regional	11.26	FLS Regional	13.94	OES State.
Southeast	AL	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	22.67	FLS National.
Southeast	AL	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.23	OES State	26.41	OES State	28.46	OES State.
Southeast	AL	45–2041	Graders and Sorters, Agricultural Products.	11.11	OES State	11.16	OES State	11.04	OES State.
Southeast	AL	45–2091	Agricultural Equipment Operators	12.80	OES State	15.80	OES State	11.05	OES State.
Southeast	AL	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	AL	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.22	OES State	11.99	OES State	13.41	OES State.
Southeast	AL	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	13.14	OES State	13.90	OES State.
Southeast	AL	53–3032	Heavy and Tractor-Trailer Truck Drivers.	19.28	OES State	18.77	OES State	19.27	OES State.
Southeast	AL	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeast	GA	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	20.96	FLS National	21.98	FLS National	31.51	OES State.
Southeast	GA	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	23.79	OES State	23.42	OES State	23.14	OES State.

TABLE 2—AVERAGE HOURLY STATEWIDE WAGES AND THEIR SOURCES UNDER THE PROPOSED RULE—Continued

Region	State	SOC	Title	2016		2017		2018	
				Wage	Source	Wage	Source	Wage	Source.
Southeast	GA	45–2041	Graders and Sorters, Agricultural Products.	10.40	OES State	10.53	OES State	10.44	OES State.
Southeast	GA	45–2091	Agricultural Equipment Operators	10.86	OES State	11.54	OES State	12.48	OES State.
Southeast	GA	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	GA	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.52	OES State	12.77	OES State	13.27	OES State.
Southeast	GA	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	19.49	OES State	18.29	OES State.
Southeast	GA	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeast	SC	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	36.96	OES State	40.39	OES State	35.55	OES State.
Southeast	SC	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	25.84	OES State	27.24	OES State	27.08	OES State.
Southeast	SC	45–2041	Graders and Sorters, Agricultural Products.	11.23	OES State	10.50	OES State	10.92	OES State.
Southeast	SC	45–2091	Agricultural Equipment Operators	12.30	OES State	15.13	OES State	16.52	OES State.
Southeast	SC	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	10.83	FLS Regional	10.93	FLS Regional	11.01	FLS Regional.
Southeast	SC	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.97	OES State	12.94	OES State	13.71	OES State.
Southeast	SC	45–2099	Agricultural Workers, All Other	12.01	FLS Regional	17.92	OES State	13.36	FLS National.
Southeast	SC	53–7064	Packers and Packagers, Hand	10.10	FLS Regional	10.31	FLS Regional	10.92	FLS Regional.
Southeastern Plains.	OK	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.66	FLS Regional	24.74	OES State	27.39	OES State.
Southeastern Plains.	OK	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.28	FLS Regional	18.06	FLS Regional	25.85	OES State.
Southeastern Plains.	OK	45–2041	Graders and Sorters, Agricultural Products.	11.17	OES State	12.09	OES State	11.70	FLS Regional.
Southeastern Plains.	OK	45–2091	Agricultural Equipment Operators	11.59	FLS Regional	11.76	FLS Regional	11.28	FLS Regional.
Southeastern Plains.	OK	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	11.60	OES State	11.53	FLS Regional	11.53	FLS Regional.
Southeastern Plains.	OK	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.31	FLS Regional	11.66	FLS Regional	12.12	FLS Regional.
Southeastern Plains.	OK	45–2099	Agricultural Workers, All Other	15.31	OES National	16.88	OES National	13.36	FLS National.
Southeastern Plains.	OK	53–3032	Heavy and Tractor-Trailer Truck Drivers.	20.27	OES State	20.21	OES State	20.74	OES State.
Southeastern Plains.	OK	53–7064	Packers and Packagers, Hand	11.17	OES State	11.39	OES State	12.09	FLS Regional.
Southeastern Plains.	TX	11–9013	Farmers, Ranchers, and Other Agricultural Managers.	23.66	FLS Regional	41.28	OES State	37.67	OES State.
Southeastern Plains.	TX	45–1011	First-Line Supervisors of Farming, Fishing, and Forestry Workers.	17.28	FLS Regional	18.06	FLS Regional	27.00	OES State.
Southeastern Plains.	TX	45–2041	Graders and Sorters, Agricultural Products.	11.10	OES State	11.07	OES State	11.70	FLS Regional.
Southeastern Plains.	TX	45–2091	Agricultural Equipment Operators	11.59	FLS Regional	11.76	FLS Regional	11.28	FLS Regional.
Southeastern Plains.	TX	45–2092	Farmworkers and Laborers, Crop, Nursery, and Greenhouse.	9.54	OES State	11.53	FLS Regional	11.53	FLS Regional.
Southeastern Plains.	TX	45–2093	Farmworkers, Farm, Ranch, and Aquacultural Animals.	11.31	FLS Regional	11.66	FLS Regional	12.12	FLS Regional.
Southeastern Plains.	TX	45–2099	Agricultural Workers, All Other	13.04	OES State	13.77	OES State	16.65	OES State.
Southeastern Plains.	TX	47–2061	Construction Laborers	14.07	OES State	14.62	OES State	15.02	OES State.
Southeastern Plains.	TX	49–2093	Electrical and Electronics Installers and Repairers, Transportation Equipment.	27.34	OES State	29.88	OES State	28.40	OES State.
Southeastern Plains.	TX	53–7064	Packers and Packagers, Hand	10.80	OES State	11.05	OES State	12.09	FLS Regional.

List of Subjects

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

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.

29 CFR Part 501

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor proposes that 20 CFR parts 653 and 655 and 29 CFR part 501 be amended as follows:

Title 20—Employees' Benefits

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

■ 1. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 2. Amend § 653.501 by revising the first sentence of paragraph (c)(2)(i) to read as follows:

§ 653.501 Requirements for processing clearance orders.

* * * * *

(c) * * *

(2) * * *

(i) The wages and working conditions offered are not less than the prevailing wages, as defined in § 655.103(b), and prevailing working conditions among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. * * *

* * * * *

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 3. The authority citation for part 655 continues 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); and 8 CFR 214.2(h)(6)(iii).

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).

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).

■ 4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

§ 655.100 Scope and purpose of this subpart.

(a) *Purpose.* (1) A temporary agricultural labor certification issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 8 U.S.C. 1188(a), that:

(i) There are not sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary agricultural labor or services for which an employer desires to hire foreign workers; and

(ii) The employment of the H–2A worker(s) will not adversely affect the wages and working conditions of workers in the United States 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 temporary employment of foreign workers in the H–2A nonimmigrant classification, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(a). It also establishes standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, as well as the rights and obligations of H–2A 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 temporary agricultural labor certification.

§ 655.101 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification.* 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 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 29 CFR part 501, and this subpart (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. The regulations governing WHD's investigatory and enforcement functions, including those related to the enforcement of temporary agricultural labor certifications issued under this subpart, are in 29 CFR part 501.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to § 655.182 and 29 CFR 501.20.

§ 655.102 Transition procedures.

(a) The NPC shall continue to process an *Application for Temporary Employment Certification* submitted prior to [effective date of the final rule] in accordance with 20 CFR part 655, subpart B, in effect as of [date 1 day before the effective date of the final rule].

(b) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after [effective date of the final rule], and that has a first date of need no later than [date 90 calendar days after the effective date of the final rule], in accordance with 20 CFR part 655, subpart B, in effect as of [date 1 day before the effective date of the final rule].

(c) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after [effective date of the final rule], and that has a first date of need later than [date 90 calendar days after the effective date of the final rule], in accordance with all job order and application filing requirements under this supbart.

§ 655.103 Overview of this subpart and definition of terms.

(a) *Overview.* In order to bring nonimmigrant workers to the United States to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. This subpart describes a 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) *Definitions.* For the purposes of this subpart:

Act. The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge. A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of OFLC Administrator and WHD Administrator below.

Adverse effect wage rate. The wage rate published by the OFLC Administrator in the **Federal Register** for the occupational classification and state based on either the U.S. Department of Agriculture's (USDA's) Farm Labor Survey (FLS) or the Bureau of Labor Statistics' (BLS') Occupational Employment Statistics (OES) survey, as set forth in § 655.120(b).

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this subpart with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable state law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment. The geographic area within normal commuting distance of the place(s) of

employment for which temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place(s) of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a multi-state MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. 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 (DC). 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, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 8 CFR 1003.101, may represent an employer under this subpart.

Average adverse effect wage rate. The simple average of the first adverse effect wage rates (AEWRs) applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) that the OFLC Administrator publishes in a calendar year in accordance with § 655.120(b).

Board of Alien Labor Certification Appeals. The permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of Administrative Law Judges (ALJs) appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of Board of Alien Labor Certification Appeals (BALCA or Board).

Certifying Officer. The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

Chief Administrative Law Judge. The chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security. The Federal department having jurisdiction over certain immigration-related functions, acting through its component agencies, including U.S. Citizenship and Immigration Services (USCIS).

Employee. 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.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) A person on whose behalf an *Application for Temporary Employment Certification* is filed.

Employment and Training Administration. The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer anticipates requiring the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor. Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this subpart, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

H–2A worker. Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

H–2A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the NPC.

Joint employment. (i) 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.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under § 655.131(b) are, at all times, joint employers of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Master application. An *Application for Temporary Employment Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations or comparable agricultural employment; the first date of need for all employer-members listed on the *Application for Temporary Employment Certification* may be separated by no more than 14 calendar days; and may cover multiple areas of intended employment within a single state but no more than two contiguous states.

Metropolitan Statistical Area. A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center. The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification. OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OFLC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Positive recruitment. The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located, and any other state designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing practice. A practice engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

Prevailing wage. A wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a state that meets the requirements in § 655.120(c).

Secretary of Labor. The chief official of the Department, or the Secretary's designee.

Secretary of Homeland Security. The chief official of DHS or the Secretary of Homeland Security's designee.

State Workforce Agency. State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 et seq.*,* to administer the state's public labor exchange activities.

Strike. 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. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or 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, agent, or attorney 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, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) 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 agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, 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 an H–2A worker,

pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and this subpart.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services. The Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary or seasonal agricultural labor or services in the United States.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

Wage and Hour Division. The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 29 CFR part 501, and this subpart.

WHD Administrator. The primary official of WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. 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 work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 28 CFR part 501, or this subpart.

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (c)(1) thorough (6) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied

in section 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in section 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780, is agricultural labor or services for purposes of paragraph (c) of this section.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites, is agricultural labor or services for purposes of paragraph (c) of this section.

(5) *Reforestation activities.* Reforestation activities are predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools; and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. Reforestation activities may include some forest fire prevention or suppression duties, such as constructing fire breaks or performing prescribed burning tasks, when such duties are in connection with and incidental to other reforestation activities. Reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way.

(6) *Pine straw activities.* Operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations, is agricultural labor or services for purposes of paragraph (c) of this section.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

Prefiling Procedures

§ 655.120 Offered wage rate.

(a) *Employer obligation.* Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of:

(1) The AEWR;

(2) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c) of this section;

(3) The agreed-upon collective bargaining wage;

(4) The Federal minimum wage; or

(5) The state minimum wage.

(b) *AEWR determinations.* (1) The OFLC Administrator will determine the AEWR for each state and occupational classification as follows:

(i) If an annual average hourly gross wage for the occupational classification in the State or region is reported by the USDA's FLS, that wage shall be the AEWR for the occupational classification and geographic area;

(ii) If an annual average hourly gross wage for the occupational classification in the state or region is not reported by the FLS, the AEWR for the occupational classification and state shall be the statewide annual average hourly wage for the standard occupational classification (SOC) if one is reported by the OES survey;

(iii) If only a national wage for the occupational classification is reported by both the FLS and OES survey for the geographic area, the AEWR for the geographic area shall be the national annual average hourly gross wage for the occupational classification from the FLS; and

(iv) If only a national wage for the SOC is reported by the OES survey for the geographic area and no wage is reported for the occupational classification by the FLS, the AEWR for the geographic area shall be the national average hourly wage for the SOC from the OES survey.

(2) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR as a notice in the **Federal Register**.

(3) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is higher than the highest of the previous AEWR, a prevailing wage for the crop activity or agricultural activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage, the employer must pay the updated AEWR not later than 14 calendar days after the updated AEWR is published in the **Federal Register**.

(4) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay the rate guaranteed on the job order.

(5) If the job duties on the *Application for Temporary Employment Certification* do not fall within a single occupational classification, the CO will determine the applicable AEWR based on the highest AEWR for all applicable occupational classifications.

(c) *Prevailing wage determinations.* (1) The OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity if all of the following requirements are met:

(i) The SWA submits to the Department a wage survey for the crop activity or agricultural activity and a Form ETA–232 providing the methodology of the survey;

(ii) The survey was independently conducted by the state, including any state agency, state college, or state university;

(iii) The survey covers a distinct work task or tasks performed in a single crop activity or agricultural activity;

(iv) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers performing the work task(s) in the crop activity or agricultural activity and geographic area surveyed or conducted a randomized sampling of such employers;

(v) The survey reports the average wage of U.S. workers in the crop activity or agricultural activity and geographic area using the unit of pay used to compensate at least 50 percent of the workers whose wages are surveyed;

(vi) The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the state;

(vii) The survey includes the wages of at least 30 U.S. workers;

(viii) The survey includes wages of U.S. workers employed by at least 5 employers; and

(ix) The wages paid by a single employer represent no more than 25 percent of the sampled wages.

(2) A prevailing wage issued by the OFLC Administrator will remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the work contract, the employer must continue to guarantee at least the expired prevailing wage rate.

(3) If a prevailing wage for the geographic area and crop activity or agricultural activity is adjusted during a work contract, and is higher than the highest of the AEWR, a previous prevailing wage for the geographic area and crop activity or agricultural activity, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage, the employer must pay that higher prevailing wage not later than 14 calendar days after the Department notifies the employer of the new prevailing wage.

(4) If a prevailing wage for the geographic area and crop activity or agricultural activity is adjusted during a work contract, and is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(d) *Appeals.* (1) If the employer does not include the appropriate offered wage rate on the *Application for Temporary Employment Certification,* the CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate.

(2) If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171.

§ 655.121 Job order filing requirements.

(a) *What to file.* (1) Prior to filing an *Application for Temporary Employment Certification,* the employer must submit a completed job order, Form ETA–790/790A, including all required addenda, to the NPC designated by the OFLC Administrator, and must identify it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H–2A workers. The employer must include in its submission to the NPC a valid Federal Employer Identification Number (FEIN) as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(2) Where the job order is being placed in connection with a future master application to be filed by an agricultural association as a joint employer with its employer-members, the agricultural association may submit a single job order to be placed in the name of the agricultural association on behalf of all employers named on the job order and the future *Application for Temporary Employment Certification.*

(3) Where the job order is being placed in connection with a future application to be jointly filed by two or more employers seeking to jointly employ a worker(s) (but is not a master application), any one of the employers may submit a single job order to be placed on behalf of all joint employers named on the job order and the future *Application for Temporary Employment Certification.*

(4) The job order must satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and the requirements set forth in § 655.122.

(b) *Timeliness.* The employer must submit a completed job order to the NPC no more than 75 calendar days and no fewer than 60 calendar days before the employer's first date of need.

(c) *Location and method of filing.* The employer must submit a completed job order to the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any job order submitted using a method other than the designated electronic method(s), unless the employer submits the job order by mail as set forth in § 655.130(c)(2) or requests a reasonable accommodation as set forth in § 655.130(c)(3).

(d) *Original signature.* The job order must contain an electronic (scanned) copy of the original signature of the employer or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized agent or attorney.

(e) *SWA review.* (1) Upon receipt of the job order, the NPC will transmit an electronic copy of the job order to the SWA serving the area of intended employment for intrastate clearance. If the job opportunity is located in more than one state within the same area of intended employment, the NPC will transmit the job order to any one of the SWAs having jurisdiction over the place(s) of employment.

(2) The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order not later than 7 calendar days from the date the SWA received the job order. The SWA notification will state the reason(s) the job order fails to meet the applicable requirements, state the modification(s) needed for the SWA to accept the job order, and offer the employer an opportunity to respond to the deficiencies within 5 calendar days from the date the notification was issued by the SWA. Upon receipt of a response, the SWA will review the response and notify the employer in writing of its acceptance or denial of the job order within 3 calendar days from the date the response was received by the SWA. If the employer's response is not received within 12 calendar days after the notification was issued, the SWA will notify the employer in writing that the job order is deemed abandoned, and the employer will be required to submit a new job order to the NPC meeting the requirements of this section. Any notice sent by the SWA to an employer that requires a response must be sent using methods to assure next day delivery, including email or other electronic methods, with a copy to the employer's representative, as applicable.

(3) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. The CO will process the emergency *Application for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167.

(f) *Intrastate and interstate clearance.* Upon its acceptance of the job order, the SWA must promptly place the job order in intrastate clearance, commence recruitment of U.S. workers, and notify the NPC that the approved job order must be placed into interstate clearance. Upon receipt of the SWA notification, the NPC will promptly transmit an electronic copy of the approved job

order for interstate clearance to any other SWAs in a manner consistent with the procedures set forth in § 655.150.

(g) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(h) *Modifications to the job order.* (1) Prior to the issuance of a final determination on an *Application for Temporary Employment Certification,* the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made, or certification will be denied pursuant to § 655.164.

(2) The employer may request a modification of the job order, Form ETA–790/790A, prior to the submission of an *Application for Temporary Employment Certification.* However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not request a modification of the job order on or after the date of filing an *Application for Temporary Employment Certification.*

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

§ 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of H–2A 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 H–2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions that must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing*—(1) *Obligation to provide housing.* The employer must provide housing at no cost to the H–2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of the DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the DOL OSHA standards at 29 CFR 1910.142(b)(2) (square footage per occupant); § 1910.142(b)(3) (provision of beds); § 1910.142(b)(9) (requirement for rooms where wookers cook, live, and sleep); § 1910.142(b)(11) (heating, cooking, and water heating equipment installed properly); § 1910.142(c) (water supply); § 1910.142(f) (laundry, handwashing, and bathing facilities); and § 1910.142(j) (insect and rodent control), state standards addressing such concerns will apply. In the absence of applicable local or state standards addressing such concerns, the relevant DOL OSHA standards at 29 CFR 1910.142(b)(2), (3), (9), and (11), (f), and (j) will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

(2) *Standards for range housing.* An employer employing workers under §§ 655.200 through 655.235 must comply with the housing requirements in §§ 655.230 and 655.235.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage that is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or state government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Compliance with applicable standards*—(i) *Timeframe.* The determination as to whether housing provided to workers under this section meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.*

(ii) *Certification of employer-provided housing.* (A) Except as provided under paragraph (d)(6)(ii)(B) of this section, the SWA (or another local, state, or Federal authority acting on behalf of the SWA) with jurisdiction over the location of the employer-provided housing must inspect and provide to the employer and CO documentation certifying that the employer-provided housing is sufficient to accommodate the number of workers requested and meets all applicable standards under paragraph (d)(1)(i) of this section. The inspector must indicate the validity period of the housing certification. Where appropriate, and only if the SWA has notified the Department that the SWA lacks resources to conduct timely, preoccupancy inspections of all employer-provided housing, the inspector may certify the employer-provided housing for a period of up to 24 months.

(B) Where the employer-provided housing has been previously inspected and certified under paragraph (d)(6)(ii)(A) of this section, the employer may self-inspect and -certify the

employer-provided housing. To self-inspect and -certify the employer-provided housing under this paragraph (d)(6)(ii)(B), the employer must inspect the housing and submit to the SWA and the CO a copy of the currently valid certification for the employer-provided housing and a written statement, signed and dated by the employer, attesting that the employer has inspected the housing, the housing is available and sufficient to accommodate the number of workers being requested, and continues to meet all of the applicable standards under paragraph (d)(1)(i) of this section.

(iii) *Certification of rental and/or public accommodations.* The employer must provide to the CO a written statement, signed and dated, that attests that the accommodations are compliant with the applicable standards under paragraph (d)(1)(ii) of this section and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). If applicable local or state rental or public accommodation standards under paragraph (d)(1)(ii) of this section require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. If the applicable standards do not require an inspection, the employer's written statement must confirm that no inspection is required.

(iv) *Certified housing that becomes unavailable.* If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, state, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, state, or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary agricultural labor certification granted under this subpart.

(e) *Workers' compensation.* (1) The employer must provide workers' compensation insurance coverage in compliance with state law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the state's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the state workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary agricultural labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph (e), including the name of the insurance carrier, the insurance policy number, and proof of insurance for the entire period of employment, or, if appropriate, proof of state law coverage.

(f) *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.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(h) *Transportation; daily subsistence*—(1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means, and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker departed to the employer's place of employment. For an H–2A worker who must obtain a visa departing to work for the employer from a location outside of the United States, ''the place from which the worker departed'' will mean the appropriate U.S. Consulate or Embassy. When it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H–2A 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. 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 payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H–2A requirements and imposes obligations on employers regarding payment of wages.

(2) *Transportation from place of employment.* If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H–2A employment, the employer must provide or pay for the worker's 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 who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's place of employment to such subsequent employer's place of employment, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's place of employment to such subsequent employer's place of employment, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H–2A worker is displaced as a result of the employer's compliance with its obligation to hire U.S. workers who apply or are referred after the employer's date of need as described in § 655.135(d).

(3) *Transportation between living quarters and place of employment.* The employer must provide transportation between housing provided or secured by the employer and the employer's place of employment at no cost to the worker.

(4) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal, state, or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 through 500.105, and 29 CFR 500.120 through 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and it must have property damage insurance.

(i) *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 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.

(i) For purposes of this paragraph (i)(1) a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. 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) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, 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 × 48 hours/week = 480 hours × 75 percent = 360). If a Federal holiday occurred during the 10-week span, 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 × 48 hours/week = (480 hours − 8 hours (Federal holiday)) × 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, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, 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 H–2A worker less employment than that required under this paragraph (i)(1), 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 if each workday did not consist of a full number of hours of work time as specified in the job order.

(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 required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H–2A worker.* The employer is not liable for payment of the three-fourths guarantee to an H–2A worker whom the CO certifies is displaced because of the employer's compliance with its obligation to hire U.S. workers who apply or are referred after the employer's date of need described in § 655.135(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H–2A employment, depart to the place outside of the United States from which the worker departed, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.* (1) An employer must keep accurate and adequate records with respect to each worker's earnings, including, but not limited to, field tally records, supporting summary payroll records, and records showing the nature and amount 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 at paragraph (i)(3) of this section); the hours actually worked each day by the worker; 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 permanent address; and the amount of and reasons for any and all deductions taken from the worker's wages. In the case of H–2A workers, the permanent address must be the worker's permanent address in the worker's home country.

(2) Each employer must keep the records required by paragraph (j) of this section, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G–28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph (j)(2).

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the

number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address, and FEIN.

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR, a prevailing wage, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of § 655.120(c), the agreed-upon collective bargaining rate, the Federal minimum wage, or the state minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing wage rate, the Federal minimum wage, the state minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the prevailing piece rate for the crop activity or agricultural activity in the geographic area if one has been issued by the OFLC Administrator; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H–2A worker, in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the **Federal Register** not later than 2 working days after such abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. Abandonment will be deemed to begin after a worker fails to report to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. The employer is required to maintain records of such notification to the NPC, and DHS in the case of an H–2A worker, for not less than 3 years from the date of the certification.

(o) *Contract impossibility.* 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 that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) departed to work for the employer, or transport the worker to the worker's next certified H–2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* (1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be

included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. 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.

(q) *Disclosure of work contract.* The employer must provide to an H–2A worker not later than the time at which the worker applies for the visa, or to a worker in corresponding employment not later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H–2A worker going from an H–2A employer to a subsequent H–2A employer, the copy must be provided not later than the time an offer of employment is made by the subsequent H–2A employer. For an H–2A worker that does not require a visa for entry, the copy must be provided not later than the time of an offer of employment. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 28 CFR part 501, or this subpart.

§ 655.123 Positive recruitment of U.S. workers.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers within a multi-state region of traditional or expected labor supply for the place(s) of employment as designated by the OFLC Administrator under § 655.154(d) to ensure that there are not able, willing, and qualified U.S. workers who will be available for the labor or services listed in the *Application for Temporary Employment Certification.* Positive recruitment under this section is in addition to, and must be conducted within the same time period as, circulation of the job order through the SWA interstate clearance system.

(b) *Positive recruitment steps.* Upon acceptance of the job order and prior to filing an *Application for Temporary Employment Certification,* the employer may commence the required positive recruitment, as set forth in §§ 655.151 through 655.154.

(c) *Positive recruitment period.* Unless otherwise instructed by the CO, if the employer chooses to engage in pre-filing positive recruitment, the employer must begin the recruitment required by this section within 7 calendar days of the date on which the job order was accepted. The positive recruitment period will terminate on the date specified in § 655.158.

(d) *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 U.S. worker is being recruited so that the worker incurs little or no cost due to the interview. Employers cannot provide potential H–2A workers with more favorable treatment than U.S. workers with respect to the requirement for, and conduct of, interviews.

(e) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity until the end of the recruitment period, as set forth in § 655.135(d). The employer must accept and hire all applicants who are qualified and who will be available for the job opportunity. U.S. applicants can be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(f) *Pre-filing recruitment report.* No more than 50 calendar days before the date of need and where positive recruitment efforts have commenced, the employer may prepare a recruitment report, consistent with the requirements set forth in § 655.156, for submission with the *Application for Temporary Employment Certification.*

§ 655.124 Withdrawal of a job order.

(a) The employer may withdraw a job order if the employer no longer plans to file an *Application for Temporary Employment Certification.* However, the employer is still obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the job order and stating the reason(s) for the withdrawal.

Application for Temporary Employment Certification Filing Procedures

§ 655.130 Application filing requirements.

All employers who desire to hire H–2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification,* all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135, and, unless a specific exemption applies, a copy of Form ETA–790/790A, submitted as set forth in § 655.121(a). The *Application for Temporary Employment Certification* must include a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's first date of need.

(c) *Location and method of filing*—(1) *E-filing.* The employer must file the *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 the application in accordance with paragraph (c)(2) or (3) of this section.

(2) *Filing by mail.* Employers that lack adequate access to electronic filing may file the application by mail. The employer must indicate that it is filing by mail due to lack of adequate access to electronic filing. The OFLC Administrator will identify the address to which such filing must be mailed by public notice(s) and by instructions on DOL's website.

(3) *Reasonable accommodation.* Employers who are unable or limited in their ability to use and/or access the electronic *Application for Temporary Employment Certification,* or any other form or documentation required under this subpart, as a result of a disability may request a reasonable accommodation to enable them to

participate in the H–2A program. An employer in need of such an accommodation may contact the NPC in writing to the address designated in a notice published in the **Federal Register** or 202–513–7350 (this is not a toll-free number), or for individuals with hearing or speech impairments, 1–877–889–5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this subpart, including the *Application for Temporary Employment Certification.* All requests for an accommodation should include the employer's name, a detailed description of the accommodation needed, and the preferred method of contact. The NPC will respond to the request for a reasonable accommodation within 10 business days of the date of receipt.

(d) *Original signature.* The *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 a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Scope of applications.* Except as otherwise permitted by this subpart, an *Application for Temporary Employment Certification* must be limited to places of employment within a single area of intended employment. An employer may file only one *Application for Temporary Employment Certification* covering the same area of intended employment, period of employment, and occupation or comparable work to be performed.

(f) *Staggered entry of H–2A workers.* (1) If a petition for H–2A workers filed by an employer, including a joint employer filing an *Application for Temporary Employment Certification* under § 655.131(b), is granted, the employer may bring those workers described in the petition, who are otherwise admissible, into the United States at any time up to 120 days from the first date of need stated on the certified *Application for Temporary Employment Certification,* including any approved modifications, without filing another H–2A petition with DHS.

(2) In order to comply with the provision in paragraph (f)(1) of this section, the employer must satisfy the following obligations:

(i) *Notice.* (A) At any time after the *Application for Temporary Employment Certification* is filed through 14 calendar days after the first date of need, as indicated in the certified *Application for Temporary Employment Certification,* notify the NPC electronically, unless the employer was permitted to file by mail as set forth in § 655.130(c), of its intent to stagger the entry of its H–2A workers into the United States, and the latest date on which such workers will enter.

(B) An agricultural association filing as a joint employer with its members must provide a single notice on behalf of all its members duly named on the application and must provide the latest date on which any of its members expects H–2A workers to enter the United States.

(ii) *Recruitment.* Comply with the duty to accept and hire U.S. worker applicants set forth in § 655.135(d)(2).

(iii) *Records.* Continue to maintain the recruitment report until the end of the additional recruitment period, as set forth in § 655.135(d)(2), and retain all recruitment documentation for a period of 3 years from the date of certification, consistent with the document retention requirements under § 655.167. The updated recruitment report and recruitment documentation is not to be submitted to the Department, unless requested by the Department or as set forth in § 655.156.

(3) Once the NPC receives the notice described in paragraph (f)(2)(i) of this section, it will inform all SWAs that received a copy of the employer's job order to extend the period of recruitment by the time period provided in the employer's written notice, if that period exceeds 30 days. In accordance with § 655.121(g), the SWA(s) will keep the employer's job order on its active file and refer any U.S. worker who applies for the job opportunity through the end of the new recruitment period.

(g) *Information dissemination.* Information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures such as audits may be forwarded from OFLC to WHD or any other Federal agency, as appropriate, for investigative or enforcement purposes.

§ 655.131 Agricultural association and joint employer filing requirements.

(a) *Agricultural association filing requirements.* If an agricultural association files an *Application for Temporary Employment Certification,* in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(1) The agricultural association must identify in the *Application for Temporary Employment Certification* for H–2A workers whether it is filing as a sole employer, a joint employer, or an agent. The agricultural association must retain documentation substantiating the employer or agency status of the agricultural association and be prepared to submit such documentation in response to a NOD from the CO prior to issuing a Final Determination, or in the event of an audit or investigation.

(2) The agricultural association may file a master application on behalf of its employer-members. The master application is available only when the agricultural association is filing as a joint employer. An agricultural association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, as long as the first dates of need for each employer-member named in the *Application for Temporary Employment Certification* are separated by no more than 14 calendar days and all places of employment are located in no more than two contiguous states. The agricultural association must identify in the *Application for Temporary Employment Certification* by name, address, total number of workers needed, period of employment, first date of need, and the crops and agricultural work to be performed, each employer-member that will employ H–2A workers.

(3) An agricultural association filing a master application as a joint employer may sign the *Application for Temporary Employment Certification* on behalf of its employer-members. An agricultural association filing as an agent may not sign on behalf of its employer-members but must obtain each employer-member's signature on the *Application for Temporary Employment Certification* prior to filing.

(4) If the application is approved, the agricultural association, as appropriate, will receive a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

(b) *Joint employer filing requirements.* (1) If an employer files an *Application for Temporary Employment Certification* on behalf of one or more other employers seeking to jointly employ H–2A workers in the same area of intended employment, in addition to complying with all the assurances,

guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply:

(i) The *Application for Temporary Employment Certification* must identify the name, address, and the crop(s) and agricultural work to be performed for each employer seeking to jointly employ the H–2A workers;

(ii) All H–2A workers must work for each employer for at least 1 workday, or its equivalent, each workweek; and

(iii) The *Application for Temporary Employment Certification* must be signed and dated by each joint employer named in the application, in accordance with the procedures contained in § 655.130(e). By signing the *Application for Temporary Employment Certification,* each joint employer attests to the conditions of employment required of an employer participating in the H–2A program, and assumes full responsibility for the accuracy of the representations made in the *Application for Temporary Employment Certification* and for compliance with all of the assurances and obligations of an employer in the H–2A program at all times during the period of employment on the *Application for Temporary Employment Certification;* and

(2) If the application is approved, the joint employer who submits the *Application for Temporary Employment Certification* will receive, on behalf of the other joint employers, a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

§ 655.132 H–2A labor contractor filing requirements.

An H–2ALC must meet all of the requirements of the definition of employer in § 655.103(b) and comply with all the assurances, guarantees, and other requirements contained in this part, including § 655.135, and in part 653, subpart F, of this chapter. The H–2ALC must include in or with its *Application for Temporary Employment Certification* at the time of filing the following:

(a) The name and location of each fixed-site agricultural business to which the H–2ALC expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed-site, and a description of the crops and activities the workers are expected to perform at such fixed-site.

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the H–2ALC is authorized to perform as an FLC.

(c) Proof of its ability to discharge financial obligations under the H–2A program by including with the *Application for Temporary Employment Certification* an original surety bond meeting the following requirements.

(1) *Requirements for the bond.* The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue NW, Room S–3502, Washington, DC 20210. Consistent with the enforcement procedure set forth at 29 CFR 501.9(b), the bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits, including any assessment of interest, owed to an H–2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 29 CFR part 501 relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must remain in full force and effect for all liabilities incurred during the period of the labor certification, including any extension thereof. The bond may not be cancelled absent a finding by the WHD Administrator that the labor certification has been revoked.

(2) *Amount of the bond.* Unless a higher amount is sought by the WHD Administrator pursuant to 29 CFR 501.9(a), the required bond amount is the base amount adjusted to reflect the average AEWR, as defined in § 655.103, and any employment of 150 or more workers.

(i) The base amounts are $5,000 for a labor certification for which an H–2ALC employs fewer than 25 workers; $10,000 for a labor certification for which an H–2ALC employs 25 to 49 workers; $20,000 for a labor certification for which an H–2ALC employs 50 to 74 workers; $50,000 for a labor certification for which an H–2ALC employs 75 to 99 workers; and $75,000 for a labor certification for which an H–2ALC employs 100 or more workers.

(ii) The bond amount is calculated by multiplying the base amount by the average AEWR and dividing by $9.25. Thus, the required bond amounts will vary annually based on changes in the average AEWR.

(iii) For a labor certification for which an H–2ALC employs 150 or more workers, the bond amount applicable to the certification of 100 or more workers is further adjusted for each additional 50 workers as follows: The bond amount is increased by a value which represents 2 weeks of wages for 50 workers, calculated using the average AEWR (*i.e.,* 80 hours × 50 workers × Average AEWR); this increase is applied to the bond amount for each additional group of 50 workers.

(iv) The required bond amounts shall be calculated and published in the **Federal Register** on an annual basis.

(3) *Form of the bond and method of filing.* The bond shall consist of an executed Form ETA–9142A—Appendix B, and must contain the name, address, phone number, and contact person for the surety, and valid documentation of power of attorney. The bond must be filed using the method directed by the OFLC Administrator at the time of filing:

(i) *Electronic surety bonds.* When the OFLC Administrator directs the use of electronic surety bonds, this will be the required method of filing bonds for all applications subject to mandatory electronic filing. Consistent with the application filing requirements of § 655.130(c) and (d), the bond must be completed, signed by the employer and the surety using a verifiable electronic signature method, and submitted electronically with the *Application for Temporary Employment Certification* and supporting materials unless the employer is permitted to file by mail or a different accommodation under § 655.130(c)(2) or (3).

(ii) *Electronic submission of copy.* Until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may submit an electronic (scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the certification is issued.

(iii) *Mailing original bond with application.* For applications not subject to mandatory electronic filing due under § 655.130(c)(2) or (3), employers may submit the original bond as part of its mailed, paper application package, or consistent with the accommodation provided.

(d) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (a) of this section.

(e) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(1) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(2) All transportation between all places of employment and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, state, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.104 through 500.105 and 500.120 through 500.128, except where workers' compensation is used to cover such transportation as described in § 655.122(h).

§ 655.133 Requirements for agents.

(a) An agent filing an *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.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must submit to the NPC all documentation required at the time of filing by § 655.130(a) except evidence of a job order submitted pursuant to § 656.121 of this chapter, a completed job order on the Form ETA–790/790A and all required addenda, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H–2A workers during the prior year's agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also 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 Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* 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.

(c) *Processing of emergency applications.* (1) Upon receipt of a complete emergency situation(s) waiver request, the CO promptly will transmit a copy of the job order to the SWA serving the area of intended employment. The SWA will review the contents of the job order for compliance with the requirements set forth in § 653.501(c) of this chapter and § 655.122. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO of the noted deficiencies within 5 calendar days of the date the job order is received by the SWA.

(2) The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167. The CO may notify the employer, in accordance with the procedures contained in § 655.141, that the application cannot be accepted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.161. Such notification will so inform the employer of the opportunity to submit a modified *Application for Temporary Employment Certification* and/or job order in accordance with the procedures contained in § 655.142.

§ 655.135 Assurances and obligations of H–2A employers.

An employer seeking to employ H–2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only 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 hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The place(s) of employment for which the employer is requesting a temporary agricultural labor certification does not currently have employees on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in §§ 655.123 and 655.154, until the date on which the H–2A workers depart for the place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

(d) *Thirty-day rule.* (1) Subject to paragraph (d)(2) of this section, the employer must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days after the first date of need stated on the *Application for Temporary Employment Certification* under which the H–2A worker who is in the job was hired, including any approved modifications.

(2) If an employer chooses to use the procedures for the staggered entry of H–2A workers at § 655.130(f), the employer must provide employment to any qualified, eligible U.S. worker who applies for the job opportunity through the date provided on the employer's notice described at § 655.130(f)(2) or the end of the 30-day period described in paragraph (d)(1) of this section, whichever is longer.

(e) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, state, and local laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H–2A employers may also be subject to the

FLSA. The FLSA operates independently of the H–2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek.

(g) *No recent or future layoffs.* The employer has not laid off and will not lay off any worker in the United States similarly employed in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment except for lawful, job-related reasons within 60 days of the first date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H–2A workers are laid off before any U.S. worker in corresponding employment.

(h) *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, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated under or related to 8 U.S.C. 1188.

(i) *Notify workers of duty to leave United States.* (1) The employer must inform H–2A workers of the requirement that they leave the United States at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under paragraph (i)(2) of this section, unless the H–2A worker is being sponsored by another subsequent H–2A employer.

(2) As defined further in the DHS regulations, a temporary agricultural labor certification limits the validity period of an H–2A Petition, and therefore, the authorized period of stay for an H–2A worker. *See* 8 CFR 214.2(h)(5)(vii). A foreign worker may not remain beyond his or her authorized period of stay, as determined by DHS, nor beyond separation from employment prior to completion of the H–2A contract, absent an extension or change of such worker's status under the DHS regulations. *See* 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification, including payment of the employer's attorney fees, application fees, or recruitment costs. For purposes of this paragraph (j), 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. The provision in this paragraph (j) 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.

(k) *Contracts with third parties comply with prohibitions.* The employer must contractually prohibit in writing any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2A workers to seek or receive payments or other compensation from prospective employees. The contract must include the following statement: ''Under this agreement, [name of foreign labor contractor or recruiter] and any agent or employee of [name of foreign labor contractor 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, attorney fees, agent fees, application fees, or any other fees related to obtaining H–2A labor certification.'' This documentation is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

§ 655.136 Withdrawal of *an Application for Temporary Employment Certification* and job order.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order at any time before the CO makes a determination under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *Application for Temporary Employment Certification* and job order and stating the reason(s) for the withdrawal.

Processing of Applications for Temporary Employment Certification

§ 655.140 Review of applications.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision to issue a NOD under § 655.141, a Notice of Acceptance (NOA) under § 655.143, or a Final Determination under § 655.160.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent electronically or via traditional methods to assure next day delivery using the address, including electronic mail address, provided on the *Application for Temporary Employment Certification.* The employer's response to such a

notice or request must be filed electronically or via traditional methods to assure next day delivery. The employer's response must be sent by the date due or the next business day if the due date falls on a Sunday or Federal holiday.

§ 655.141 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the NOA;

(3) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made not later than 30 calendar days before the first date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* or job order within 5 business days and in a manner specified by the CO; and

(4) State that if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification.*

§ 655.142 Submission of modified applications.

(a) *Submission requirements and certification delays.* If in response to a NOD the employer chooses to submit a modified *Application for Temporary Employment Certification* or job order, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5-business-day period allowed under § 655.141(b) to submit a modified *Application for Temporary Employment Certification* or job order, up to a maximum of 5 calendar days. The CO may issue one or more additional NODs before issuing a Final Determination. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* or job order within 12 calendar days after the NOD was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* or job order does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* are the same as for a non-modified *Application for Temporary Employment Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.143 Notice of acceptance.

(a) *Notification timeline.* When the CO determines the *Application for Temporary Employment Certification* and job order meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of the notice will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice must:

(1) When recruitment of U.S. workers, as specified in §§ 655.151 through 655.154, has not commenced prior to the filing of the *Application for Temporary Employment Certification,* or when recruitment has commenced but not concluded prior to the filing of the *Application for Temporary Employment Certification,* and the CO has determined that the recruitment activities undertaken are compliant with positive recruitment requirements:

(i) Authorize conditional access to the interstate clearance system and direct each SWA receiving a copy of the job order to commence recruitment of U.S. workers as specified in § 655.150;

(ii) Direct the employer to engage in positive recruitment of U.S. workers under §§ 655.151 through 655.154 and to submit a report of its positive recruitment efforts meeting the requirements of § 655.156; and

(iii) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 of this subpart and will terminate on the date specified in § 655.158.

(2) When recruitment of U.S. workers, as specified in §§ 655.151 through 655.154, has commenced prior to the filing of the *Application for Temporary Employment Certification,* but the CO has determined the employer failed to comply with one or more of its positive recruitment obligations:

(i) Direct the employer to engage in corrective positive recruitment of U.S. workers and submit proof of compliant advertising concurrently with a report of its positive recruitment efforts meeting the requirements of § 655.156;

(ii) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated for interstate clearance under § 655.150 and will terminate on the date specified in § 655.158;

(3) State any other documentation or assurances needed for the *Application for Temporary Employment Certification* to meet the requirements for certification under this subpart; and

(4) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need, except as provided for under § 655.142 for modified *Applications for Temporary Employment Certification* or when the *Application for Temporary Employment Certification* does not meet the requirements for certification but is expected to before the first date of need.

§ 655.144 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142.

(b) *Length of posting on electronic job registry.* Unless otherwise provided, the Department will keep the job order posted on the electronic job registry in active status until the end of the recruitment period, as set forth in § 655.135(d).

§ 655.145 Amendments to Applications for Temporary Employment Certification.

(a) *Increases in number of workers.* The *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 *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 the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. All requests for increasing the number of workers must be made in writing.

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment. 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 the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. If the request is for a delay in the first date of need and is made after workers have departed for the employer's place of employment, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

Post-Acceptance Requirements

§ 655.150 Interstate clearance of job order.

(a) *CO approves for interstate clearance.* The CO will promptly transmit a copy of the approved job order for interstate clearance to all states listed in the job order as anticipated place(s) of employment and all other states designated by the OFLC Administrator as states of traditional or expected labor supply for the anticipated place(s) of employment under § 655.154(d).

(b) *Duration of posting.* Each of the SWAs to which the CO transmits the job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

§ 655.151 Advertising in the area of intended employment.

(a) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and is appropriate to the occupation and the workers likely to apply for the job opportunity. Newspaper advertisements must satisfy the requirements set forth in § 655.152.

(b) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

§ 655.152 Advertising content requirements.

All advertising conducted to satisfy the required recruitment activities under §§ 655.151 and 655.154 must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those offered to the H–2A workers. All advertising must contain the following information:

(a) The employer's name, each joint employer's name, or in the event that a master application will be filed by an agricultural association, the agricultural association's name and a statement indicating that the name and location of each member of the agricultural association can be obtained from the SWA of the state in which the advertisement is run;

(b) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the labor or services;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of labor or services to be performed and the anticipated start and end dates of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (*e.g.,* where a master application will be filed by an agricultural association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an agricultural association, a statement indicating that the rate(s) applicable to each employer can be obtained from the SWA of the State in which the advertisement is run;

(e) The three-fourths guarantee specified in § 655.122(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers who cannot reasonably return to their permanent residence at the end of each working day;

(h) A statement that transportation and subsistence expenses to the place of employment will be provided by the employer or paid by the employer upon completion of 50 percent of the work contract, or earlier, if appropriate;

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the state in which the advertisement appeared; and

(k) Contact information for the applicable SWA and, if available, the job order number.

§ 655.153 Contact with former U.S. workers.

The employer must contact, by mail or other effective means, U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and before the date specified in § 655.158. Documentation sufficient to prove contact must be maintained in the event of an audit or investigation. 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 § 655.122(n).

§ 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* The employer

must conduct positive recruitment within a multistate region of traditional or expected labor supply where the OFLC Administrator finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

(b) *Additional requirements should be comparable to non-H–2A employers in the area.* The CO will ensure that the effort, including the location(s) and method(s) of the positive recruitment required of the employer must be no less than the normal recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment, and the kind and degree of recruitment efforts which the employer made to obtain foreign workers.

(c) *Nature of the additional positive recruitment.* The CO will describe the precise nature of the additional positive recruitment, but the employer will not be required to conduct positive recruitment in more than three states for each area of intended employment listed on the employer's *Application for Temporary Employment Certification* and job order.

(d) *Determination of labor supply states.* (1) The OFLC Administrator will make an annual determination with respect to each state whether there are other traditional or expected labor supply states in which there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work in that state. The OFLC Administrator will publish the determination annually on the OFLC's website. The traditional or expected labor supply states designated by the OFLC Administrator will become effective on the date of publication on the OFLC's website for employers who have not commenced positive recruitment under this subpart and will remain valid until the OFLC Administrator publishes a new determination.

(2) The determination as to whether any state is a source of traditional or expected labor supply to another state will be based primarily upon information provided by the SWAs to the OFLC Administrator within 120 calendar days preceding the determination.

§ 655.155 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that they are qualified, able, willing, and available for employment.

§ 655.156 Recruitment report.

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must contain the following information:

(1) Identify the name of each recruitment source and date of advertisement;

(2) State 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;

(3) Confirm that former U.S. employees were contacted and by what means or state there are no former U.S. employees to contact; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report until the end of the recruitment period, as set forth in § 655.135(d). The updated report is not to be submitted to the Department, unless requested by the Department. The updated report mustbe made available in the event of a post-certification audit or upon request by the Department or any other Federal agency.

§ 655.157 Withholding of U.S. workers prohibited.

(a) *Filing a complaint.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the place of employment of H–2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (*e.g.,* dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after conducting the interviews required by paragraph (b) of this section, that the employer's complaint is valid and justified, the CO will immediately suspend the applicable recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

§ 655.158 Duration of positive recruitment.

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150 through 655.154 will terminate on the date H–2A workers depart for the employer's place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

Labor Certification Determinations

§ 655.160 Determinations.

Except as otherwise noted in this section, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.* An *Application for Temporary Employment Certification* that is modified under § 655.142 or that otherwise does not meet the requirements for certification in this subpart is not subject to the 30-day timeframe for certification.

§ 655.161 Criteria for certification.

(a) The criteria for certification include whether the employer has complied with the applicable requirements of parts 653 and 654 of this chapter, and all requirements of this subpart, which are necessary to grant the labor certification.

(b) In making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, whom the employer has not rejected for a lawful, job-related reason.

§ 655.162 Approved certification.

If temporary agricultural labor certification is granted, the CO will send a Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order 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 § 655.130(c), the CO will send the Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order by means normally assuring next day delivery. The CO will send the certified *Application for Temporary Employment Certification* and job order, including any approved modifications, on behalf of the employer, directly to USCIS using an electronic method(s) designated by the OFLC Administrator.

§ 655.163 Certification fee.

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H–2A workers under the *Application for Temporary Employment Certification* (except joint employer agricultural associations, which may not be assessed a fee in addition to the fees assessed to the members of the agricultural association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H–2A worker certified under the *Application for Temporary Employment Certification,* provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification.* The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H–2A employer-members, the aggregate fees for all employers of H–2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 calendar days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

§ 655.164 Denied certification.

If temporary agricultural labor certification is denied, the CO will send a Final Determination notice to the employer and a copy, if appropriate, 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 § 655.130(c), the CO will send the Final Determination notice by means normally assuring next day delivery. 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 an expedited administrative review or a de novo administrative hearing before an ALJ of the denial under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the denial is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of employment or the number of H–2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *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 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 § 655.162. The Final Determination notice will:

(a) State the reason(s) the period of employment and/or the number of H–2A workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the partial certification under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the partial certification is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.166 Requests for determinations based on nonavailability of U.S. workers.

(a) *Standards for requests.* If a temporary agricultural labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the first date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary agricultural labor certification determination from the CO. Prior to making a new determination, the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request under paragraph (c) of this section. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.171.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO in writing using an electronic method(s) designated by the OFLC Administrator, unless the employer requests to file the request by mail as set forth in § 655.130(c). If the employer requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(c) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are able, willing, eligible, and qualified or who are likely to become available, the CO will grant the employer's request for a new determination on the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162 or § 655.165. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts

concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful, job-related reasons.

§ 655.167 Document retention requirements of H–2A employers.

(a) *Entities required to retain documents.* All employers must retain documents and records demonstrating compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all employers.* All employers must retain:

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Advertising as specified in § 655.152, or, if used, professional, trade, or ethnic publications;

(iii) Contact with former U.S. workers as specified in § 655.153; and

(iv) Additional positive recruitment efforts (as specified in § 655.154).

(2) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.156, such as evidence of nonapplicability of contact of former employees as specified in § 655.153.

(3) The final recruitment report and any supporting resumes and contact information as specified in § 655.156(b).

(4) Proof of workers' compensation insurance or state law coverage as specified in § 655.122(e).

(5) Records of each worker's earnings as specified in § 655.122(j).

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.122(q).

(7) If applicable, records of notice to the NPC and DHS of the abandonment of employment or termination for cause of a worker as set forth in § 655.122(n).

(d) *Additional retention requirement for agricultural associations filing an Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) of this section, associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

Post-Certification

§ 655.170 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests 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 notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would last longer than 1 year, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

(c) *Disclosure.* The employer must provide to the workers a copy of any approved extension in accordance with § 655.122(q), as soon as practicable.

§ 655.171 Appeals.

(a) *Request for review.* Where authorized in this subpart, an employer wishing review of a decision of the CO must request an administrative review or de novo hearing before an ALJ of that decision to exhaust its administrative remedies. In such cases, the request for review:

(1) Must be received by the Chief ALJ, and the CO who issued the decision, within 10 business days from the date of the CO's decision;

(2) Must clearly identify the particular decision for which review is sought;

(3) Must include a copy of the CO's decision;

(4) Must clearly state whether the employer is seeking administrative review or a de novo hearing. If the request does not clearly state the employer is seeking a de novo hearing, then the employer waives its right to a hearing, and the case will proceed as a request for administrative review;

(5) 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 decision in question;

(6) May contain any legal argument that the employer believes will rebut the basis of the CO's action, including any briefing the employer wishes to submit where the request is for administrative review;

(7) May contain only such evidence as was actually before the CO at the time of the CO's decision, where the request is for administrative review; and

(8) May contain new evidence for the ALJ's consideration, where the request is for a de novo hearing, provided that the new evidence is introduced at the hearing.

(b) *Appeal file.* After the receipt of the request for review, the CO will send a copy of the OFLC administrative file to the Chief ALJ as soon as practicable by means normally assuring next-day delivery.

(c) *Assignment.* The Chief ALJ will immediately assign an ALJ to consider the particular case, which may be a single member or a three-member panel of the BALCA.

(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 OFLC administrative 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.

(3) *Scope of review.* The ALJ will affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The ALJ will reach this decision after due consideration of the documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence. The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file.

(4) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately 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 OFLC administrative file, whichever is later, using means normally assuring next-day delivery.

(e) *De novo hearing*—(1) *Conduct of hearing.* Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 14 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence during the hearing as appropriate;

(iii) The ALJ may authorize discovery and the filing of pre-hearing motions, and so limit them to the types and quantities which in the ALJ's discretion will contribute to a fair hearing without unduly burdening the parties;

(iv) The ALJ's decision must be rendered within 10 calendar days after the hearing; and

(v) If the employer waives the right to a hearing, such as by asking for a decision on the record, or if the ALJ determines there are no disputed material facts to warrant a hearing, then the standard and scope of review for administrative review applies.

(2) *Standard and scope of review.* The ALJ will review the evidence presented during the hearing and the CO's decision de novo. The ALJ may determine that there is no genuine issue covering some or all material facts and limit the hearing to any issues of material fact as to which there is a genuine dispute. If new evidence is submitted with a request for a de novo hearing, and the ALJ subsequently determines that a hearing is warranted, the new evidence provided with the request must be introduced at the hearing to be considered by the ALJ. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action.

(3) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, and counsel for the CO by means normally assuring next-day delivery.

§ 655.172 Post-certification withdrawals.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order after the CO grants certification under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the certification and stating the reason(s) for the withdrawal.

§ 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* An employer may only charge workers up to a maximum amount per day for providing them with three meals. The maximum charge allowed by this paragraph (a) will begin at $12.26 per day and will be updated annually by the same percentage as the 12-month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective not later than 14 calendar days following the date of their publication by the OFLC Administrator of a document in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Petitions for higher meal charges.* The employer may file a petition with the CO to request approval to charge more than the applicable amount set under paragraph (a) of this section, up to $14.94, until a new maximum higher meal charge is set. The maximum higher meal charge allowed by this paragraph (b) will be changed annually following the same methodology and procedure as paragraph (a).

(1) *Filing higher meal charge request.* To request approval to charge up to the maximum higher meal charge, the employer must submit the documentation required by either paragraph (b)(1)(i) or (ii) of this section. A higher meal charge request will be denied, in whole or in part, if the employer's documentation does not justify the higher meal charge requested, if the amount requested exceeds the current maximum higher meal charge permitted, or both.

(i) *Meals prepared directly by the employer.* Documentation submitted must include only the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served, and the number of days meals were provided. The cost of the following items may be included in the employer's charge to workers for providing prepared meals: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection for a period of 3 years.

(ii) *Meals provided through a third party.* Documentation submitted must identify each third party that the employer will engage to prepare meals, describe how the employer will fulfill its obligation to provide three meals per day to workers through its agreement with the third party, and document the third party's charge(s) to the employer for the meals to be provided. Neither the third party's charge(s) to the employer nor the employer's meal charge to workers may include a profit, kick back, or other direct or indirect benefit to the employer, a person affiliated with the employer, or to another person for the employer's benefit. Receipts and other cost records documenting payments made to the third party that prepared the meals and meal charge deductions from employee pay must be retained for the period provided in § 655.167(b) and must be available for inspection by the CO and WHD during an investigation.

(2) *Effective date and scope of validity of a higher meal charge approval.* The employer may begin charging the higher rate upon receipt of approval from the CO, unless the CO sets a later effective date in the decision, and after disclosing to workers any change in the meal charge or deduction. A favorable decision from the CO is valid only for the meal provision arrangement documented under paragraph (b)(1) of this section and the approved higher meal charge amount. If the approved meal provision arrangement changes, the employer may charge no more than the maximum permitted under paragraph (a) of this section until a new petition for a higher meal charge based on the new arrangement is approved.

(3) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial.

Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

§ 655.174 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.175 Post-certification amendments.

(a) *Scope of post-certification amendments.* A certified *Application for Temporary Employment Certification* and job order may be amended to make minor changes to the certified place(s) of employment, provided the employer has good and substantial cause for the amendment requested, the circumstance(s) underlying the request for amendment could not have been reasonably foreseen before certification and is wholly outside the employer's control, the material terms and conditions of the job order are not affected, and the amendment requested is within the certified area(s) of intended employment.

(b) *Employer requirements.* The employer must submit to the NPC a written request to amend the certified place(s) of employment. The written request must:

(1) Specify each place of employment the employer requests to add to or remove from the certified *Application for Temporary Employment Certification* and job order, the expected beginning and ending dates of work at each place of employment, and, if applicable, the name of each fixed-site agricultural business;

(2) Describe the good and substantial cause justifying the need for the requested amendment, as that term is defined in § 655.134, and explain how the circumstance could not have been reasonably foreseen before certification and is wholly outside the employer's control;

(3) Assure the amendment requested will not change the material terms and conditions of the job order;

(4) Assure the employer will provide to the workers a copy of the amendment as soon as practicable after receiving notice that the requested amendment is approved by the CO, consistent with § 655.122(q); and

(5) Assure the employer will retain and make available all documentation substantiating the requested amendment, where approved by the CO and required by § 655.167, in the event of a post-certification audit or upon request by the Department.

(c) *Processing and effective date of amendments.* The CO will expeditiously, but in no case later than 3 business days after the date the request is received, decide whether to grant the requested amendment and provide notification of the decision to the employer. In considering whether to approve the request, the CO will determine whether the requested amendment is sufficiently justified, whether the employer has provided assurances that it will satisfy all program requirements and obligations to workers, and how the amendment will affect the underlying labor market test for the job opportunity. Requests that do not satisfy all requirements will not be approved. Changes will not be effective until approved by the CO. Upon approval of an amendment, the CO will submit to the SWA any necessary changes to the job order.

Integrity Measures

§ 655.180 Audit.

The CO may conduct audits of applications for which certifications have been granted.

(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 agent or attorney. 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 fully comply with the audit process may result in the revocation of the certification or program debarment.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/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, WHD, or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 655.181 Revocation.

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a temporary agricultural labor certification approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation—*(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's temporary agricultural labor certification, the OFLC Administrator will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 14 calendar days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the

employer of its right to appeal according to the procedures of § 655.171. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of § 655.171. The ALJ's decision is the final agency action.

(4) *Stay.* The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) *Decision.* If the temporary agricultural labor certification is revoked, the OFLC Administrator will send a copy of the final agency action to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under this subpart.

§ 655.182 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501 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 temporary agricultural labor certification, with respect to H–2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, 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) *Statute of limitations and period of debarment.* (1) The OFLC Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A workers and/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 one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180;

(vii) Employing an H–2A worker outside the area of intended employment, in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of § 655.135(j) or (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) The H–2ALC's failure to submit an original surety bond meeting the requirements of § 655.132(c) within 30 days of the date the temporary agricultural labor certification was issued or failure to submit additional surety within 30 days of a finding under 20 CFR 501.9(a) that the face value of the bond is insufficient;

(4) Fraud involving the *Application for Temporary Employment Certification;* or

(5) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so 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) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(2) The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188; or

(7) 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, or attorney, the OFLC Administrator will send the party a Notice of Debarment. The Notice will state the reason 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 or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 30-day period.

(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

should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of paragraph (f)(3) of this section. The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency action and the debarment will take effect at the end of the 30-calendar-day period.

(3) *Hearing.* The recipient of a Notice of Debarment may request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the OFLC Administrator after review of rebuttal evidence submitted pursuant to paragraph (f)(2) of this section. To obtain a debarment hearing, the debarred party must, within 30 calendar days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street NW, Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 calendar days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately to the parties to the debarment hearing by means normally assuring next day delivery. 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 will be deemed 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 hearing record to the ARB.

(iii) Where the ARB has determined to review such 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 such 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. If the ARB fails to provide a decision within 90 calendar days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and WHD may inform one another and may coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS promptly.

(h) *Debarment involving members of agricultural associations.* If the OFLC Administrator determines that an individual employer-member of an agricultural association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the agricultural association or another agricultural association member participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) as well.

(i) *Debarment involving agricultural associations acting as joint employers.* If the OFLC Administrator determines that an agricultural association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving agricultural associations acting as sole employers.* If the OFLC Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

§ 655.183 Less than substantial violations.

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred but has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary agricultural labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or

attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H–2A certification determination will be reduced by 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in a written temporary agricultural labor certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

§ 655.184 Applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification,* the CO may refer the matter to DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If WHD, a court, or DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarrable violation under § 655.182.

§ 655.185 Job service complaint system; enforcement of work contracts.

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve work contracts must be referred by the SWA to WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if the Immigrant and Employee Rights Section becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations

§ 655.200 Scope and purpose of herding and range livestock regulations in §§ 655.200 through 655.235.

(a) *Purpose.* The purpose of §§ 655.200 through 655.235 is to establish certain procedures for employers who apply to the Department to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201. Unless otherwise specified in §§ 655.200 through 655.235, employers whose job opportunities meet the qualifying criteria under §§ 655.200 through 655.235 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to §§ 655.200 through 655.235.* The procedures in §§ 655.200 through 655.235 apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under § 655.201;

(2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and

(3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

§ 655.201 Definition of herding and range livestock terms.

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving the herding or production of livestock on the range.

Herding. Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the range.

Livestock. An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of §§ 655.200 through 655.235, livestock refers to those species raised on the range.

Production of livestock. The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock. This term also includes duties performed off the range that are closely and directly related to herding and/or the production of livestock. The following are non-exclusive examples of ranch work that is closely and directly related: Repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the workers use on the range to assist with herding or

guarding the flock; feeding and caring for the horses that the workers use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. The following are examples of ranch work that is not closely and directly related: Working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range.

Range. The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: It involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling, and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Range housing. Range housing is housing located on the range that meets the standards articulated under § 655.235.

§ 655.205 Herding and range livestock job orders.

An employer whose job opportunity has been determined to qualify for the procedures in §§ 655.200 through 655.235 is not required to comply with the job order filing timeframe requirements in § 655.121(a) and (b) or the job order review process in § 655.121(e) and (f). Rather, the employer must submit the job order along with a completed *Application for Temporary Employment Certification,* as required in § 655.215, to the designated NPC for the NPC's review.

§ 655.210 Contents of herding and range livestock job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* The job offer must include a statement that the workers are on call for up to 24 hours per day, 7 days per week and that the workers spend the majority (meaning more than 50 percent) of the workdays during the contract period in the herding or production of livestock on the range. Duties may include activities performed off the range only if such duties constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). All such duties must be specifically disclosed on the job order. The job offer may also specify that applicants must possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers engaged in herding or the production of livestock on the range. Any such requirements must be applied equally to both U.S. and foreign workers. Each job qualification and requirement listed in the job offer must be bona fide, and the CO may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) *Range housing.* The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in § 655.235.

(d) *Employer-provided items.* (1) The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the worker during the entire period of employment; and

(ii) If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being. This contact must include either arrangements for the workers to be located, on a regular basis, in geographic areas where the electronic communication devices operate effectively, or arrangements for regular, pre-scheduled, in-person visits between the workers and the employer, which may include visits between the workers and other persons designated by the employer to resupply the workers' camp.

(e) *Meals.* The employer must specify in the job offer and provide to the worker, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his or her own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).

(f) *Hours and earnings statements.* (1) The employer must keep accurate and adequate records with respect to the worker's earnings and furnish to the worker on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed, but all other regulatory requirements in § 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating whether the site of the employee's work was on the range or off the range. If the employer prorates a worker's wage pursuant to paragraph (g)(2) of this section because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

(g) *Rates of pay.* The employer must pay the worker at least the monthly AEWR, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if a worker is voluntarily unavailable to work for personal reasons.

(h) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly. Employers must pay wages when due.

§ 655.211 Herding and range livestock wage rate.

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment, and pay each worker employed under §§ 655.200 through 655.235 a wage that is the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or state law or judicial action.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than both the agreed-upon collective bargaining wage and the applicable minimum wage imposed by Federal or state law or judicial action in effect at the time the work is performed, the employer must pay that adjusted monthly AEWR not later than 14 calendar days following the date of publication by the Department in the **Federal Register**.

(b) *Publication of the monthly AEWR.* The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to the monthly AEWR as a notice in the **Federal Register**.

(c) *Monthly AEWR rate.* (1) The monthly AEWR shall be $7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month; and

(2) Beginning for calendar year 2017, the monthly AEWR shall be adjusted annually based on the ECI for wages and salaries published by BLS for the preceding October—October period.

(d) *Transition rates.* (1) For the period from November 16, 2015 through calendar year 2016, the Department shall set the monthly AEWR at 80 percent of the result of the formula in paragraph (c) of this section.

(2) For calendar year 2017, the Department shall set the monthly AEWR at 90 percent of the result of the formula in paragraph (c) of this section.

(3) For calendar year 2018 and beyond, the Department shall set the monthly AEWR at 100 percent of the result of the formula in paragraph (c) of this section.

§ 655.215 Procedures for filing herding and range livestock Applications for Temporary Employment Certification.

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification* and job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment and one or more contiguous states.

(2) The period of need identified on the *Application for Temporary Employment Certification* and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days. The period of need identified on the *Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.

(3) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous states with different first dates of need. Unless modifications to a sheep or goat herding or production of livestock job order are required by the CO or requested by the employer, pursuant to § 655.121(h), the agricultural association is not required to re-submit the job order during the calendar year with its *Application for Temporary Employment Certification.*

§ 655.220 Processing herding and range livestock Applications for Temporary Employment Certification.

(a) *NPC review.* Unless otherwise specified in §§ 655.200 through 655.235, the CO will review and process the *Application for Temporary Employment Certification* and job order in accordance with the requirements outlined in §§ 655.140 through 655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with §§ 655.140 through 655.141.

(b) *Notice of acceptance.* Once the job order is determined to meet all regulatory requirements, the NPC will issue a NOA consistent with § 655.143(b), provide notice to the employer authorizing conditional access to the interstate clearance system, and transmit an electronic copy of the approved job order to each SWA with jurisdiction over the anticipated place(s) of employment. The CO will direct the SWA to place the job order promptly in clearance and commence recruitment of U.S. workers. Where an agricultural association files as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit a copy of the job order to the SWA having jurisdiction over the location of the agricultural association, those SWAs having jurisdiction over other States where the work will take place, and to the SWAs in all States designated under § 655.154(d), directing each SWA to place the job order in intrastate clearance and commence recruitment of U.S. workers.

(c) *Electronic job registry.* Under § 655.144(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, the Department will keep the job order posted on the OFLC electronic job registry until the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all

employer-members identified on the job order.

§ 655.225 Post-acceptance requirements for herding and range livestock.

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. workers by the employer and SWA must be satisfied, as specified in §§ 655.150 through 655.158.

(b) Pursuant to § 655.150(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, each of the SWAs to which the job order was transmitted by the CO or the SWA having jurisdiction over the location of the agricultural association must keep the job order on its active file the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order, and must refer to the agricultural association each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to him or her absent a request for a different location by the U.S. worker. Employers must make reasonable efforts to accommodate such placement requests by the U.S. worker.

(d) The employer will not be required to place an advertisement in a newspaper of general circulation serving the area of intended employment, as required in § 655.151.

(e) An agricultural association that fulfills the recruitment requirements for its members is required to maintain a written recruitment report containing the information required by § 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

§ 655.230 Range housing.

(a) Housing for work performed on the range must meet the minimum standards contained in §§ 655.235 and 655.122(d)(2).

(b) The SWA with jurisdiction over the location of the range housing must inspect and certify that such housing used on the range is sufficient to accommodate the number of certified workers and meets all applicable standards contained in § 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards, the CO may deny the H–2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in § 655.235 only when the employer has received a certification from the SWA for the range housing it seeks to use within the past 36 months.

(2) To self-certify the range housing, the employer must submit a copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of workers being requested for temporary agricultural labor certification, and meets all the applicable standards for range housing contained in § 655.235.

(d) The use of range housing at a location other than the range, where fixed-site employer-provided housing would otherwise be required, is permissible only when the worker occupying the housing is performing work that constitutes the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). In such a situation, workers must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in § 655.122(d)(1)(i). When such work does not constitute the production of livestock, workers must be housed in housing that meets all the requirements of § 655.122(d).

§ 655.235 Standards for range housing.

An employer employing workers under §§ 655.200 through 655.235 may use a mobile unit, camper, or other similar mobile housing vehicle, tents, and remotely located stationary structures along herding trails, which meet the following standards:

(a) *Housing site.* Range housing sites must be well drained and free from depressions where water may stagnate.

(b) *Water supply.* (1) An adequate and convenient supply of water that meets the standards of the state or local health authority must be provided.

(2) The employer must provide each worker at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the workers will have at least this amount available for their use until this supply is next replenished. Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker. This additional water may be non-potable, and an employer may require a worker to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. If an employer relies on alternate water sources to meet any of the workers' needs, it must take precautionary measures to protect the worker's health where these sources are also used to water the herd, dogs, or horses, to prevent contamination of the sources if they collect runoff from areas where these animals excrete.

(3) The water provided for use by the workers may not be used to water dogs, horses, or the herd.

(4) In situations where workers are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to workers, provided the following conditions are satisfied:

(i) It seeks the variance at the time it submits its *Application for Temporary Employment Certification;*

(ii) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the worker is at that location;

(iii) It attests that it shall provide each worker an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and

(iv) The CO approves the variance.

(5) Individual drinking cups must be provided.

(6) Containers appropriate for storing and using potable water must be provided and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing.

(c) *Excreta and liquid waste disposal.* (1) Facilities, including shovels, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the state health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not

filled in completely after each use. The maintenance of disposal pits must be in accordance with state and local health and sanitation requirements.

(d) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window that can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial housing.

(e) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) *Lighting.* (1) In areas where it is not feasible to provide electrical service to range housing units, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

(2) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit, including tents.

(g) *Bathing, laundry, and hand washing.* Bathing, laundry, and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) *Food storage.* When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

(i) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation; and

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(j) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, including tents, for storing garbage and other refuse; and

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary, except where the terrain in which the housing is located cannot be accessed by motor vehicle and the refuse cannot be buried, in which case the employer must provide appropriate receptacles for storing the refuse and for removing the trash when the employer next transports supplies to the location.

(k) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents and other vermin.

(l) *Sleeping facilities.* A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement, unless a variance is requested from and granted by the CO. When filing an application for certification and only where it is demonstrated to the CO that it is impractical to provide a comfortable and clean bed, cot, or bunk, with a clean mattress, for each range worker, the employer may request a variance from this requirement to allow for a second worker to join the range operation. Such a variance must be used infrequently, and the period of the variance will be temporary (*i.e.,* the variance shall be for no more than 3 consecutive days). Should the CO grant the variance, the employer must supply a sleeping bag or bed roll for the second occupant free of charge or deposit charge.

(m) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable state or local fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Housing units for range use must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used.

(5) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the range housing.

Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

§ 655.300 Scope and purpose.

(a) *Purpose.* The purpose of §§ 655.300 through 655.304 is to establish certain procedures for employers who apply to the Department of Labor to obtain labor certifications to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, custom combining, and reforestation, as defined in this subpart. Unless otherwise specified in §§ 655.300 through 655.304, employers whose job opportunities meet the qualifying criteria under §§ 655.300 through 655.304 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to §§ 655.*300 *through 655.*304. The procedures in §§ 655.300 through 655.304 apply to job opportunities for animal shearing, commercial beekeeping, custom combining, and reforestation as defined under §§ 655.103 and 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment in one or more contiguous states.

§ 655.301 Definition of terms.

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving animal shearing, commercial beekeeping, and custom combining.

Animal shearing. Activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece, including gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position, whether loose, tied, or otherwise immobilized, prior to shearing; selecting and using suitable handheld or power-driven equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts on animals due to shearing; cleaning and washing animals after shearing is complete; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Transporting equipment and other tools used for shearing qualifies as an activity associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. Wool or fleece grading, which involve examining, sorting, and placing unprocessed wool or fleece into containers according to government or industry standards, qualify as activities associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew.

Commercial beekeeping. Activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, including assembling, maintaining, and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

Custom combining. Activities associated with combining crops for agricultural producers, including operating self-propelled combine equipment (*i.e.,* equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to cutters, blowers and conveyers; performing safety checks on harvesting equipment; and maintaining and repairing equipment and other tools used for performing swathing or combining work. Transporting harvested crops to elevators, silos, or other storage areas, and transporting combine equipment and other tools used for custom combining work from one field to another, qualify as activities associated with custom combining for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the custom combining crew and who travel and work with the custom combining crew. Component parts of custom combining not performed by the harvesting entity (*e.g.,* grain cleaning), are not eligible for the variance granted by this provision. The planting and cultivation of crops, and other related activities, are not considered custom combining or activities associated with custom combining for the purposes of this definition.

§ 655.302 Contents of job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* (1) For job opportunities involving animal shearing, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at the place the employer is located, and must be available to complete the scheduled itinerary under the job order. U.S. applicants whose experience is based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the employer's preferred shearing method or pattern.

(2) For job opportunities involving commercial beekeeping, the job offer may specify that applicants must possess up to 3 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants may not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

(3) For job opportunities involving custom combining, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must be willing to join the employer at the time and place the employer is located and must be available to complete the scheduled itinerary under the job order.

(4) An employer may specify other appropriate job qualifications and requirements for its job opportunity, subject to § 655.122(a) and (b).

(c) *Employer-provided communication devices.* For job opportunities involving animal shearing and custom combining, the employer must provide to the worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit charge to the worker during the entire period of employment.

(d) *Housing.* For job opportunities involving animal shearing and custom combining, the employer must specify

in the job order that housing will be provided as set forth in § 655.304.

§ 655.303 Procedures for filing Applications for Temporary Employment Certification.

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.300 through 655.304 the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification.* The employer must identify each place of employment with as much geographic specificity as possible, including the names of each farmer/rancher, the names, physical locations and estimated period of employment where work will be performed under the job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous states. An *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous state at the beginning and end of the period of employment for the overwintering of bee colonies.

(2) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous states. An agricultural association filing as a joint employer may file an *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous state at the beginning and end of the period of employment for the overwintering of bee colonies.

§ 655.304 Standards for mobile housing.

(a) *Use of mobile housing.* An employer employing workers engaged in animal shearing or custom combining, as defined by § 655.301, may use a mobile unit, camper, or other similar mobile housing unit that complies with all of the following standards, except as provided in paragraph (a)(1) or (2) of this section:

(1) When the mobile housing unit is located on the range as defined in § 655.201 to enable work to be performed on the range, the mobile housing is subject only to the standards for range housing in § 655.235. As soon as the mobile housing unit is moved to a location off of the range, the mobile housing standards in this section apply. An employer whose mobile housing unit is or will be located on the range must have the housing unit inspected and approved by an a SWA with jurisdiction over the location of the mobile unit when not in use, at least once every 36 months, subject to the procedures for range housing inspection and self-certification in § 655.230(b) and (c).

(2) A Canadian employer performing custom combining operations in the United States whose mobile housing unit is located in Canada when not in use must have the housing unit inspected and approved by an authorized representative of the federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

(b) *Compliance with mobile housing standards.* The employer may comply with the standards for mobile housing in this section in one of two ways:

(1) The employer may provide a mobile housing unit that complies with all applicable standards; or

(2) The employer may provide a mobile housing unit and supplemental facilities (*e.g.,* located at a fixed housing site) if workers are afforded access to all facilities contained in these standards.

(c) *Housing site.* (1) Mobile housing sites must be well drained and free from depressions where water may stagnate. They shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create, a nuisance or a hazard to health.

(2) Mobile housing sites shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(3) Mobile housing sites shall be free from debris, noxious plants (*e.g.,* poison ivy, etc.), and uncontrolled weeds or brush.

(d) *Drinking water supply.* (1) An adequate and convenient supply of potable water that meets the standards of the local or state health authority must be provided.

(2) Individual drinking cups must be provided.

(3) A cold water tap shall be available within a reasonable distance of each individual living unit when water is not provided in the unit.

(4) Adequate drainage facilities shall be provided for overflow and spillage.

(e) *Excreta and liquid waste disposal.* (1) Toilet facilities, such as portable toilets, RV or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, state, or Federal health authority, whichever is most stringent.

(2) Where mobile housing units contain RV or trailer toilets, such facilities must be connected to sewage hookups whenever feasible (*i.e.,* in campgrounds or RV parks).

(3) If wastewater tanks are used, the employer must make provisions to regularly empty the wastewater tanks.

(4) If pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with local and state health and sanitation requirements.

(f) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition, and must provide shelter against the elements to occupants.

(2) Housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering.

(3) Each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.

(g) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(h) *Electricity and lighting.* (1) Barring unusual circumstances that prevent access, electrical service or generators must be provided.

(2) In areas where it is not feasible to provide electrical service to mobile housing units, lanterns must be provided (*e.g.,* battery operated lights).

(3) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit.

(i) *Bathing, laundry, and hand washing.* (1) Bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day.

(2) Laundry facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per week.

(3) Alternative bathing and laundry facilities must be available to occupants at all times when water under pressure is unavailable.

(4) Hand washing facilities must be available to all occupants at all times.

(j) *Food storage.* (1) Provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.

(2) When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage (*e.g.,* a butane or propane gas refrigerator).

(k) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates.

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(l) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, for storing garbage and other refuse.

(2) Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal in accordance with applicable local, state, or Federal law, whichever is most stringent.

(m) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.

(n) *Sleeping facilities.* (1) A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.

(2) Clean and sanitary bedding must be provided for each person.

(3) No more than two deck bunks are permissible.

(o) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable local or state fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.

(p) *Maximum occupancy.* The number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit.

Title 29—Labor

■ 5. Revise part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

Subpart A—General Provisions

Sec.

Subpart B—Enforcement

Subpart C—Administrative Proceedings

Procedures Relating to Hearing

Rules of Practice

Referral for Hearing

Procedures Before Administrative Law Judge

Post-Hearing Procedures

Review of Administrative Law Judge's Decision

Record

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

Subpart A—General Provisions

§ 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B, applicable to the employment of H–2A workers and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, subpart B.

§ 501.1 Purpose and scope.

(a) *Statutory standards.* 8 U.S.C. 1188 provides that:

(1) A petition to import an H–2A worker, as defined at 8 U.S.C. 1188, may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary agricultural labor certification from the Secretary of Labor (Secretary). The

temporary agricultural labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and

(ii) The employment of the H–2A worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(b) *Authority and role of the Office of Foreign Labor Certification.* 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 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(c) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

(e) *Effect of regulations.* The enforcement functions carried out by WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part apply to the employment of any H–2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* processed under 20 CFR 655.102(c).

§ 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the worker will be immediately forwarded to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2A program, other Departments or agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 501.3 Definitions.

(a) *Definitions of terms used in this part.* The following defined terms apply to this part: *Act.* The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge. A person within the Department's Office of Administrative Law Judges (OALJ) appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of *OFLC Administrator* and *WHD Administrator* in this section.

Adverse effect wage rate. The wage rate published by the OFLC Administrator in the **Federal Register** for the occupational classification and State based on either the U.S. Department of Agriculture's Farm Labor Survey or the Bureau of Labor Statistics' Occupational Employment Statistics survey, as set forth in 20 CFR 655.120(b).

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9124A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment. The geographic area within normal commuting distance of the place(s) of employment for which the temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place(s) of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a

multi-State MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. 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 (DC). Such a person is also permitted to act as an agent under this part. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer. The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the National CO. Other COs may be designated by the OFLC Administrator to also make the determination required under 20 CFR part 655, subpart B.

Chief Administrative Law Judge. The chief official of the Department's OALJ or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security. The Federal department having jurisdiction over certain immigration-related functions, acting through its component agencies, including U.S. Citizenship and Immigration Services (USCIS).

Employee. 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.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) A person on whose behalf an *Application of Temporary Employment Certification* is filed.

Employment and Training Administration. The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations from the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer anticipates requiring the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor. Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

H–2A worker. Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

H–2 A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the SWA on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the National Processing Center.

Joint employment. (i) 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.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under 20 CFR 655.131(b) are, at all times, joint employers of all H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Metropolitan Statistical Area. A geographic entity defined by OMB for

use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center. The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification. OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OLFC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Secretary of Labor. The chief official of the Department, or the Secretary's designee.

State Workforce Agency. State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.,* to administer the state's public labor exchange activities.

Successor in interest. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, 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, agent, or attorney 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, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) 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 agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, 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 an H–2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and 20 CFR part 655, subpart B.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services. The Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary or seasonal agricultural labor or services in the United States.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

Wage and Hour Division. The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part.

WHD Administrator. The primary official of the WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. 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 work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) *Definition of agricultural labor or services.* For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: Agricultural labor as defined and applied in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (b)(1) through (6) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (b) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock,

bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in section 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in section 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780, is agricultural labor or services for purposes of paragraph (b) of this section.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites, is agricultural labor or services for purposes of paragraph (b) of this section.

(5) *Reforestation activities.* Reforestation activities are predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools; and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. Reforestation activities may include some forest fire prevention or suppression duties, such as constructing fire breaks or performing prescribed burning tasks, when such duties are in connection with and incidental to other reforestation activities. Reforestation activities do not include vegetation management activities in and around utility, highway, railroad, or other rights-of-way.

(6) *Pine straw activities.* Operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations, is agricultural labor or services for purposes of paragraph (b) of this section.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

§ 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(5) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by WHD. Where WHD has determined through investigation that such allegations have been substantiated,

appropriate remedies may be sought. WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the worker whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current temporary agricultural labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by WHD to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 501.5 Waiver of rights prohibited.

A person may not seek to have an H–2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Any agreement by a worker purporting to waive or modify any rights given to said person under these provisions shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 501.6 Investigation authority of the Secretary.

(a) *General.* The Secretary, through WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person, and gather any information as may be appropriate.

(b) *Confidential investigation.* WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.7 Cooperation with Federal officials.

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and this part during the performance of such duties. WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation, and/or assessing a civil money penalty therefor. In addition, WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing temporary agricultural labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

§ 501.8 Accuracy of information, statements, and data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1188 or this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.9 Enforcement of surety bond.

Every H–2A labor contractor (H–2ALC) must obtain a surety bond demonstrating its ability to discharge financial obligations as set forth in 20 CFR 655.132(c).

(a) Notwithstanding the required bond amounts set forth in 20 CFR 655.132(c), the WHD Administrator may require that an H–2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(b) Upon a final decision reached pursuant to the administrative proceedings of subpart C of this part, including any timely appeal, or resulting from an enforcement action brought directly in a District Court of the United States finding a violation or violations of 20 CFR part 655, subpart B, or this part, the WHD Administrator may make a written demand on the surety for payment of any wages and benefits, including the assessment of interest, owed to an H–2A worker, a worker engaged in corresponding employment, or a U.S. worker improperly rejected or improperly laid off or displaced. The WHD Administrator shall have 3 years from the expiration of the certification, including any extension thereof, to make such written demand for payment on the surety. This 3-year period for making a demand on the surety is tolled by commencement of any enforcement action of the WHD Administrator pursuant to § 501.6, § 501.15, or § 501.16 or the commencement of any enforcement action in a District Court of the United States.

Subpart B—Enforcement

§ 501.15 Enforcement.

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, as provided in this part for enforcement by WHD, pertain to the employment of any H–2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

§ 501.16 Sanctions and remedies—general.

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including, but not limited to, the following:

(a)(1) Institute appropriate administrative proceedings, including: The recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (*see* 20 CFR 655.135(k)); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, or improperly laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the

employer, agent, or attorney, or from its successor in interest, as appropriate. In the case of an H–2ALC, the remedies will be sought from the H–2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to the H–2ALC, as required by 20 CFR part 655, subpart B, and § 501.9.

(b) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, by any person.

(c) Petition any appropriate District Court of the United States for an order directing specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in 20 CFR part 655, subpart B, and § 501.1(b) . WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c). The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. OFLC and WHD have concurrent jurisdiction to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

§ 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and this part.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that the WHD Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(2) The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188; and

(7) 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).

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part will not exceed $1,692 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or for each act of discrimination prohibited by § 501.4 shall not exceed $5,695.

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker shall not exceed $56,391 per worker.

(3) For purposes of paragraphs (c)(2) and (4) this section, the term serious injury includes, but is not limited to:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand, or other body part.

(4) A civil money penalty for a repeat or willful violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker, shall not exceed $112,780 per worker.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,695 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker employed in work or activities that are encompassed by the approved *Application for Temporary Employment Certification* for H–2A workers in the area of intended employment either within 60 calendar days preceding the first date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed $16,917 per violation per worker.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, shall not exceed $16,917 per violation per worker.

§ 501.20 Debarment and revocation.

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The WHD Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney, or their successors in interest, may be debarred under this part for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A workers and/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 one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or this part, or an audit under 20 CFR part 655, subpart B;

(vii) Employing an H–2A worker outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);

(ix) A violation of any of the provisions listed in § 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered.

(e) *Procedural requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a timeframe under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 30 calendar days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

(f) *Debarment involving members of agricultural associations.* If, after investigation, the WHD Administrator determines that an individual employer-member of an agricultural association has committed a substantial violation, the debarment determination will apply only to that member unless the WHD Administrator determines that the agricultural association or another agricultural association member participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) as well.

(g) *Debarment involving agricultural associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

(h) *Debarment involving agricultural associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the WHD Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(i) *Revocation.* WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary agricultural labor certification;

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

§ 501.21 Failure to cooperate with investigations.

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H–2A worker, a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H–2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer, agent, or attorney from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the WHD Administrator, an ALJ, or the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 calendar days of the date of the final order. The person assessed such penalty shall remit the amount ordered to the WHD Administrator by certified check or money order, made payable to ''Wage and Hour Division, United States Department of Labor.'' The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules in this subpart.

The procedures and rules contained in this subpart prescribe the administrative process that will be applied with respect to a determination to assess civil money penalties, debar, or increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or to the collection of monetary

relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in a District Court of the United States without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, debar, increase a surety bond, or proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the amount of any civil money penalty assessment; whether debarment is sought and if so its term; and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

Rules of Practice

§ 501.34 General.

(a) Except as specifically provided in this part, the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1188 and the regulations in this part shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and the regulations in this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of_____, Respondent.

(b) For the purposes of such administrative proceedings, the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under 29 CFR part 18 or this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 calendar days from the date on which the Order of Reference was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, and one copy on the attorney

representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 calendar days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 calendar days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, WHD, or any other party wishing review, including judicial 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. If the ARB does not issue a notice accepting a petition for review of the decision within 30 calendar days after receipt of a timely filing of the petition, or within 30 calendar days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions must be made (*e.g.,* briefs or oral argument); and

(c) The time within which such presentation must be submitted.

§ 501.45 Final decision of the Administrative Review Board.

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.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part shall be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a District Court of the United States, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify, and file with the appropriate District Court of the United States, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Molly E. Conway,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2019–15307 Filed 7–19–19; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Part 63
Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2019–0282; FRL–9996–00–OAR]

RIN 2060–AM75

Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing amendments to the General Provisions to the National Emission Standards for Hazardous Air Pollutants (NESHAP). The proposed amendments implement the plain language reading of the ''major source'' and ''area source'' definitions of section 112 of the Clean Air Act (CAA) and provide that a major source can reclassify to area source status at any time by limiting its potential to emit (PTE) hazardous air pollutants (HAP) to below the major source thresholds of 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP. The EPA is proposing that PTE HAP limits must meet the proposed effectiveness criteria of being legally and practicably enforceable. The proposal also clarifies the requirements that apply to sources choosing to reclassify to area source status after the first substantive compliance date of an applicable NESHAP standard. The EPA is proposing electronic notification when a source reclassifies. We are also proposing to revise provisions in specific NESHAP standards that specify the applicability of General Provisions requirements to account for the regulatory provisions we are proposing to add through this rule.

DATES:

Comments. Comments must be received on or before September 24, 2019.

Public hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing, will be published in a second **Federal Register** document and posted at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean*. See **SUPPLEMENTARY INFORMATION** for information on registering and attending a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2019–0282, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov*. Include Docket ID No. EPA–HQ–OAR–2019–0282 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2019–0282.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2019–0282, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Elineth Torres, Sector Policies and Programs Division (D205–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–4347; fax number: (919) 541–4991; and email address: *torres.elineth@epa.gov*.

SUPPLEMENTARY INFORMATION:

Public hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing will be published in a second **Federal Register** document.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2019–0282. All documents in the docket are listed in *Regulations.gov*. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2019–0282. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov/* or email. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in

the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA's Docket Center homepage at *https://www.epa.gov/dockets*.

The EPA is expressly soliciting comment on numerous aspects of the proposed rule. The EPA has indexed each comment solicitation with an alpha-numeric identifier (*e.g.,* ''C–1,'' ''C–2,'' ''C–3'') to provide a consistent framework for effective and efficient provision of comments. Accordingly, the EPA asks that commenters include the corresponding identifier when providing comments relevant to that comment solicitation. The EPA asks that commenters include the identifier in either a heading, or within the text of each comment (*e.g.,* ''In response to solicitation of comment C–1, . . .'') to make clear which comment solicitation is being addressed. The EPA emphasizes that the Agency is not limiting comment to these identified areas and encourages submission of any other comments relevant to this proposal.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2019–0282.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA Clean Air Act
CAM compliance assurance monitoring
CBI Confidential Business Information
CEDRI Compliance and Emissions Data Reporting Interface
CEMS continuous emission monitoring system
CFR Code of Federal Regulations
EAV equivalent annualized value
EIA economic impact analysis
EPA Environmental Protection Agency
FESOP federally enforceable state operating permit
FIP Federal Implementation Plan
HAP hazardous air pollutant(s)
MACT maximum achievable control technology
MM2A Major MACT to Area
MRR monitoring, recordkeeping, and reporting
NESHAP national emission standards for hazardous air pollutants
NMA National Mining Association
NSPS new source performance standards
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act
OIAI Once In, Always In
OMB Office of Management and Budget
P2 pollution prevention
PRA Paperwork Reduction Act
PSD prevention of significant deterioration
PTE potential to emit
PV present value
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RTR risk and technology review
SBA Small Business Administration
SIP State Implementation Plan
TIP Tribal Implementation Plan
tpy tons per year
UMRA Unfunded Mandates Reform Act
VOC volatile organic compound(s)

Organization of this document. The information in this preamble is organized as follows:

I. Executive Summary

A. Purpose of the Regulatory Action

On January 25, 2018, the EPA issued a guidance memorandum titled ''Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act'' (Major Maximum Achievable Control Technology (MACT) to Area, or MM2A) memorandum. The memorandum discusses the statutory provisions that govern when a major source subject to a major source standard under section 112 of the CAA may be reclassified as an area source, and thereby avoid being subject to major source requirements. The proposed amendments to the General Provisions of the NESHAP regulations in 40 CFR part 63, subpart A implement the plain language reading of the ''major source'' and ''area source'' definitions of section 112 of the CAA and provide that a major

source can reclassify to area source status at any time by limiting its potential to emit HAP to below the major source thresholds of 10 tpy of any single HAP or 25 tpy of any combination of HAP. The proposal also clarifies the requirements that apply to sources choosing to reclassify to area source status after the first substantive compliance date of an applicable NESHAP standard (also ''CAA section 112 requirements'' or ''requirements'').

Further, we propose to amend the definition of ''potential to emit'' in the General Provisions of the NESHAP regulations to address a Court decision remanding the definition to the EPA. Under the current definition in 40 CFR 63.2, any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. In 1995, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *National Mining Association (NMA)* v. *EPA,* 59 F.3d 1351 (D.C. Cir. 1995), in which it remanded the definition of ''potential to emit'' found in 40 CFR 63.2. In the NMA decision, the Court stated that the Agency had not adequately explained how ''federal enforceability'' furthered effectiveness. 59 F.3d at 1363–1365. In this action, the EPA is proposing specific criteria that HAP PTE limits must meet for these limits to be effective in ensuring that a source would not emit above the PTE limits. The EPA is proposing to amend the definition of ''potential to emit'' in 40 CFR 63.2, accordingly, by removing the requirement for federally enforceable PTE limits and requiring instead that HAP PTE limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable.

To ensure the EPA and the public is aware of the universe of sources that reclassify from major source to area source status, we propose to amend the current notification requirements in 40 CFR 63.9(b) and (j)(9) to require the notifications to be submitted electronically. This proposal also responds to questions received after the issuance of the MM2A memorandum and requests comment on issues relevant to implementation of the plain language reading of the statute. In addition, this proposal revises the General Provisions applicability tables in specific NESHAP standards to reflect the proposed changes to the General Provisions requirements. This proposal is intended to provide clarity and certainty to stakeholders and the public regarding the reclassification process.

B. Summary of the Major Provisions of the Regulatory Action

The EPA is proposing to amend the applicability section found in 40 CFR 63.1 by adding a new paragraph (c)(6). This paragraph will specify that a major source can become an area source at any time by limiting its HAP PTE to below the major source thresholds established in 40 CFR 63.2. The EPA is also proposing to amend the definition of ''potential to emit'' in 40 CFR 63.2 to remove the requirement that limits on emissions be federally enforceable and instead require that any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is legally and practicably enforceable (*i.e.,* ''effective''). The EPA is also proposing to include in 40 CFR 63.2 the definitions of legally and practicably enforceable. By proposing this amendment, the EPA is allowing for the use of non-federally enforceable limits *(e.g.,* state only enforceable limits) to be recognized as effective in limiting a source's potential to emit for purposes of CAA section 112 applicability provided those limits are legally and practicably enforceable.

To address the issue of compliance time frames for sources that reclassify from major source status to area source status after the first substantive compliance date of an applicable major source NESHAP standard, we are proposing regulatory text in the new provision at 40 CFR 63.1(c)(6)(i) under which major sources that reclassify to area source status become subject to applicable area source requirements in 40 CFR part 63 immediately upon becoming an area source in those situations where the first substantive compliance date of the area source requirements has passed. For sources that reclassify from major to area source status and then revert back to their previous major source status, the EPA is proposing to add a new provision in 40 CFR 63.1(c)(6)(ii)(A) to specify that upon reverting back to major source status, a source must meet the major source NESHAP requirements at the time that those requirements again become applicable to the source. The EPA is proposing to add a new provision at 40 CFR 63.1(c)(6)(iii) to address the interaction of the reclassification of sources with enforcement actions arising from violations that occurred while the source was a major source subject to major source requirements. Specifically, we are proposing that status reclassification from major source to area source does not affect a source's liability or any enforcement investigations or enforcement actions for a source's past violations of major source requirements that occurred prior to the source's reclassification.

The EPA is proposing to amend the notification requirements in 40 CFR 63.9(b) so that an owner or operator of a facility that reclassifies must notify the Administrator of any standards to which it becomes subject. With this amendment, the notification requirements of 40 CFR 63.9 will cover both situations where a source switches from major to area source status, and where a source switches from major, to area, and back to major source status. The EPA is also proposing to clarify that a source that reclassifies must notify the EPA of any changes in the applicability of the standards that the source was subject to per the notification requirements of 40 CFR 63.9(j). The EPA is also proposing to amend the notification requirements in 40 CFR 63.9(b) and (j) to require the notification be submitted electronically through the Compliance and Emissions Data Reporting Interface (CEDRI). The EPA is also proposing to amend the General Provisions to add 40 CFR 63.9(k) to include the CEDRI submission procedures. The EPA is also proposing to remove the time limit for record retention in 40 CFR 63.10(b)(3) so sources that obtain new legally and practicably enforceable PTE limits are required to keep the required records until the source becomes subject to major source NESHAP requirements. The EPA is also proposing to amend 40 CFR 63.12(c) to clarify that a source may not be exempted from electronic reporting requirements.

The EPA is proposing to amend the General Provisions applicability tables contained within most subparts of 40 CFR part 63 to add a reference to a new proposed paragraph 63.1(c)(6) discussed above. The EPA has identified one general category of regulatory provisions in several NESHAP subparts that include a date by which a major source can become an area source. Accordingly, in this action we are proposing to revise these provisions by removing such date limitations. The provisions we are proposing to revise

are: 40 CFR part 63, subpart QQQ at 63.1441; 40 CFR part 63, subpart QQQQQ at 63.9485; 40 CFR part 63, subpart RRRRR at 63.9581; and Table 2 of 40 CFR part 63, subpart WWWW. We are also proposing to revise several area source NESHAP subparts that include a specific date for an existing source to submit the initial notification because the date specified in the regulations has passed. The provisions we are proposing to revise are: 40 CFR part 63, subpart HHHHHH at 63.11175; 40 CFR part 63, subpart XXXXXX at 63.11519; 40 CFR part 63, subpart AAAAAAA at 63.11564; 40 CFR part 63, subpart BBBBBBB at 63.11585; and 40 CFR part 63, subpart CCCCCCC at 63.11603. We request comments on whether there are other NESHAP subparts that contain the same type of general provisions of those discussed above that will need to be revised (Comment C–1).[1]

C. Costs and Benefits

The EPA projects that this proposed action may result in substantial cost savings based on illustrative estimates of its reduced administrative burden. Other changes in costs, such as from changes in control device operation and maintenance in response to this proposed action, are not estimated due to lack of information. To assess potential changes in emissions, we analyzed the reclassification of 34 sources and also performed an illustrative analysis of six source categories in detail; however, due to limited information on how emissions changes could take place across the broad array of HAP emissions sources, we are unable to provide precise estimates of changes in emissions for all source categories that could be impacted by this action. Due to the uncertainties in determining precise emission impacts, we are providing a qualitative assessment of benefits that may result from this proposed action. The illustrative cost saving impacts of this proposed regulation are estimated for all sources that could potentially reclassify from major source status to area source status under section 112 of the CAA for the 2 years after promulgation of this action. The impacts presented in the preamble reflect those estimated from the illustrative cost saving analysis of the primary scenario, which for analytical purposes is defined as only those facilities whose actual emissions are below 75 percent of the major source thresholds (7.5 tpy for a single HAP and 18.75 tpy for all HAP) that could potentially reclassify from major to area source status, a scenario that is further described in section VI of this preamble and the Regulatory Impact Analysis (RIA) that is available in the docket for this action. The RIA also presents two other alternative scenarios to provide a range of estimated cost savings.[2] All impacts are estimated compared to a baseline in which all promulgated regulations to limit HAP emissions under section 112 of the CAA are in place and includes implementation of the 1995 Once In, Always In (OIAI) policy. Results are presented as the present value (PV) and equivalent annualized value (EAV) of the cost savings of the proposed action in 2016 dollars. The PV is the one-time value of a stream of impacts over time, discounted to the current (or nearly current) day. The EAV is a measure of the annual cost that is calculated consistent with the PV. The cost savings of the proposed action in 2014 dollars are also presented later in this preamble and in the RIA.

A summary of key results from the proposed action presented as shown in the RIA can be found in Table 1. This table presents the PV and EAV, estimated in 2016 dollars using discount rates of 7 and 3 percent, and discounted to 2016, of the cost savings of the proposed action. Yearly estimates are presented for the second year after promulgation and subsequent years.

TABLE 1—ANNUAL COST SAVINGS COMPARED TO THE BASELINE, FOR YEAR 2

[Including following years]
[Billions 2016$]*

	Present value	7% Equivalent annualized value	Present value	3% Equivalent annualized value
Benefits (Cost Savings)	$2.39	$0.17	$6.24	$0.19

*The analytic timeline begins in 2020 and continues thereafter for an indefinite period. Year 1 impacts are those for 1 year after 2020, and Year 2 impacts are those for the second year after 2022 and annually afterwards. Impacts for year 2 are representative of impacts in subsequent years. Impacts are for the primary scenario analyzed for the proposal.

To assess the potential for emission changes from the reclassification of major sources as area sources, the EPA evaluated the sources that the EPA knows have reclassified to area source status consistent with the EPA's plain language reading of the CAA section 112 definitions of ''major'' and ''area'' source, since January 2018. The EPA reviewed permits associated to the reclassification of 34 sources. The EPA also performed an illustrative analysis of changes in emissions for six source categories covered by the proposed rule. In addition, the EPA also performed an illustrative analysis of control cost estimates under one alternative scenario for five source categories covered by the proposed rule. The assessment of the reclassifications and illustrative analyses are summarized in section VI of this preamble and presented in details in the Emission Impacts Analysis Technical Support Memorandum (TSM), the illustrative 125% Scenario Cost Considerations Memorandum and the RIA for the proposal that are available in the docket for this action.

II. General Information

A. Does this proposed action apply to me?

Categories and entities potentially impacted by this proposal include sources subject to NESHAP requirements under section 112 of the CAA.

The proposed amendments, if promulgated, will be applicable to

[1] The EPA notes that the regulatory provisions cited and discussed in this paragraph continue to be in effect. These provisions will remain in effect until such time as they are revised or removed by final agency action.

[2] Alternative scenario 1 assumes that only those facilities whose actual emissions are below 50 percent of the major source thresholds (5 tpy for a single HAP and 12.5 tpy for all HAP) would reclassify from major to area source status. Alternative scenario 2 assumes that sources below 125 percent of the major source thresholds (12.5 tpy for a single HAP and 31.25 tpy for all HAP) would reclassify from major to area source status. Discussion of these scenarios and results can be found in the RIA for this proposal.

sources that reclassify from major source to area source status under section 112 of the CAA and sources that revert from their reclassified status as an area source resulting from this action to their previous major source status.

Federal, state, local, and tribal governments may be affected by this action if they own or operate sources that choose to request reclassification from major source status to area source status or if they choose to subsequently revert to their major source status at some time in the future after such reclassification. The EPA is the permitting authority for issuing, rescinding, and amending permits for sources that request reclassification in Indian country, with four exceptions.[3] State, local, or tribal regulatory authorities[4] may receive requests to issue new permits or make changes to existing permits for sources in their jurisdiction to address reclassification related activities (*e.g.,* title V, synthetic minor permits, establishing limits on a source's PTE).

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean*. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key documents at this same website.

A redline version of the regulatory language that incorporates the proposed changes in this action is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2019–0282).

C. What should I consider as I prepare my comments for the EPA?

In 2007, the EPA issued a proposed rule to amend the General Provisions to the NESHAP. *See* 72 FR 69 (January 3, 2007). This new proposal supersedes and replaces the 2007 proposed rule. The EPA will not be responding to comments received on the 2007 proposal. While some aspects of this new proposal are similar to some aspects of the 2007 proposal, some aspects also differ from the 2007 proposal. To the extent that your comments on this new proposal are similar to or the same as comments submitted in 2007, you can restate those comments in the document that you prepare and submit on this proposal. Please do not resubmit 2007 comment documents or attach 2007 comment documents in what you submit on this proposal.

The EPA is expressly soliciting comment on numerous aspects of the proposed rule. The EPA has indexed each comment solicitation with an alpha-numeric identifier (*e.g.,* ''C–1,'' ''C–2,'' ''C–3'') to provide a consistent framework for effective and efficient provision of comments. Accordingly, the EPA asks that commenters include the corresponding identifier when providing comments relevant to that comment solicitation. The EPA asks that commenters include the identifier in either a heading, or within the text of each comment (*e.g.,* ''In response to solicitation of comment C–1, . . .'') to make clear which comment solicitation is being addressed. The EPA emphasizes that the Agency is not limiting comment to these identified areas and encourages the submission of any other comments relevant to this proposal.

III. Basis for the Proposed Action

A. Prior Agency Actions

Shortly after the EPA began implementing individual NESHAP standards resulting from the 1990 CAA Amendments, the Agency received multiple requests to clarify when a major source of HAP could avoid CAA section 112 requirements applicable to major sources by taking enforceable limits on its PTE below the major source thresholds. In response, the EPA issued, on May 16, 1995, a memorandum from John Seitz, Director of the Office of Air Quality Planning and Standards, to the EPA Regional Air Division Directors (the 1995 Seitz Memorandum).[5] The 1995 Seitz Memorandum provided guidance on three timing issues related to avoidance of CAA section 112 requirements for major sources:

- ''By what date must a facility limit its PTE if it wishes to avoid major source requirements of a MACT standard?''
- ''Is a facility that is required to comply with a MACT standard permanently subject to that standard?''
- ''In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?''

In the 1995 Seitz Memorandum, the EPA stated its interpretation of the relevant statutory language that facilities that are major sources of HAP may switch to area source status at any time until the ''first compliance date'' of the standard.[6] Under this interpretation, facilities that are major sources on the first substantive compliance date of an applicable major source NESHAP were required to comply permanently with that major source standard even if the source was subsequently to become an area source by limiting its PTE. This position was commonly referred to as the ''Once In, Always In'' (OIAI) policy. The expressed basis for this OIAI policy was that this would help ensure that required reductions in HAP emissions were maintained over time. *See* 1995 Seitz Memorandum at 9 (''A once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.''). Finally, the 1995 Seitz Memorandum provided that a source that is major for one MACT standard would not be considered major for a subsequent MACT standard if the source's potential to emit HAP emissions was reduced to below major source levels by complying with the first major source MACT standard. In the 1995 Seitz Memorandum, the EPA set forth transitional policy guidance that was intended to remain in effect only until the Agency proposed and promulgated amendments to the 40 CFR part 63 General Provisions.

[3] Two tribes have approved title V programs or delegation of 40 CFR part 71. The tribes may have sources that request to no longer be covered by title V. Neither of these two tribes have approved minor source permitting programs but may in the future. In the meantime, the tribes will need to coordinate with the EPA, who is the permitting authority in Indian country for these requests. In addition, two other tribes have approved Tribal Implementation Plans (TIPs) authorizing the issuance of minor source permits. Only one of these tribes has a major source that would be eligible to request reclassification. If that source requests a new permit, the tribe may issue the minor source permit, but the EPA would need to be made aware of the request as the EPA is the permitting authority for title V.

[4] The term regulatory authority is intended to be inclusive of the permitting authority or other governmental agency with authority to process reclassification requests and issuance of legally and practicably enforceable HAP PTE limits.

[5] *See* ''Potential to Emit for MACT Standards-Guidance on Timing Issues.'' From John Seitz, Director, Office of Air Quality Planning and Standards, to the EPA Regional Air Division Directors. May 16, 1995, *https://www.epa.gov/sites/production/files/2018-02/documents/pteguid.pdf*.

[6] The ''first substantive compliance date'' is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement (*i.e.,* leak detection and repair programs, work practice measures, etc. . . , but not a notice requirement) in the applicable standard.

After issuing the 1995 Seitz Memorandum, the EPA twice proposed regulatory amendments that would have altered the OIAI policy. In 2003, the EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention (P2) activities. Apart from certain provisions associated with the EPA's National Environmental Performance Track Program, a national voluntary program designed to recognize and encourage top environmental performers whose program participants go beyond compliance with regulatory requirements to attain levels of environmental performance that benefit people, communities, and the environment, that proposal was never finalized. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004). In 2007, the EPA issued a proposed rule to replace the OIAI policy set forth in the May 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, the EPA reviewed the provisions in CAA section 112 relevant to the OIAI policy interpretation, applicable regulatory language, stakeholder concerns, and potential implications. *Id.* at 71–74. Based on that review, the EPA proposed an interpretation of the relevant statutory language that a major source that is subject to a major source NESHAP would no longer be subject to that major source standard if the source were to become an area source through enforceable limitations on its PTE for each HAP. *Id.* at 72–73. Under the 2007 proposal, major sources could take such limits on their PTE and obtain ''area source'' status at any time and would not be limited to doing so only before the ''first substantive compliance date,'' as the OIAI policy provided.[7] *Id.* at 70. The EPA did not take final action on this 2007 proposal. This proposal supersedes and replaces the 2007 proposed rule.

Many commenters supporting the 2007 proposal expressed the view that, by imposing an artificial time limit on major sources obtaining area source status, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions further. Stakeholders commented to the EPA that the definitions in CAA section 112(a)(2) contain a single factor for distinguishing between major source and area source—the amount of HAP the source ''emits'' or ''has the potential to emit.'' Commenters further stated that the temporal limitation imposed by the OIAI policy was inconsistent with the CAA and created an arbitrary date by which sources must determine whether their HAP PTE will exceed either of the major source thresholds. These issues were re-emphasized in recent comments received per Executive Order 13777, Enforcing the Regulatory Reform Agenda (February 24, 2017), and the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017).

On January 25, 2018, the EPA issued a guidance memorandum from William L. Wehrum, Assistant Administrator of the Office of Air and Radiation, to the EPA Regional Air Division Directors titled ''Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act'' (MM2A Memorandum).[8] The MM2A Memorandum discussed the statutory provisions that govern when a major source subject to major source NESHAP requirements under section 112 of the CAA may be reclassified as an area source, and thereby avoid being subject thereafter to major source NESHAP requirements and other requirements applicable to major sources under CAA section 112. In the MM2A Memorandum, the EPA discussed the plain language of CAA section 112(a) regarding Congress's definitions of ''major source'' and ''area source,'' and determined that the OIAI policy articulated in the 1995 Seitz Memorandum is contrary to the plain language of the CAA and, therefore, must be withdrawn. In the MM2A Memorandum, the EPA announced the future publication of a proposed rule to receive input from the public on adding regulatory text consistent with the plain reading of the statute as described in the MM2A Memorandum.

In this action, the EPA is proposing regulatory text to implement the plain language reading of the statute as discussed in the MM2A Memorandum, and this proposal supersedes and replaces the 2007 proposal. *See* 72 FR 69 (January 3, 2007). This proposal also addresses questions received after the issuance of the MM2A Memorandum. In the comments on the 2007 proposal, many stakeholders asserted that the implementation of this plain reading and withdrawal of the OIAI policy will incentivize stationary sources that have reduced HAP emissions to below major source thresholds to reclassify to area source status by taking enforceable PTE limits and reduce their compliance burden. These stakeholders also stated that sources with emissions above major source thresholds after complying with CAA section 112 major source requirements could be encouraged to evaluate their operations and consider additional changes that can further reduce their HAP emissions to below the major source thresholds. Overall, many stakeholders believed the implementation of the plain language reading of the statute will encourage sources to pursue pollution abatement efforts, including innovation in pollution reduction technologies, engineering, and work practices. Other stakeholders raised the concern that allowing sources to reclassify could potentially result in emission increases from sources that have reduced their actual emissions to below the major source thresholds because they have had to comply with major source NESHAP requirements.

We solicit comment on all aspects of this proposal, including the EPA's position that the withdrawal of the OIAI policy and the proposed approach gives proper effect to the statutory definitions of ''major source'' and ''area source'' in CAA section 112(a) and is consistent with the plain language and structure of the CAA as well as the impacts of the proposal on costs, benefits, and emissions impacts (Comment C–2).

B. Statutory Authority

CAA section 112 distinguishes between major and area sources of HAP emissions. Major sources are larger sources of air emissions than area sources and, generally, different requirements apply to major sources and area sources. For some HAP source categories, the EPA has promulgated requirements for only major sources, and HAP emissions from area sources in that source category are not regulated under the NESHAP program.

Whether a source is a ''major source'' or an ''area source'' depends on the amount of HAP emitted by the source based on its actual or potential emissions. Congress defined ''major source'' to mean a source that emits or has the potential to emit at or above either of the statutory thresholds of 10 tpy of any one HAP or 25 tpy of total HAP. CAA section 112(a)(1). An ''area source'' is defined as any source of HAP that is not a major source. CAA section 112(a)(2). If a source does not emit or does not have the potential to emit at or above either of the major source thresholds, then it is an ''area source.'' The statutory definitions of ''major

[7] As provided in the 2007 proposal, ''[p]rior to the effective date of the permit [that limits the emissions of HAP], the source must comply with the relevant major source MACT standard(s) and other conditions in its title V permit.'' *See* 72 *FR* 76.

[8] See notice of issuance of this guidance memorandum at 83 *FR* 5543 (February 8, 2018).

source'' and ''area source'' do not contain any language that fixes a source's status as a major source or area source at any particular point in time, nor do they otherwise contain any language suggesting that there is a cut-off date after which a source's status cannot change.

Congress did, however, create a distinction based on timing in CAA section 112 in defining and creating provisions related to ''new sources'' and ''existing sources.'' Specifically, Congress defined ''new source'' to mean a source that is constructed or reconstructed after the EPA first proposes regulations covering the source. CAA section 112(a)(4). An ''existing source'' is defined as any source other than a new source. CAA section 112(a)(10). A source will be subject to different requirements depending on whether it is a new source or an existing source. *See, e.g.,* CAA section 112(d)(3) (identifying different minimum levels of stringency (known as ''MACT floors'') for new and existing sources).

The emissions-based distinction (arising from the definitions of major source and area source) and the timing-based distinction (arising from the definitions of new source and existing source) are independent, and neither is tied to the other. For example, the statutory definition of ''major source'' does not provide that major source status is determined based on a source's emissions or PTE as of the date that the EPA first proposes regulations applicable to that source or any other point in time. As noted above, the plain language of the ''major source'' and ''area source'' definitions create a distinction that is based solely on amount of emissions and PTE, and not timing. Similarly, with respect to the timing-based distinction, a source is a ''new source'' or an ''existing source'' based entirely on the timing of its construction or reconstruction and without consideration of its actual emissions or PTE. The contrast between the temporal distinction in the contrasting definitions of existing and new sources on the one hand, and the absence of any temporal dimension to the contrasting definitions of major and area sources on the other, is further evidence that Congress did not intend to place a temporal limitation on a source's ability to be classified as an area source (including a source's ability to be classified as an area source through the permitting authority's ''considering controls'' that may have been imposed after the source was initially classified as major).

Notwithstanding the independence of the two distinctions that the statute created based on amount of emissions and timing (and without addressing that independence or otherwise addressing the plain language of the statutory definitions of ''major source'' and ''area source''), the EPA issued the May 1995 Seitz Memorandum, which set forth the OIAI policy. Under the OIAI policy, a source's status as a major source for the purpose of applying a specific major source MACT standard issued under the requirements of CAA section 112 is unalterably fixed on the first substantive compliance date of the specific applicable major source requirements. Thus, a source that was a major source on that first compliance date would continue to be subject to the major source requirements for that specific NESHAP even if the source reduced its PTE to below the statutory thresholds in the definition of ''major source,'' and, thus, fell within the definition of ''area source.''

On January 25, 2018, the EPA issued a guidance memorandum titled ''Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,'' signed by William L. Wehrum, Assistant Administrator of EPA's Office of Air and Radiation (MM2A Memorandum). The MM2A Memorandum discussed the statutory definitions of ''major source'' and ''area source'' and explained that the OIAI policy articulated in the May 1995 Seitz Memorandum was contrary to the plain language of the CAA, and, therefore, must be withdrawn.

As discussed above, Congress expressly defined the terms ''major source'' and ''area source'' in CAA section 112(a) in unambiguous language. Nonetheless, under the OIAI policy, a source that reduced its PTE to below the statutory thresholds for major source status after the relevant compliance date would nevertheless continue to be subject to the requirements applicable to major sources. This policy was applied notwithstanding that the statutory definitions of ''major source'' and ''area source'' lack any reference to the compliance date of major source requirements or any other text that indicates a time limit for changing between major source status and area source status. In short, Congress placed no temporal limitations on the determination of whether a source emits or has the potential to emit HAP in sufficient quantity to be a major source under CAA section 112. Because, the OIAI policy imposed such a temporal limitation (before the ''first compliance date''), the EPA had no authority for the OIAI policy under the plain language of the CAA. Under the plain language of the statute, a major source that takes enforceable limits on its PTE to bring its HAP emissions below the CAA section 112 major source thresholds, no matter when it may choose to do so, becomes an area source under the plain language of the statute. We are proposing to make clear in this rulemaking that such a source, now having area source status, will not be subject to the CAA section 112 requirements applicable to the source as a major source under CAA section 112—so long as the source's actual and PTE HAP remains below the CAA section 112 thresholds—and will instead be subject to any applicable area source requirements.

A discussion of the statutory definitions of ''new source'' and ''existing source'' in CAA section 112(a)(4) and (a)(10) further demonstrates that the OIAI policy was inconsistent with the language of the statute. As discussed above, the major source/area source distinction and the new source/existing source distinction are two separate and independent features of the statute. Significantly, the statutory definitions of ''new source'' and ''existing source'' dictate that the new source/existing source distinction is determined by when a source commences construction or reconstruction and say nothing about the source's volume of emissions. No one can reasonably suggest that this silence concerning volume of emissions indicates that Congress intended to give the EPA the discretion to conclude that sources should be classified as new or existing based, in part, on how much they emit. For example, if the EPA were to say that a source is only a new source if it both (1) commences construction after regulations are first proposed (as stated in CAA section 112(a)(4)), and (2) emits more than 20 tpy of any single HAP (which is not stated anywhere in the statute), that second element would be contrary to the plain language of the statute. Similarly, the OIAI policy of considering timing matters as part of the major source/area source distinction is contrary to the plain language of the statute, because it interjects timing matters into the major/area distinction when Congress provided that such distinction would be based only on the source's actual and potential emissions.

Some interested parties assert that the EPA's plain language reading of the definitions of ''major source'' and ''area source'' is contradicted by CAA section 112(i)(3)(A). Specifically, they contend that the first phrase in CAA section 112(i)(3)(A) precludes a major source from reclassifying to area source status

after the source has become subject to a major source standard, and that this statutory text compels the OIAI policy. The EPA disagrees with this contention and is taking comment on the following analysis. The first phrase in CAA section 112(i)(3)(A) states: ''After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation. . . .'' The EPA reads this phrase to have the same meaning as similar ''effective date'' provisions in the CAA, such as CAA section 111(e), notwithstanding that CAA section 112(i)(3)(A) has somewhat different phrasing. In short, this text simply provides that, after the effective date of a CAA section 112 rule, sources to which a standard is applicable must comply with that standard. This text is not reasonably read to say that, once a standard is applicable to a source, that standard continues to be applicable to the source for all time, even if the source's potential to emit changes such that it no longer meets the applicability criteria for the standard. Such a reading would produce some odd results. For example, if the first phrase in CAA section 112(i)(3)(A) were read to say that a source's applicable requirements are determined at the point in time that a source first becomes subject to CAA section 112 requirements, then a source that was initially an area source would continue to be subject to area source requirements even if that source increased its potential to emit above either of the major source thresholds. The EPA's reading is that an area source that actually emits or increases its PTE above either of the major source thresholds is subject to major source requirements. In sum, we are proposing to determine that the CAA section 112 definitions of ''major source'' and ''area source'' and the ''effective date'' provision in CAA section 112(i)(3)(A) are properly read together to say that sources must comply with the applicable requirements corresponding to their major source or area source status, and that if this status changes, then the source becomes subject to the requirements corresponding to its current status.

Nothing in the structure of the CAA counsels against the plain language reading of the statute to allow major sources to become area sources after an applicable compliance date in a regulation, in the same way that they have long been able to become area sources before the applicable compliance date. Congress defined major sources and area sources differently and established different provisions applicable for each. The OIAI policy, by contrast, created an artificial time limit that does not exist on the face of the statute by including a temporal limitation on when a major source could become an area source by limiting its PTE HAP.

Some interested parties have pointed to various provisions in CAA section 112 in addition to CAA section 112(i)(3)(A) as demonstrating that the EPA's plain language reading is contrary to the purposes and structure of CAA section 112. The EPA disagrees that these provisions are contrary to or inconsistent with EPA's plain language reading, for the following reasons.

First, some interested parties have pointed to CAA sections 112(c)(3) and (c)(6) as reflecting a Congressional intent for sources to be subject to continuous, permanent compliance with major-source standards and, thus, these provisions are inconsistent with the EPA's plain language reading. But there is no real inconsistency here. Those provisions required the EPA to ensure that sources accounting for 90 percent of the emissions of specific pollutants were listed and regulated by November 2000. The premise of the argument based on CAA sections 112(c)(3) and (c)(6) is that these provisions do not simply require the EPA to list and regulate sufficient source categories to meet the 90 percent requirement at a given point in time; rather, they require that the EPA's regulations ensure that 90 percent of emissions are subject to regulation on an ongoing basis. This is not a reasonable reading of what is required by CAA sections 112(c)(3) and (c)(6), as demonstrated by the inherent implications of the regulation called for in these provision and simple math. Once the sources in the categories that represent 90 percent of the emissions addressed in these provisions become subject to standards, those sources' emissions will decrease and those categories will no longer represent 90 percent of all emissions of the pollutants in question. As a hypothetical example, if the total emissions of one of the pollutants addressed in CAA sections 112(c)(3) and (c)(6) were 100 tpy, and if the source categories emitting 90 tpy were subjected to a standard that called for a 50 percent reduction in emissions, then those source categories would now only be emitting 45 tpy, which would be about 82 percent of the new total emissions of 55 tpy. Under the interested parties' reading of CAA sections 112(c)(3) and (c)(6), the EPA would then be required to add source categories to get back to 90 percent and set standards to reduce the emissions of those sources. This would, once again, reduce the regulated sources to below 90 percent. In short, this reading of CAA sections 112(c)(3) and (c)(6) would create a never-ending cycle of listing and regulation in order to achieve an unattainable goal of ensuring the 90 percent of emissions are regulated. This is not a reasonable reading of what CAA sections 112(c)(3) and (c)(6) require. Further, one would expect the number of sources in a source category to change over time due to shifts in the economy. For example, one source category regulated under CAA section 112 is magnetic tape manufacturing operations. *See* subpart EE, 40 CFR 63.701–63.708. Since this source category was first regulated in 1994 (*see* 59 FR 64596, December 15, 1994), the use of digital recording and data storage has largely replaced the use of magnetic tape, and, thus, the number of sources in this source category has declined. As the number of sources in a source category declined, the total emissions from the source category would decline, which creates another reason why the total group of source categories that at one point represented 90 percent of emissions would fall to less than 90 percent. Thus, again, a reading that the 90 percent requirement is an ongoing requirement that must be continuously met is not a reasonable reading, because it is not reasonable to think, and there is nothing in the statute to suggest, that Congress intended the 90 percent requirement to impose on the EPA the need to endlessly revisit its 90 percent determination as the implementation of MACT standards under CAA section 112 achieved reductions in emissions. For these reasons, there is no conflict between the EPA's plain language reading of CAA sections 112(a)(1)–(2) and the requirements of CAA sections 112(c)(3) and (c)(6).

Second, opponents of the EPA's plain language reading also point to CAA section 112(f)(2) (commonly referred to as the residual risk provision) and CAA section 112(d)(6) (commonly referred to as the technology review provision). These parties suggest that these provisions demonstrate Congress's ''legislative plan'' that sources will continually reduce their emissions, and that the EPA's plain language reading will allow sources to become area sources and, in so doing, undermine this ''legislative plan.'' This argument, however, fails to recognize that Congress in CAA section 112 also plainly distinguished between major sources emitting above the 10/25

threshold and area sources emitting below the 10/25 threshold and subjected them to different requirements. Perhaps the clearest example of the differential treatment of major sources and area sources is the provision in CAA section 112(d)(5) allowing the EPA to set GACT standards rather than MACT standards for area sources. In short, any consideration of Congress' ''legislative plan'' has to look at the entire plan, including the plain language that Congress used to define major sources and area sources.

Third, some parties have pointed to the requirements of CAA section 112(d) as requiring that sources that are at any point subjected to major source standards must continue to be subject to major source standards permanently and argued that EPA's plain language reading undermines the protections provided by these CAA 112 standards. Section 112(d)—and in particular, section 112(d)(2) and (d)(3) of the CAA—addresses how the EPA sets MACT standards for major sources (based on the maximum degree of emissions reduction the EPA determines is achievable, which may be a complete prohibition on emissions). As an initial point, sections 112(d)(2) and (d)(3) are not the only provisions that govern major source standards, and in some cases, they are not the controlling provisions. For example, CAA section 112(h) provides that the EPA, in certain circumstances, can set standards that are different from the MACT floor-based standards created under CAA sections 112(d)(2) and (d)(3). More fundamentally, the question of what standard is applicable to major sources in a source category—whether MACT floor standards or otherwise—logically cannot control the proper reading of the statutory text identifying the pool of sources to which major source requirements apply. In short, once again, these contextual arguments are misplaced. Congress has spoken by defining ''major source'' without any temporal limitation. The EPA's plain language reading honors that unambiguous choice.

Parties opposed to the EPA's plain language reading also suggest that the EPA's reading is inconsistent with the purpose and provisions of CAA section 112 because it will lead major sources that reclassify to area source status to increase their emissions above what they could emit if they continued to be major sources. The EPA disagrees that a sources' reclassification from major source to area source will necessarily lead to an increase in emissions for the source, for the following reasons.

First, as the EPA noted in the MM2A memorandum (at 4) and as discussed above in section III.A of this preamble, some stakeholders have stated that some sources with emissions above the major source thresholds will reduce their emissions below what is required by the applicable major sources standards and to below the major source thresholds in order to be able to reclassify as area sources. As discussed in more detail in section VI of this preamble and in the EPA's Emissions Impacts Analysis TSM, the EPA has identified three sources that have reclassified, and as a result will decrease their emissions. *See* Emission Impacts Analysis TSM Table 2: (1) City of Columbia—Municipal Power Plant (Facility #27 on Table 2); (2) Holland Board of Public Works—James DeYoung Generating Station and Wastewater Treatment Plant (Facility #28 on Table 2); and (3) MidAmerican Energy Company—Riverside Generating Station (Facility #29 on Table 2).

Second, the EPA's analysis of the 34 sources that have reclassified or are in the process of reclassifying since January 2018 based on the EPA's plain language reading shows that none of them will increase their emissions as a result of reclassification. *See* section VI of this preamble and the EPA's Emissions Impact Analysis TSM at Table 2, available in the docket.

Nonetheless, the EPA recognizes (as discussed below in section IV at Table 3) that there are possible scenarios in which major sources might increase emissions after they reclassify to area source status. However, the EPA does not view such potential emission increase scenarios as a basis for disregarding the plain language of Congress's ''major source'' and ''area source'' definitions and the lack of any temporal restriction on sources' opportunity to reclassify. Instead, the EPA views such scenarios as a matter that needs to be evaluated and addressed in determining how the agency should implement the plain language of the statute. Thus, the EPA is seeking comment on (1) to what extent will theoretical emission increase scenarios actually occur, including (a) what emissions restrictions will be put in place as part of the PTE HAP limits that a major source takes to be reclassified as an area source and (b) whether other regulatory controls are in place and applicable to sources after reclassification that will either continue to restrict the source from emitting above the major source standard or prevent an emissions increase after reclassification; and (2) whether the EPA should adopt regulatory text to establish safeguards to prevent emissions increases following reclassification (Comment C–3).

With respect to the second issue (whether the EPA should adopt regulatory text to establish safeguards to prevent emissions increases), the EPA is seeking comment on what legal basis the agency would have for requiring such safeguards (Comment C–4). In addition to seeking comment on this question generally, we are seeking comment on several specific points.

First, the EPA is seeking comment on the following rationale for separating the timing of reclassification from the sufficiency of the PTE limits that support reclassification (Comment C–5). There are two related but distinct matters at issue here. The first matter is the timing of reclassification: Whether sources can reclassify at any time or are permanently classified as major sources after the first substantive compliance date. The second matter is what PTE limit is sufficient to form the basis for a source to reclassify. One aspect of this ''sufficiency'' matter is enforceability, which is discussed below in section IV.B of this preamble. Another aspect of ''sufficiency'' is whether the PTE limit must, in addition to being enforceable, ensure that the source does not increase emissions as a result of reclassification. As discussed above, the ''timing'' matter is governed by the plain language of the statutory definitions of ''major source'' and ''area source.'' The ''sufficiency'' matter is governed by the phrasing in the major source definition that directs the EPA to compare a source's ''potential to emit considering controls'' to the 10/25 major source thresholds. The D.C. Circuit has previously looked at a ''sufficiency'' question and the phrase ''potential to emit considering controls.'' Specifically, in *NMA* v. *EPA,* 59 F.3d 1351 (D.C. Cir. 1995), the Court considered whether a PTE limit had to be federally enforceable to be a sufficient basis for reclassification and, as part of its analysis, concluded that the phrase ''considering controls'' was ambiguous and the EPA's application of those words had to be reviewed under a Chevron Step 2 analysis. 59 F.3d at 1362–1363 (concluding that the EPA had not explained why a PTE limit had to be federally enforceable to be sufficient to support reclassification). Similarly, whether a PTE limit that allows a source to increase its emissions as a result of reclassification is sufficient to support reclassification cannot be determined by the plain language reading of the statute that governs the timing of reclassification, but must be considered based on the ambiguous phrase ''potential to emit considering

controls'' and in light of the other provisions in CAA section 112.

Second, assuming that the above rationale properly frames the ''sufficiency'' matter as a separate question based on how to reasonably read the phrase ''potential to emit considering controls,'' the EPA is seeking comment on whether a requirement that PTE limits used to reclassify a major source to area source status must include safeguards to prevent emissions increases is a reasonable reading of the ambiguous phrase ''potential to emit considering controls'' in light of the other provisions in CAA section 112 (Comment C–6). For example, some interested parties have presented arguments opposing the EPA's plain language reading on timing based on CAA section 112(d)—specifically, that major sources must be subject to MACT floor standards that are at least as stringent as what is achieved by the best performing sources, as provided under CAA section 112(d)(2) and (d)(3). The EPA is seeking comment on whether the arguments presented in opposition to EPA's plain language reading on timing are appropriately considered on the question of the sufficiency of the PTE limit and support the conclusion that PTE limits used to support reclassification must not allow sources to increase emissions as a result of reclassification (Comment C–7).

Third, assuming that requiring safeguards against emission increases in PTE limits is a reasonable reading of the statute, the EPA is seeking comment on what safeguards should be required (Comment C–8). Possible safeguards include requiring that: (1) PTE limits include a limit of the same type as the major source standard and at least as stringent, (2) PTE limits include the requirement that the source continue to implement the measures that it is taking to meet the major source requirement (*i.e.,* the source must continue to operate the same control device and at the same level of effectiveness), or (3) the permitting authority determine that the source will implement the same measures that are being used to meet major source requirements in order to meet the PTE limit—even if such use is not mandated—and thus that emissions will not increase.

Fourth, and finally, the EPA is seeking comment generally on whether it is reasonable and appropriate to require safeguards against emission increases following reclassification (Comment C–9).

As discussed above, the EPA reads the plain language of the statute to allow reclassification of a source's status from major source to area at any time. However, even if the statutory definitions of ''major source'' and ''area source'' were to be read as containing an ambiguity that would allow an interpretation under which the EPA could set a cut-off point (as it did in the OIAI policy), the EPA's reading that there is no such cut-off point is a reasonable reading of the statute, and indeed is the best reading. First, the statutory definitions do not specify any particular cut-off point after which Congress said that a source's status was fixed. Second, the statutory definitions contain no text in which Congress directed or suggested that the EPA create a cut-off point. Third, even if Congress's silence is read to create an ambiguity that the EPA can address by creating a cut-off date for fixing a source's status, that is, at most, only a permissible way to address such an ambiguity and does not undermine the conclusion that the statute can be reasonably read—and indeed is best read—as not requiring a cut-off date. In short, even if the statutory text were found to contain an ambiguity on the question of a cut-off date for setting a source's status, the absence of any cut-off date or cut-off language in the statutory definitions enacted by Congress is best read as allowing a source to change from a major source to area source or vice versa at any time.

Further, such a reading is consistent with the statutory structure and goals of the CAA. In addition to the points discussed above in support of the EPA's plain language reading, and as discussed in more detail below in sections IV and VI, there are various reasons why a major source's reclassification to area source status, in some cases, may result in a decrease in HAP emissions rather than an increase in that source's HAP emissions. First, when the corresponding regulatory authority reviews the application for a new or revised permit that will incorporate enforceable limits on a source's PTE of HAP below the major source thresholds, the regulatory authority will consider the specifics of each source. Among other things, the regulatory authority will consider the current and proposed HAP emissions levels, the type of limits proposed and whether such limits are legally and practicably enforceable, any newly applicable area source NESHAP subparts, and if other requirements are needed to ensure that the source complies with the CAA. Second, some major sources have undergone facility and operational modifications since they became subject to the major source NESHAP requirements, and these modifications may prevent the HAP emissions from increasing even without the sources remaining subject to major source NESHAP requirements (*e.g.,* a source that has eliminated the use of HAP binders or coatings from their operations or has switched to low-HAP or no-HAP products). Third, as discussed below in sections IV and VI, some sources with actual emissions just above one or both of the major source thresholds under their current major source NESHAP requirements might choose to accept HAP PTE limits that are lower than their current emissions and further reduce their emissions consistent with the PTE limits in order to achieve area source status and reduce their regulatory burden. In those cases, allowing sources to reclassify as area sources even after they are subject to major source NESHAP requirements can provide an incentive for them to reduce their emissions below what is required under the CAA section 112 major source requirements.

The EPA invites interested persons to comment on the EPA's plain language reading discussed above. The EPA is interested in specific examples of sources that would reclassify consistent with the EPA's reading and whether those sources' emissions would increase, decrease, or stay the same after reclassification, and in any additional information on whether allowing major sources to reclassify as areas sources would or would not increase emissions from such sources or lead to a reduction in their emissions (Comment C–10). Further, the EPA invites comments on whether the Agency's reading is a permissible interpretation of the statute even if it is not the only possible reading (Comment C–11).

C. Role of the PTE Definition in the Regulation of Major Sources

Section 112 of the CAA defines a major source not only in terms of a source's actual emissions of an air pollutant, but also in terms of its potential emissions of an air pollutant or any combination of air pollutants. The definition of PTE in the General Provisions of the NESHAP regulations interprets the statutory term ''potential to emit'' found in the definition of major source of section 112 of the CAA and provides a legal mechanism for sources that wish to restrain their emissions to avoid triggering major source requirements. 40 CFR part 63.2 defines ''potential to emit'' to mean the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Under the current definition in 40 CFR 63.2, any physical or operational limitation

on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.[9]

Accordingly, a source that has the physical and operational design allowing it to potentially emit HAP above the statutorily specified thresholds (*i.e.,* 10 tpy or more of an individual HAP, or 25 tpy or more of total HAP) is a major source of air pollution unless the source limits its maximum capacity to emit HAP under its physical and operational design by obtaining restrictions that have the effect of limiting the amount of emissions (referred to as ''HAP PTE limits'' or ''PTE limits'') the source can legally emit. Further, as explained in more detail below in section IV.B, to ensure that sources do not disregard their PTE limits, the EPA's definition of ''potential to emit'' in 40 CFR 63.2 required that limitations on a source's operations can only be taken into account in determining PTE if the limitation was federally enforceable. In 1995, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *National Mining Association (NMA)* v. *EPA,* 59 F.3d 1351 (D.C. Cir. 1995), in which it remanded the definition of ''potential to emit'' found in 40 CFR 63.2 to the EPA to justify the requirement that physical or operational limits be ''federally enforceable.'' The NMA Court decision confirmed that the EPA has an obligation to ensure that limits considered in determining a source's PTE are effective, but it stated that the Agency had not adequately explained how ''federal enforceability'' furthered effectiveness. 59 F.3d at 1363–1365. In this action, the EPA is proposing specific criteria that HAP PTE limits must meet for these limits to be effective in ensuring that a source would not emit above the PTE limits. The EPA is proposing to amend the definition of ''potential to emit'' in 40 CFR 63.2, accordingly, by removing the requirement for federally enforceable PTE limits and requiring instead that HAP PTE limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable. The EPA is also proposing to amend 40 CFR 63.2 to include the definitions of ''legally enforceable'' and ''practicably enforceable'' as described in this proposal. These proposed amendments will facilitate such effective HAP PTE limits to be issued by the EPA and by state, local, and tribal regulatory agencies. The EPA is taking comment in this proposal on the criteria required for effective HAP PTE limits for purposes of determining whether a source is a major source under 40 CFR 63.2 and whether the EPA's proposed criteria are necessary and sufficient to ensure HAP PTE limits are effective to support reclassification of a major source to an area source (Comment C–12). In this action, the EPA is not proposing to change our approach to any PTE limits other than those for HAP for purposes of NESHAP applicability. *See* section IV.B for a discussion on the criteria for effective HAP PTE limits, enforceability considerations, and requests for comments on specific issues.

D. Issues Not Resolved by the Statute or Existing Regulations

As discussed in section III.B above, the EPA's read of the statutory definitions of ''major source'' and ''area source'' in section 112(a) of the CAA is that these are not dependent on timing and do not contain any language concerning when a source may change its status from major source to area source. The General Provisions section of 40 CFR part 63, subpart A, addresses compliance with standards when an area source subsequently increases its emissions of HAP such that the source becomes a major source subject to requirements established under section 112 of the CAA. But these existing regulations do not address the issue of compliance time frames for sources that reclassify from major source status to area source status. This action proposes to amend 40 CFR part 63, subpart A to address the issues not resolved by the current General Provisions requirements with regard to the reclassification of major sources as area sources under section 112 of the CAA and to clarify existing requirements that apply to sources that reclassify. This action proposes to amend the General Provisions applicability tables contained within most subparts of 40 CFR part 63 to reflect the proposed amendments to subpart A. *See* section V.A and V.B for proposed amendments to 40 CFR part 63, subpart A, and for proposed changes to individual NESHAP General Provisions applicability tables.

In addition to the provisions that the EPA is proposing to amend in the 40 CFR part 63 General Provisions, the EPA has identified a number of provisions in the 40 CFR part 63 subparts that reflect the 1995 OIAI policy by stating the date after which a major source can no longer become an area source. In this action, we are proposing to remove these provisions because they are contrary to the plain language of the statute as discussed above. *See* section V.C for proposed amendments to specific NESHAP subparts.[10]

IV. Considerations for Sources Seeking Reclassification From Major to Area Source Status

As explained above in section III.A, the EPA reads the definitions of major source and area source in section 112 of the CAA to impose no time constraint for when a major source can be reclassified as an area source. Given the statutory definitions, a major source that takes enforceable limits [11] on its PTE HAP can be reclassified as an area source at any time.[12] The decision by a source to be reclassified as an area source would be voluntary. We expect that the process for reclassification to area source status for HAP will rely on existing programs (*e.g.,* minor source programs, title V permitting procedures, and/or approved programs for issuing PTE limits under CAA section 112(l)). It is also possible for state, local, and tribal regulatory authorities to develop new programs for issuing HAP PTE limits.

After the issuance of the MM2A Memorandum, the EPA received questions from stakeholders about the reclassification of sources that already emit at levels lower than the major source thresholds but have major source NESHAP requirements in their permits because of the OIAI policy. Stakeholders also inquired about public notice requirements associated with the issuance of enforceable HAP PTE limits. We address specific stakeholders' questions regarding permitting and procedural steps associated with reclassification in more detail in section IV.B and IV.C of this preamble. The following discussion presents some general considerations for sources that

[9] *See* 40 CFR 63.2 definition of ''federally enforceable'' available at *https://ecfr.io/Title-40/se40.11.63_12.*

[10] In the meantime, and unless and until the EPA takes final action to remove or revise such provisions, the provisions in part 63 subparts that reflect the 1995 OIAI policy continue to control when major sources subject to those subparts may reclassify to area sources status.

[11] The concept ''enforceable limits'' incorporates legal enforceability and practical enforceability. Throughout this proposed rulemaking, we use the term ''enforceable limits'' to mean limitations that satisfy both of these criteria.

[12] Note, however, that reclassification does not affect a source's responsibility to comply with the major source requirements prior to the time the source reclassifies. Further, even after a source reclassifies from major source to area source, it may be subject to requirements under a consent decree or permit that obligates it to continue to comply with the major source requirements.

will be seeking reclassification from major source to area source status.

Sources seeking status reclassification from major source to area source can generally be grouped in three categories: (1) Existing major sources that would need to obtain enforceable limits on their HAP PTE that are below major source thresholds; (2) existing sources previously classified as major sources for a specific major source NESHAP that already have obtained enforceable limits on all their HAP emissions such that the source's PTE, as well as actual emissions, are currently below major source thresholds for each individual HAP and any combination of HAP; and (3) existing sources previously classified as major sources for a specific major source NESHAP that are no longer physically or operationally able to emit HAP in amounts that exceed the major source thresholds (commonly known as true or natural area sources).[13]

The third category includes former major sources that no longer have the ability to emit at major source levels because they have either permanently removed equipment, changed their processes, or for other reasons. Pursuant to the plain language of the statute, the sources in this third category are area sources because their maximum capacity to emit HAP under the physical or operational design is less than the thresholds for a major source under CAA section 112(a)(1). These true area sources do not rely on such things as State Implementation Plan (SIP)-imposed limits or pollution control equipment to constrain their emissions. Any source that needs a physical or operational limit on its maximum capacity to emit, including requirements for the use of air pollution control equipment or restrictions on the hours of operations or on the type or amount of material combusted, stored, or processed, is not in this third category.

Sources in any of these three categories who are seeking to reclassify to area source status will apply to their corresponding regulatory authority[14] and follow the corresponding regulatory authority's procedures for reclassifying and, if needed, for obtaining enforceable limits on their HAP PTE. A source proposing to reclassify to area source status must identify any applicable area source NESHAP requirements in its request. Upon submission, the regulatory authority will review the source's proposed enforceable limitations and, if approved, the regulatory authority will incorporate the enforceable HAP PTE limitations and other applicable CAA requirements, such as any applicable area source NESHAP requirements, in a revised title V permit or a minor source permit. In lieu of an individual permit, a source may be eligible for coverage under a general permit or registration program under a specific regulatory authority program. Depending on the regulatory authority rules for minor source programs, sources that no longer have the capacity to emit HAP above the major source thresholds, unaided by added controls or operational limitations, may have additional options.

After a source completes the process to reclassify to area source status, the source must comply with any applicable area source NESHAP requirements and would no longer be subject to major source NESHAP requirements or other major source requirements that were applicable to it as a major source under CAA section 112.[15] A source that reclassifies will need to update the information already provided to the Administrator per the notification requirements of 40 CFR 63.9(j). The permitting programs have procedures in place for processing changes to a source's applicable requirements and the ability to coordinate any notification required under 40 CFR part 63. *See* section V.A of this preamble for proposed changes to notification requirements of 40 CFR 63.9(b) and (j).

Below are some general considerations for sources contemplating seeking reclassification from major to area source status. An improved understanding of these considerations should serve to alleviate the concerns that have been expressed regarding the reclassification of major sources as area sources under section 112 of the CAA.

A. PTE Determination Considerations

The definition of ''major source'' in section 112(a) of the CAA includes ''any stationary source or group of sources located within a contiguous area and under common control that emits or has the potential to emit considering controls [HAP emissions that exceed the thresholds].'' Regulatory authorities (*i.e.,* permitting authorities) and sources have a long history of evaluating HAP PTE calculations, developing HAP PTE limits, and making applicability determinations. That said, the HAP PTE calculations and determination are critical steps for (1) any source seeking to understand whether it is subject to major source requirements and (2) for any source that is seeking to cease being subject to major source requirements by reclassifying from major source to area source status. Following the issuance of the MM2A Memorandum, we received many questions concerning the requirements for sources to obtain PTE limits, including requests for clarity regarding the minimum requirements that a request for reclassification must meet. While this proposed action does not propose any new requirements regarding the process for completing a HAP PTE calculation and determination for sources seeking reclassification from major to area source status, the EPA is requesting comments on whether it would be appropriate to include in the General Provisions of 40 CFR part 63 the minimum requirements that a major source of HAP must submit to its regulatory authority when seeking to obtain HAP PTE limitations to reclassify as area sources under section 112 of the CAA (Comment C–13).

A source seeking to obtain enforceable limits on its HAP PTE to below the major source thresholds will follow the established process and submit to the regulatory authority any required documentation and demonstration. For example, the discussion below presents the requirements a source seeking to obtain HAP PTE limits under the established regulations for the Federal Minor New Source Review Program in Indian Country must follow. 40 CFR 49.158(a)(1) provides that the application for a synthetic minor source permit must include the following information:

(1) Identifying information, including name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact;

(2) For each regulated New Source Review (NSR) pollutant and/or HAP and for all emissions units to be covered by an emissions limitation, the following information: (a) The proposed emission limitation and a description of its effect on actual emissions or the PTE. Proposed emission limitations must

[13] See definition of true area in memorandum titled ''Potential to Emit (PTE) Guidance for Specific Source Categories.'' From John S. Seitz, Director, Office of Air Quality Planning and Standards, page 2, April 14, 1998.

[14] The term regulatory authority is intended to be inclusive of the permitting authority or other governmental agency with authority to process reclassification requests and issuance of legally and practicably enforceable HAP PTE limits.

[15] A source that reclassifies from major source to area source may be subject to major source requirements under a consent decree, permit, or other enforceable vehicle that obligates it to continue to comply with the major source requirements for a specified amount of time. This rule is not intended to affect any of those existing obligations. Any changes to those obligations would need to be made through the appropriate processes (*e.g.,* modification of the consent decree with the Court, or revisions of the permit with the permit authority).

have a reasonably short averaging period, taking into consideration the operation of the source and the methods to be used for demonstrating compliance; (b) proposed testing, monitoring, recordkeeping, and reporting requirements to be used to demonstrate and assure compliance with the proposed limitation; (c) a description of the production processes; (d) identification of the emissions units; (e) type and quantity of fuels and/or raw materials used; (f) description and estimated efficiency of air pollution control equipment under present or anticipated operating conditions; (g) estimates of the current actual emissions and current PTE, including all calculations for the estimates; (h) estimates of the allowable emissions and/or PTE that would result from compliance with the proposed limitation, including all calculations for the estimates; and

(3) Any other information specifically requested by the reviewing authority.

As described above, for the Federal Minor New Source Review Program in Indian Country, a source seeking to obtain HAP PTE limits, as part of its PTE evaluation, will show that it has accounted for emissions of all HAP, from all emission points, including fugitive HAP emissions, and HAP emissions from insignificant activities [16] [17] from the stationary source or group of sources located within a contiguous area and under common control. The source also provides the current and proposed HAP emissions levels, the type of limitations or controls proposed, and a demonstration that the emission reductions are achievable in practice.

While the PTE calculations and supporting evaluation for large and complex sources might require data collection and validation and accounting for a larger number of emission points, the process is not different than what is already required within some source category rules [18] or under the recordkeeping requirements for applicability determinations of 40 CFR 63.10(b)(3). In the Federal Minor New Source Review Program in Indian Country regulations at 40 CFR 49.158(a)(2),[19] the EPA provided a hierarchy of acceptable data and methods to determine a source's PTE for a source seeking to obtain a synthetic minor source permit, including a synthetic minor permit for purposes of 40 CFR part 63. The hierarchy in 40 CFR 49.158(a)(2) presents the procedures that are generally acceptable for estimating emissions from air pollution sources: (1) Source-specific emission tests; (2) mass balance calculations; (3) published, verifiable emission factors that are applicable to the source; (4) other engineering calculations or (5) other procedures to estimate emissions specifically approved by the reviewing authority. We request comment on whether the EPA should include in the General Provisions to 40 CFR part 63 the hierarchy of acceptable data and methods a source seeking reclassification would use to determine the source PTE (Comment C–14).

As described above, the best approach uses source specific test data (on-site measurements) or continuous emission monitoring system (CEMS) data where available. Where these data are not available, the next best approach uses a material-balance approach (comparing inputs and outputs). Where these data are not available, the next best approach uses source-specific models (based on information about the source's operations). Finally, where these data are not available, the approach uses emission factors (based on industry-average emission rates).[20] The responsibility for using the best data available in preparing the source's PTE calculations and analyses is with the owner and operator of a source. The data should be accurate and representative of the source's emissions. A source's efforts to be reclassified from major source to area source may be unsuccessful if it does not use the best data.

The EPA requests comments on whether adding the same or similar requirements that are now in 40 CFR 49.158(a)(1) to 40 CFR 63.10 would be appropriate to create the minimum requirements that a major source of HAP must submit to its regulatory authority when seeking to obtain PTE HAP limitations to reclassify as area sources under section 112 of the CAA (Comment C–15). We also request comments on whether the EPA should also include the hierarchy of acceptable data and methods a source seeking reclassification would use to determine the source PTE. This hierarchy could be the same or similar to the one provided in 40 CFR 49.158(a)(2) (Comment C–16).

In response to the 2007 proposal, the EPA received multiple comments regarding sources that have reduced their HAP emissions to below major source thresholds because of the implementation of major source NESHAP requirements. Some stakeholders were concerned that if these sources were to reclassify to area source status and were no longer subject to major source NESHAP requirements, they could stop using the emission controls or emission reduction practices implemented for major source NESHAP compliance or no longer maintain the same level of control as before.[21] This concern was also raised by stakeholders after the issuance of the MM2A Memorandum. A source seeking reclassification because it has reduced its HAP emissions to below the major source thresholds through use of control devices or emission reduction practices implemented for compliance with major source NESHAP requirements will need to demonstrate to the regulatory authority issuing the HAP PTE limits, the degree to which the control devices and emission reduction practices are needed to restrict the source's PTE. If the source relies on its existing control devices and/or emission reduction practices to limit its HAP PTE below the major source thresholds, under the proposed effectiveness criteria, the use of the control devices and/or emission

[16] As part of its PTE evaluation, sources must account for emissions of all HAP, from all emission points, including fugitive HAP emissions. ''. . . An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement . . .'' *See* 40 CFR 70.5(c). ''Insignificant Activities—Section 70.5(c) allows the Administrator to approve as part of a State program a list of insignificant activities which need not be included in permit applications. For activities on the list, applicants may exclude from part 70 permit applications information that is not needed to determine (1) which applicable requirements apply, (2) whether the source is in compliance with applicable requirements, or (3) whether the source is major.'' See ''White Paper for Streamlined Development of Part 70 Permit Applications.'' From Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to the EPA Regional Air Division Directors. July 10, 1995; *https://www.epa.gov/sites/production/files/2015-08/documents/fnlwtppr.pdf.*

[17] *See* order granting in part and denying in part petition for objection to permit for Hu Honua Bioenergy, at *https://www.epa.gov/sites/production/files/2015-08/documents/hu_honua_decision2011.pdf.*

[18] *See,* as example, 40 CFR part 63, subpart F at 63.100, Applicability and designation of source.

[19] *See* 40 CFR part 49 subpart C, Synthetic minor source permits under the Federal Indian Country Minor New Source Review Rule at 40 CFR 49.158, and Potential to Emit A Guide for Small Business. October 1998. US EPA, OAQPS. *https://www3.epa.gov/airtoxics/1998sbapptebroc.pdf.*

[20] ''Use of emission factors as source-specific permit limits and/or as emission regulation compliance determinations are not recommended by the EPA. Because emission factors essentially represent an average of a range of emission rates, approximately half of the subject sources will have emission rates greater than the emission factor and the other half will have emission rates less than the emission factor. As such, a permit limit using an AP–42 emission factor would result in half of the sources being in noncompliance. *See* ''Compilation of Air Pollutant Emission Factors, Introduction,'' January 1995.

[21] These stakeholders are concerned that these sources could increase their emissions to just below the major source thresholds of 10/25 tpy of HAP. *See* section IV for a discussion of the assessment of potential emission changes from the reclassification of major sources as area sources.

reduction practices must be made legally and practicably enforceable in the absence of the applicability of the major source NESHAP requirements. Alternatively, if a source intends not to retain the control device equipment or emission reduction practices used to comply with a previously applicable major source NESHAP requirement, the source must demonstrate that other limits exist or can be imposed that will restrict the source's maximum capacity to emit HAP, and that these limits are or can be made legally and practicably enforceable to ensure that the source will not emit HAP at or above the major source thresholds. A blanket emissions limit on HAP generally (*e.g.,* no more than 10 tpy of an individual HAP or no more than 25 tpy of total HAP) is not sufficient as it fails to meet the practicably enforceable criteria of being a technically accurate limitation of short duration with adequate monitoring (*i.e.,* there is no monitoring method for ''HAP'' in the aggregate).[22] *See* section IV.B of this preamble, Criteria for Effective HAP PTE Limits, for a full discussion of proposed criteria for effective HAP PTE limits.

B. Criteria for Effective HAP PTE Limits

In this action, the EPA is proposing that a major source that reduces its PTE HAP emissions to below the major source thresholds by taking HAP PTE limits that meet the proposed criteria for effective PTE limits may request and, upon approval, be reclassified to area source status. In the past, the EPA concluded that federal enforceability was required for the effectiveness of PTE limits; [23] hence, the requirement is in the current regulations for the HAP programs (*see* PTE definition in 40 CFR 63.2). Since the issuance of the MM2A Memorandum, stakeholders have raised the question of whether HAP PTE limitations still need to be federally enforceable. By proposing to establish criteria for effective HAP PTE limits in this action, we will respond to this question from stakeholders.

In the context of HAP PTE limits, the term federally enforceable under 40 CFR 63.2, refers to the legal authority granted under the CAA (*i.e.,* under section 113 and section 304(a) of the statute) to the EPA Administrator and citizens to enforce in Federal court all limitations and conditions that implement requirements under the CAA (*e.g.,* issued under an approved program under section 112(l) of the CAA or a SIP or another statute administered by the EPA.). Given that sources that rely on state or local PTE limitations cease to be subject to major source CAA requirements, in the past the EPA concluded that these PTE limitations must be federally enforceable [24] to be consistent with the enforcement structure of the CAA. The EPA also linked effectiveness of PTE limits to programs that followed the EPA's specific procedures for issuance of PTE limits (*e.g.,* program requirements and implementation).[25] To recognize the state or local PTE limitations as federally enforceable, the EPA then imposed various administrative requirements on SIP programs issuing limitations.[26] These program requirements specified procedures, meant to ensure that a source's PTE limitations included in a permit have the intended effect of reducing the amount of emissions, and that sources could not disregard their PTE limits without enforcement consequences. For implementing the air toxics program under CAA section 112, the EPA adopted the SIP federal enforceability framework for PTE limits. The original 40 CFR part 63 General Provisions preamble explains that federal enforceability was required: (1) To confirm that PTE HAP limits were included as part of the source's physical and operational design, and that any claimed limitations will be observed; (2) to ensure that a permitting authority had strong enforcement capability and the legal and practical means to make sure that such commitments are carried out; and (3) to support the goal of the CAA to enforce all relevant features of the air toxics program.[27] Following litigation on the 40 CFR part 63 General Provisions, on July 21, 1995, the Court issued a decision in *National Mining Association* v. *EPA* (59 F. 3d 1351 (D.C. Cir. 1995)), in which, after examining the question of whether HAP PTE limits must be federally enforceable, it remanded, but did not vacate, the definition of ''potential to emit'' found in 40 CFR 63.2. The Court found that the EPA had not adequately explained why only federally enforceable measures should be considered as effective limits on a source's HAP PTE.

After the *NMA* decision, the EPA extended a pre-existing policy allowing the use of non-federally enforceable limits (*e.g.,* state-only enforceable limits) for limiting PTE provided those limits are legally enforceable and practicably enforceable.[28] Also, on March 23, 2001, the EPA added recordkeeping requirements for applicability determinations for sources with a maximum capacity to emit HAP in amounts greater than major source thresholds but with PTE limits to avoid applicability of a standard. *See* 40 CFR 63.10(b)(3).[29] At that time, the EPA also confirmed that until the rules are clarified to address various PTE issues, consistent with the *NMA* Court decision, any determination of HAP PTE under 40 CFR 63.2 should consider the regulations and also take into consideration the EPA transition policy guidance memoranda. 66 FR 16342 (March 23, 2001).

Our experience shows that while many states have programs for issuing HAP PTE limits that have been reviewed by the EPA and have become federally enforceable through the EPA's approval (*e.g.,* CAA section 112(l)/40 CFR 63.91 programs to limit HAP PTE, federally enforceable state operating permit (FESOP), or title V permitting programs), many state and local agencies also implement programs that have the proper legal authority but are not subject to the EPA's review either because these programs reflect state-only initiatives or are not otherwise required under other CAA provisions (*e.g.,* state permitting programs for air toxics). These state-only or local-only programs are implemented in

[22] There is substantial body of EPA guidance and administrative decisions relating to PTE and PTE limits. *E.g., see generally,* Terrell E. Hunt and John S. Seitz, ''Limiting Potential to Emit in New Source Permitting'' (June 13, 1989); John S. Seitz, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act'' (January 25, 1995); Kathie Stein, ''Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits'' (January 25, 1995); John Seitz and Robert Van Heuvelen, ''Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit'' (January 22, 1996); ''In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,'' Order on Petition No. II–2001–05 (April 8, 2002) at 4–7.

[23] The EPA concluded that Federal enforceability was required for issuing effective PTE limits in a June 28, 1989, rule that amended the Federal enforceability requirement and created federally enforceable operating permits. *See* 54 FR 27274.

[24] *See* 54 FR 27274 (June 28, 1989).

[25] In the past, the EPA held the view that it could be certain that only programs reviewed and approved by the EPA had adequate procedures for issuance of effective PTE limits.

[26] *Id.*

[27] *See,* National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions. March 16, 1994. 59 FR 12430.

[28] *See* memorandum, ''Third Extension of January 25, 1995 Potential to Emit Transition Policy'' from John S. Seitz and Eric V. Schaeffer, to Regional Offices, December 20, 1999. Also, *see* memorandum, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act,'' from John S. Seitz and Robert I. Van Heuvelen, to Regional offices, January 25, 1995; and ''Extension of January 25, 1995, Potential to Emit Transition Policy,'' from John S. Seitz and Robert I. Van Heuvelen, to Regional offices, August 27, 1997.

[29] These requirements became final April 5, 2002. *See* 67 FR 16582, also, 66 FR 16342 (March 23, 2001).

coordination with federally approved programs and share infrastructure and resources, as well as program management and personnel, and create HAP PTE limits that are structurally similar to their federally enforceable counterparts. In sum, for purposes of determining HAP PTE under 40 CFR 63.2, the EPA's PTE definition and current policies make clear that an enforceability requirement remains in place until we finalize a rule addressing the remand, but that HAP PTE limits that are both (1) legally enforceable (that is, either federally enforceable or legally enforceable by a state, local, or tribal authority) and (2) practicably enforceable are allowed in the interim as effective limits restraining emissions.

Consistent with the Court's decision in *NMA,* the EPA views ''effectiveness'' as both a foundation and a constraint on the EPA's discretion in defining PTE under 40 CFR 63.2. As a foundation, effectiveness is a minimum element of limitations on a source's HAP PTE, and the EPA has an obligation to ensure that limits considered in determining a source's HAP PTE are effective. 59 F.3d at 1362. As a constraint, promoting effectiveness must be the purpose for any conditions the EPA would require before considering a limit valid for HAP PTE purposes, and the Court indicated it would not uphold requirements that were extraneous to that goal. *Id.* at 1364–65. In *NMA* the Court concluded that the EPA had not explained why the federal enforceability requirement was necessary to ensure the ''effectiveness'' the Court viewed as essential. For example, the Court expressed concern that the EPA has ''proposed conditions for achieving 'federal enforceability' that go beyond the mere effectiveness of a particular constraint as a practical matter.'' *Id.* at 1363. Although it is clear from this that effectiveness as a practical matter must be preserved in some way, the Court was not convinced that federal enforceability was necessarily a prerequisite to ''effectiveness.'' The discussion below presents the criteria the EPA is proposing as necessary for HAP PTE limits to be ''effective'' in ensuring that a source does not emit HAP above the legally enforceable PTE level. The EPA views these proposed criteria as sufficient to effectively constrain a source's emissions for purposes of calculating HAP PTE under section 112 of the CAA and, if met, support reclassification of major sources as area sources under CAA section 112. The EPA requests comments on the proposed effectiveness criteria and whether these criteria are sufficient to support reclassification (Comment C–17). At the same time, the EPA invites comments on whether there are additional criteria that must be included to ensure that HAP PTE limits are effective (Comment C–18). The Agency's overarching goal in proposing these criteria is to achieve a clear and simple implementation process to motivate area sources to maintain reduced HAP emissions and ensure that sources of HAP comply with CAA requirements. Avoiding unreasonable burden on industry or states is also an important objective under this goal.

The EPA is proposing that to be effective, HAP PTE limits must meet the criteria of legal enforceability and practical enforceability as explained below. We request comments on these proposed effectiveness criteria and the elements discussed below (Comment C–19). The EPA is also requesting comments on whether there are other criteria that should be required for ensuring effectiveness of HAP PTE limits, including whether public notice and comment procedures should be part of the required effectiveness criteria (Comment C–20). At the end of this section, we discuss some considerations regarding the issuance of HAP PTE limits and public notice and comment procedures. In this action, the EPA is not proposing to change our approach to establishing PTE limits other than those used for CAA section 112 NESHAP applicability.

1. Legal Enforceability

The EPA proposes that to be effective, HAP PTE limits must be legally enforceable. The legal enforceability of a HAP PTE limit is composed of two parts: (a) The authority to establish the HAP PTE limits and (b) the authority to enforce the HAP PTE limits. Each of these parts is discussed below.

a. Authority To Establish the Limits

To be effective, HAP PTE limits must be required by law and legally binding on the source. To that end, the first aspect of the legally enforceable criterion for effective HAP PTE limits must address the adequacy of the legal authority to issue the PTE limits. This first aspect of legal enforceability ensures that the HAP PTE limits are issued under governmental regulatory authority and are not merely voluntary. Accordingly, we propose that to be effective, HAP PTE limits must identify the legal authority under which the HAP PTE limits are being issued. The proper identification of legal authority ensures that the issued HAP PTE limits are required by law and legally binding on the source and not merely voluntary. The EPA is requesting comments both on the appropriateness of this requirement and on whether there are other considerations that warrant being part of the criterion of legal authority to issue HAP PTE limits (Comment C–21).

b. Legal Authority To Enforce the PTE Limits

The second aspect of legal enforceability for effective HAP PTE limits refers to the legal authority to enforce the limits. A PTE limit may appear to be effective in every technical sense yet fail to be effective if no governmental authority has sufficient legal authority to enforce against violations of the limit once issued. There is a benefit to compliance oversight by a governmental entity that has the expertise in air pollution control and requisite authority to enforce a PTE limit. The EPA proposes that for HAP PTE limits to be effective, the regulatory authority issuing the limits must also have the authority to enforce the limits. The EPA recognizes that to be effective, PTE limits must carry with them a credible risk for enforcement if they are violated, that sources be on notice of their legal obligation to comply, and that sources are cognizant of the consequences of non-compliance. As part of that, the EPA is taking comment on whether state-only or local-only enforcement authority alone is sufficient to impose a credible risk of enforcement and, therefore, ensure compliance with the HAP PTE limits or whether to be effective, the EPA and/or citizens through the enforcement authorities in the CAA must also have the authority to enforce the HAP PTE limits that are being used to avoid a Federal requirement (Comment C–22). In addition, we request comments on whether enforceability of a PTE limit by the EPA and/or citizens reduces the implementation burden for all parties and provides a level of compliance incentive unmatched by enforcement by only a state or local authority that warrants it to be part of the effectiveness criteria (Comment C–23).

2. Practical Enforceability

The second criterion for effective HAP PTE limits is that the limits must be enforceable as a practical matter, *i.e.,* practicably enforceable. The EPA proposes that to be practicably enforceable, HAP PTE limits must be written so that it is possible to readily verify compliance and to document violations when enforcement action is necessary. We are proposing that to meet this criterion, PTE limits must specify: (1) A technically accurate limitation and identify the portions of the source subject to the limitation; (2)

the time period for the limitation (hourly, daily, monthly, and annual limits such as 12-month rolling limits); and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting (MRR).[30] Below, the EPA presents specific guidance regarding MRR requirements, as well as a discussion of technically accurate limitations so that HAP PTE limits will be compliant with the proposed criteria of being practicably enforceable.

a. Technically Accurate Limits That Identify the Portions of the Source Subject to the Limitations

A technically accurate limit is one that accounts for each emissions unit contributing to the maximum capacity of the source to emit HAP and must be based on the physical and operational design of the emission units. A technically accurate limit is also one that is capable of being monitored, regardless of whether the monitoring is accomplished by means of monitoring individual units or monitoring a common point for multiple sources. For example, a blanket emission limit on a single HAP or on total HAP (*e.g.,* no more than 10 tpy of an individual HAP or no more than 25 tpy of total HAP) is not technically accurate because it does not contain any analysis on the physical or operational design of the emission unit or units under consideration. Such a blanket emission limit is also not generally capable of being monitored as there is no emission testing techniques for ''HAP'' in general. In the case of monitoring usage of materials, a limit on the HAP emissions must be based in the formulations of the materials used and the specific HAP content, even if a limit eventually taken to avoid a major source classification is a limit on the collection of specific HAP used at the facility. If a single pollutant or class of pollutants is used as a surrogate for HAP emissions from a source, this correlation needs to be provided to the regulatory authority reviewing the limits, and not just assumed by the source through use of a monitoring technique, such as a total hydrocarbons CEMS for volatile organic compounds (VOC).

b. Time Periods for Limitations

The time periods for the limitations will depend on the type of limits proposed. Limits ''should be as short term as possible and should generally not exceed one month.'' [31] However, a limit longer than 1 month may be appropriate if it is a rolling limit for sources with ''substantial or unpredictable annual variations in production,'' not exceeding an annual limit rolled on a monthly basis. In other words, although the emissions may be totaled for a 12-month period, they should be measured and ''checked'' more frequently to ensure the source is maintaining compliance. Typically, with longer term periods, the emissions for the shorter-term period are ''rolled'' with those in the previous periods to get the total for the longer compliance period. For example, a 365-day rolling limit requires a source to calculate its emissions and/or operational parameters relevant to any operational restriction, daily, and then add that total to the totals for the previous 364 days to determine whether the source is in compliance. When a control device or other ongoing operating parameter limits, which indirectly indicate emissions, are required for meeting the PTE limit, much shorter time periods are necessary. These may include limits such as the minimum operating temperature of a thermal oxidizer measured hourly, where this shorter period is necessary in order to ensure the proper operation of the control device. These shorter limits may be either block or rolling averages as appropriate.

Also, time periods should be frequent enough to allow a source to rapidly identify periods of deviation and bring operations back into normal operating conditions expeditiously. Periods longer than once per day may be appropriate if the limits do not consider the use of a control device. For restrictions on content or usage of raw materials, coatings, or fuels, the EPA recommends a frequency of record (*i.e.,* certified product data sheets traceable to EPA or American Society for Testing and Materials (ASTM) methods or formulation data, or fossil fuel analytical data reports traceable to EPA or ASTM methods) collection of once per batch of material used or for each separate delivery of material or fuel, as appropriate. This frequency is consistent with procedures specified in several EPA regulations (*e.g.,* 40 CFR part 63, subpart NNNN, NESHAP: Surface Coating of Large Appliances, 40 CFR part 63, subpart OOOO, NESHAP: Printing, Coating, and Dyeing of Fabrics and Other Textiles, and 40 CFR part 63, subpart RRRR, NESHAP: Surface Coating of Metal Furniture), the General Provisions to both 40 CFR parts 60 and 63, and 40 CFR part 75. For other types of limitations, such as restrictions on operating hours, conduct of certain work practices, fugitive emissions control measures, and equipment integrity inspections, unless circumstances justify otherwise, a limit frequency of once per week or once per operating period (if operated less frequently than weekly) is appropriate and may be justified, but should not be assumed.

c. MRR Requirements

MRR requirements are necessary components of the proposed practicably enforceable criterion for effective PTE HAP limits. MRR requirements prescribe the collection of data necessary to verify that the requirements and conditions that are part of the PTE limits are checked at the frequency needed to avoid deviations, and, thus, they are crucial to compliance and providing transparency and accountability to the public as well as enabling the EPA and other state, local, and tribal regulatory agencies to determine whether emissions remain below the PTE limits and the major source thresholds. The MRR requirements associated with the HAP PTE limits enable the EPA to carry out the provisions of CAA section 112 to ensure that sources are complying with the appropriate requirements with respect to HAP emissions. Appropriate MRR requirements are dependent on site-specific variables such as the nature of the facility and the type of control device(s) installed at that facility. To meet the proposed criterion of being practicably enforceable a HAP PTE limit must provide for the collecting, maintaining, and reporting of the information necessary to determine the emissions of each HAP, which is necessary to determine whether the source's emissions are compliant with the source's PTE limits, as well as compliance with any other requirements that are part of the PTE limit (such as operating parameters). Appropriate MRR requirements serve to assure that the source is continuously complying with HAP PTE limits and any associated requirements as required by the CAA, as well as to identify when a source is not in compliance in a timely fashion so as

[30] *See* discussion of principles of enforceability in Attachment 4 of the January 25, 1995, EPA Memorandum, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act.'' *See,* also, *e.g., https://www.epa.gov/sites/production/files/2015-08/documents/masada_decision2000.pdf* at page 9.

[31] ''Guidance on Limiting Potential to Emit in New Source Permitting,'' available at *https://www.epa.gov/sites/production/files/2015-08/documents/lmitpotl.pdf. See* also ''Time Frames for Determining Applicability for New Source Review,'' March 13, 1986; ''Clarification of New Source Review Policy on Averaging Times for Production Limitations,'' April 8, 1987; ''Use of Long Term Rolling Averages to Limit Potential to Emit,'' February 24, 1992.

to avoid long periods of non-compliance.

If monitoring is proposed from a common point for various units, it should accurately evaluate emissions from all of the individual sources covered by the monitoring (*e.g.,* monitoring the mercury content of a fuel at a common header instead of at each of the individual emissions sources or monitoring at a common stack for multiple operating units). In practice, monitoring for a surrogate (*e.g.,* particulate matter (PM)) can adequately estimate or provide the actual emissions for a group of HAP at the unit, provided there exists a validated relationship between the surrogate and the HAP emissions (*e.g.,* emissions of HAP metals may be controlled as PM by a baghouse and continuously monitored through bag leak detectors and pressure drop measurement; this requires a validated relationship between PM emissions and the HAP metals emissions as well as the relationship between the baghouse operating parameters and the PM emissions). The monitoring requirements for a HAP PTE limit must be developed to ensure that compliance with the limit can be monitored on a pollutant-by-pollutant basis (including surrogacy, if applicable); they must cover every emissions source included in the limit, describe the emissions unit covered, and the level of accuracy needed for verifying the restriction(s) considered such that the monitored parameter can be certain of demonstrating ongoing compliance with the PTE limits. Depending on the situation, appropriate monitoring may consist of one or more of the following: collecting data on operational parameters that are used to monitor emissions; CEMS or CEMS-based methods; data collection and calculations for mass balance determinations; and continuous monitoring of operating parameters on a control device or process performance parameters correlated with actual emissions and used with calculations of emissions, including appropriate adjustments for control devices or process out-of-control periods. To determine whether a given set of monitoring requirements is appropriate, one should consider the following aspects of the monitoring: The parameter and its measurement approach; the operating range; and the performance criteria, including the representativeness of the data collected, an operational status check, quality assurance and control practices, frequency of data collection, data collection procedures, and averaging period.[32] It is important to identify and select these aspects of the monitoring to assure the emissions control measures employed are properly operated and maintained, and do not deteriorate to the point that the source's emissions fail to be in compliance with the applicable PTE limit. We request comments on the inclusion of the specific considerations for monitoring, discussed above in the General Provisions of 40 CFR part 63 proposed regulatory text defining practicably enforceable (Comment C–24).

Selection of the parameter and the measurement approach, as well as the operating range, are all dependent directly upon site-specific criteria including the nature of the source, any control devices present, and other site-specific criteria. The EPA has provided guidance and requirements for performance criteria, including the representativeness of the data collected, an operational status check, and quality assurance and control practices within the CAM Technical Guidance Document and the Performance Specifications and ongoing quality assurance procedures for continuous emissions monitoring systems and continuous opacity monitoring systems (COMS) in 40 CFR part 60, appendixes B and F. Though the CAM rule is not applicable to the emissions units covered in this proposed rulemaking, the general principles of representativeness and quality assurance and control presented in the guidance are still relevant.

Good recordkeeping requirements document the facility's compliance with the PTE limits on an ongoing basis. These records may consist of many types (*e.g.,* CEMS data, coating HAP content and usage rates, documentation that required work practices are being followed, or continuous parameter monitoring system data) and must include all the variables in each of the PTE calculations needed to determine if the source is emitting at less than the PTE limits. Good recordkeeping requirements at a minimum correspond to the time period of the limitation required by the enforceable conditions (*e.g.,* 3-hour average temperature) and require periodic determinations of compliance with the area source designation. Records should also be readily accessible for review by the relevant regulatory authority.

Good periodic reporting requirements must provide sufficient information to demonstrate to the regulatory authority that the PTE limits are being met on an ongoing basis (*e.g.,* periodic summary reports, exception reports, and deviation reports provide contemporaneous information about the source's compliance status) and that emissions remain below the major source threshold, similar to those of the periodic excess emissions and continuous monitoring system performance report and summary report of 40 CFR 63.10(e)(3).

Many stakeholders have raised concerns that, without proper MRR requirements, an owner or operator using add-on emission controls to reduce and maintain HAP emissions at area source levels may dial down the use or cease the proper maintenance regime of those emission controls, and, thus, increase emissions above the HAP PTE limit. Other stakeholders have asked for clarification on the type of monitoring that is adequate for demonstrating compliance with a HAP PTE limit designed to keep HAP emissions below the applicable major source thresholds.

While it is possible for any control device to be operated in a manner reducing its effectiveness, such as neglecting to perform required maintenance or reducing the operating temperature of a thermal oxidizer, the EPA has no reason to believe, and does not anticipate, that, as a result of this rulemaking, facility owners or operators will cease to properly operate their control devices where the operation of the control is needed to restrict the PTE and appropriate MRR are established as enforceable conditions.[33] [34] In any event, the incorporation of appropriate MRR requirements as enforceable conditions should assure that sources continue to operate the required control devices correctly. For example, where the control device is required to maintain the emissions of HAP below the PTE limits and the major source thresholds, for the PTE limits to be enforceable, the MRR requirements need to be sufficient to assess the effectiveness of the control device on emissions on an ongoing basis (such as hourly or shift measurements of operating parameters for the control device that demonstrate it is operating as designed for the specified daily control efficiency limit). For a facility which no longer requires the use of a control device to remain below the

[32] *See* Table 1 of the Compliance Assurance Monitoring (CAM) Technical Guidance Document, available at *https://www.epa.gov/sites/production/files/2016-05/documents/cam-tgd.pdf.*

[33] *See* discussion of specific technically accurate limits in Attachment 4 of the January 25, 1995, EPA memorandum, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act.'')

[34] *See* analysis of reclassifications in the EPA's Emission Impact Analysis Technical Support Memorandum available in the docket.

major source thresholds, the regulatory authority will determine what alternative MRR are needed (along with revised PTE limits, if necessary) to continue ensuring the source will not exceed the major source thresholds (*e.g.,* a coatings operation that has reformulated to remove HAP from its coatings and no longer requires a thermal oxidizer to control HAP emissions to meet a PTE limit of 98-percent destruction does not need to have MRR on the thermal oxidizer temperature if reducing HAP emissions was the only purpose of the thermal oxidizer but may now need a PTE limit and require MRR on the content of the coatings). As another example, if the coating operation had instead reformulated their materials such that a specific HAP is eliminated, then appropriate monitoring may simply consist of the ongoing documentation of the remaining HAP content of the materials that corresponds to a new PTE limit based on the remaining HAP in the materials used. We solicit comment on whether, as a result of this rulemaking, facility owners or operators of sources that reclassify will cease to properly operate their control devices where the operation of the control device is needed to restrict the PTE and appropriate MRR are established as enforceable conditions (Comment C–25).

As discussed above, MRR requirements are components of the proposed practicably enforceable criterion for effective HAP PTE limits. The MRR requirements ensure that a source complies with its PTE limits and does not emit HAP in major source amounts. As described above in this section, the MRR requirements associated with HAP PTE limits are source specific and will be determined on a case-by-case basis by the regulatory authority issuing the HAP PTE limits. Appropriate MRR requirements serve to assure that the established enforceable PTE limits are being met, to meet the ongoing compliance requirement in the CAA, and to identify for the facility when violations exist in order to return to compliance as quickly as possible.

In sum, the EPA proposes that HAP PTE limits that meet the legally and practicably enforceable criteria explained above are effective HAP PTE limits and are necessary and sufficient to support the reclassification of major sources as area sources under section 112 of the CAA. We request comments on the proposed criteria and the elements of effective HAP PTE limits as discussed above (Comment C–26). The EPA is also proposing that legally and practicably enforceable HAP PTE limits issued under state and local regulatory agencies' rules would be considered effective HAP PTE limitations even if those HAP PTE limits are not federally enforceable. As a result of this proposed determination, the EPA is proposing to amend the PTE definition in 40 CFR 63.2 to require HAP PTE limits to meet the criteria of being legally and practicably enforceable as discussed above. The EPA is also proposing to include in 40 CFR 63.2 the definitions of legally enforceable and practicably enforceable as described above. At the same time, the EPA invites comments on whether there are additional criteria that must be included to ensure that HAP PTE limits are effective and have practical utility (Comment C–27).

In particular, the EPA request comment on whether to be effective, HAP PTE limits need to undergo public notice and comment procedures (Comment C–28) and whether HAP PTE limits can be properly and legally established if the limits do not go through public notice and comment procedures (Comment C–29). After the issuance of the MM2A Memorandum, sources and permitting authorities asked about public notice and comment requirements for issuing enforceable PTE HAP limits for sources seeking reclassification. The underlying concerns can relate to the processing time involved and overall burden for certain situations, and confusion about what is required for issuing HAP PTE limitations.[35] State and local regulatory agencies implement public notice and comment procedures for state, local, and tribal programs as required under state and/or local regulations and statutes. The legal authority under which the PTE limits are issued contain issuance procedures including any procedures for public notice and comment. Importantly, regulatory authorities use different issuing mechanisms depending on the complexity of the PTE limits required for the situation and the pollutants addressed. Typically, states issue enforceable PTE limits for individual sources in a SIP construction permit or a synthetic minor type of operating permit (*e.g.,* operating permits other than title V permit). States can also utilize less burdensome mechanisms for limiting PTE such as general permits for source categories, permits by rule or registration programs, as appropriate. Regardless of the mechanism used to issue an enforceable PTE limit, the state must follow the applicable procedures for that mechanism, including providing for public notice and comment when required.

As part of the effectiveness criteria, the EPA is requesting comments on whether, in order to further the effectiveness of HAP PTE limits and support reclassification of major sources as area sources under section 112 of the CAA, the EPA should require public comment and notice procedures (Comment C–30). The EPA request comments on how requiring public comment and notice procedures for issuance of HAP PTE limits enhance or is needed for ensuring effectiveness of such limits (Comment C–31).

In the past, when the EPA included specific requirements for public comment and notice procedures for programs reviewed and approved by the EPA (*i.e.,* FESOP), state and local agencies raised the cost of the public notice as a concern. For these programs, the EPA then revised the rules to allow for electronic notice as an alternative to newspaper notices. Another concern raised regarding public notice and comment was the additional time associated with this procedural step. We request comments on whether these concerns are still an issue if EPA were to require that HAP PTE limits that will be used as the basis for reclassifying major sources to area source status need to be subject to public notice and comment procedures (Comment C–32). The EPA also requests comments on whether there are specific criteria for deciding under what circumstances a source's proposed HAP PTE limits would need to undergo public review and comment under the state or local program (*e.g.,* controversial or complex sources, sources with actual emissions close to the major source thresholds, etc.) (Comment C–33). The EPA recognizes that some state-programs may process HAP PTE limits concurrently with a minor NSR or other permitting action such that the EPA and the interested public would have the opportunity to provide comments on PTE limits in that case. The EPA seeks comment on whether the public notice and comment procedures provided in those circumstances would be sufficient (Comment C–34). The EPA requests comments on whether, to be effective and support reclassification from major to area source under section 112 of the CAA, PTE limitations need to undergo public comment and notice procedures (Comment C–35). The EPA notes that

[35] Public notice has been closely associated with federal enforceability of PTE limits because, in the past, the EPA regulations have required that for PTE limits issued pursuant to FESOP programs to be considered federally enforceable, a state, local, or tribal program must provide the public and the EPA with an upfront opportunity for notice and comment on any issued limit. *See* 54 FR 27274, 27282, 27283 (1989).

nothing in this proposal is meant to alter or affect in any way those public notice procedures in the SIP-approved regulations for federally enforceable programs such as FESOP or minor NSR permit programs. *See, i.e.,* 54 FR 27281–27281, *see* also 40 CFR 51.161.

To provide information to the EPA and the public, 40 CFR 63.9(b) currently requires sources to notify the EPA when a source becomes subject to a relevant standard and 40 CFR 63.9(j) requires sources to notify the Administrator when there is a change in the information previously submitted to the EPA. This notification requirement applies to sources that reclassify from major source to area source status under CAA section 112 (*e.g.,* by taking a HAP PTE limits). To improve the availability of this information, the EPA is proposing electronic submission of such notifications. Sources that reclassify to area source status by taking a HAP PTE limit are also currently required under 40 CFR 63.10 to keep records of applicability determinations on-site. In this action, the EPA is proposing that any source that takes a HAP PTE limit and uses that limit to reclassify from major source to area source status must keep these records as long as the source is an area source. The EPA expects these notification and recordkeeping requirements under 40 CFR part 63 would assist the EPA in its oversight role under the CAA and be of minimal burden to the regulated community.

C. Permitting Considerations

As mentioned above, sources seeking status reclassification from major source to area source can generally be grouped in three categories: (1) Existing major sources that need to obtain enforceable limits on their HAP PTE to ensure that their emissions do not exceed major source thresholds; (2) existing sources previously classified as major sources for a specific major source NESHAP that already have obtained enforceable limits on all their HAP emissions such that the source's PTE, as well as actual emissions, is currently below major source thresholds for both each individual HAP and total HAP; and (3) existing sources previously classified as major sources for a specific major source NESHAP that are no longer physically or operationally able to emit HAP in amounts that exceed the major source thresholds (commonly known as true or natural area sources). The third category includes former major sources that no longer have the ability to emit at major source levels either by permanently removing equipment or changing their processes, among other reasons.

After the issuance of the MM2A Memorandum, the EPA received questions from sources and permitting authorities regarding permit process, mechanisms, and the requirements for reclassifying to an area source. Stakeholders asked that we clarify the process for implementing area source status for sources with title V permits that already have enforceable HAP PTE limits or now no longer have the ability to emit HAP in amounts that exceed major source thresholds. This section addresses these questions.

From the questions received in relation to the 2018 MM2A Memorandum, we learned that sources with title V permits that already have enforceable HAP PTE limits or no longer have the ability to emit HAP in amounts that exceed major source thresholds fit in two scenarios. The first scenario involves a source subject to major source requirements that has made changes and no longer has the ability to emit HAP above major source thresholds (*i.e.,* enforceable limits are not needed on the source's physical or operational design to restrict the source's PTE) but was still subject to major source requirements because of the OIAI policy. For a source which no longer has the ability to emit HAP at major source levels, enforceable limits for HAP emissions are not needed for changing its status to area source.[36] The second scenario involves a source that has already taken enforceable PTE limits on its capacity to emit HAP that make it an area source, often to avoid major source requirements in the future. However, in accordance with the OIAI policy, such a source remained subject to the requirements of any previous major source NESHAP prior to the limits becoming effective because the source was not an area source at the time of the first substantive compliance deadline in that NESHAP. In each of these situations, the EPA assumes that the major source NESHAP requirements have been listed as applicable requirements in the source's title V (or equivalent)[37] operating permit.

A question that applies to all the above scenarios is whether a reclassified source continues to have an obligation to comply with the major source requirements in their title V permit. While our reading of the statute is that a source in these scenarios qualifies as an area source of HAP, a permitted source must continue to comply with the terms of its title V permit until the source follows the permitting authority's procedures for facility changes and permit revisions to its title V permit. Sources should work with their permitting authorities who have knowledge of the specific procedures in their individual programs. The permitting authority will generally be in the best position to help a source decide on the appropriate procedures under the specific program rules. The EPA expects that the procedures will generally depend on the approved regulations and the facts of the situation. Some programs may specifically provide a streamlined mechanism for the removal of non-applicable requirements while others may require a significant modification process. The process may depend on the specific facts of the situation. For instance, some situations may simply call for the removal of the non-applicable major source permit terms and no other changes to the permit. In contrast, when the major source permit terms are relied upon to demonstrate compliance with some other applicable requirement (*e.g.,* in the case of streamlining the permit conditions), concurrently with their removal, the permitting authority may need to reevaluate the MRR for applicable requirements remaining in the permit. Sources should consult with their permitting authority and the program regulations on the proper process to add any newly applicable MRR requirements, but the EPA notes that the regulations in 40 CFR part 71 would require a significant modification to add these requirements to a title V permit.

For sources located within Indian country,[38] where the EPA is the

[36] The definition of HAP PTE does not mandate a restriction to achieve area source status if, after considering limitations inherent to the process (*i.e.,* the physical or operational design), a source no longer has the capacity to emit HAP above major source thresholds without the aid of operational restrictions. An example of limitations inherent to the process would be changing a boiler so that it can burn only gaseous fuel, such that HAP associated with burning coal need not be considered in determining the source maximum capacity to emit.

[37] These include permits the EPA deems to meet the title V requirements but are not called title V operating permits.

[38] The Federal Indian Country Minor NSR Rule defines ''Indian country'' to include three categories of lands consistent with 18 U.S.C. 1151: *i.e.,* Indian reservations, dependent Indian communities, and Indian allotments. The Court vacated the rule with respect to non-reservation areas of Indian country (*i.e.,* dependent Indian communities and Indian allotments), in the absence of a demonstration by the EPA or a tribe that a tribe has jurisdiction over the non-reservation area of Indian country (*Oklahoma Dept. of Environmental Quality* v. *EPA,* 740 F.3d 185 (D.C. Cir. 2014)). The Court held that states have initial responsibility for implementation plans under CAA section 110 in non-reservation areas of Indian country in the absence of a demonstration of tribal jurisdiction by the EPA or a tribe. Therefore, the Federal Indian Country Minor NSR Rule does not apply in non-reservation areas of Indian country unless and until a tribe or the

reviewing authority unless the EPA has approved a non-federal minor source permitting program or a delegation of the Federal Indian Country Minor NSR Rule, the Federal Indian Country Minor NSR Rule at 40 CFR 49.151–49.165 provides a mechanism for an otherwise major source to voluntarily accept restrictions on its PTE to become a synthetic minor source. The Federal Indian Country Minor NSR Rule applies to sources located within the exterior boundaries of an Indian reservation or other lands as specified in 40 CFR part 49, collectively referred to as ''Indian country.'' *See* 40 CFR 49.151(c), 49.152(d). This mechanism may also be used by an otherwise major source of HAP to voluntarily accept restrictions on its PTE to become a synthetic minor HAP source. The EPA's Federal Implementation Plan (FIP) program, which includes the Federal Indian Country Minor NSR Rule, provides additional options for particular situations such as general permits for specific source categories to facilitate minor source emissions management in Indian country. Existing sources in Indian country may have PTE limits that preceded the EPA's FIP for minor sources, and for that reason, were issued a 40 CFR part 71 permit.

D. SIP Considerations

This rulemaking does not affect states' continuing obligations under CAA section 110 or requirements for SIP development, including the obligation to maintain major source NESHAP requirements that may have been approved in a SIP under CAA section 110. In addition, states have an ongoing obligation under CAA section 110 to ensure that changes to any measure incorporated into a SIP do not interfere with attainment or maintenance of any National Ambient Air Quality Standards or with any other requirement of the CAA.[39] The EPA cannot approve changes to SIP provisions unless the Agency can conclude that the changes would not result in backsliding, pursuant to CAA section 110(l).

V. Proposed Regulatory Changes

To reflect the plain language reading of the statute as discussed in section III above, the EPA is proposing to amend the General Provisions of 40 CFR part 63, subpart A. We are also proposing amendments to the General Provision tables contained within most subparts of 40 CFR part 63 to incorporate the changes proposed to the General Provisions of 40 CFR part 63, subpart A. The EPA is also proposing changes to several individual NESHAP intended to remove rule specific OIAI provisions.

A. Proposed Changes to 40 CFR Part 63, Subpart A: General Provisions

1. Applicability

We are proposing to amend the applicability section found in 40 CFR 63.1 by adding a new paragraph (c)(6). This paragraph will specify that a major source can become an area source at any time by limiting its PTE HAP to below the major source thresholds established in 40 CFR 63.2.[40] [41] [42] Sources can also become area sources by making permanent physical changes (*e.g.,* by the removal of emission units), if these changes limit the potential to emit HAP below the major source thresholds. As explained in section IV of this preamble, sources who are seeking to reclassify to area source status will apply to their corresponding regulatory authority and follow the corresponding regulatory authority's procedures for reclassifying and, if needed, for obtaining enforceable limits on their HAP PTE.

A major source that reclassifies to area source will no longer be subject to NESHAP requirements applicable to a major source. The major source requirements to which the source would no longer be subject may include, but are not limited to, CAM[43] and title V requirements[44] (assuming the source is not otherwise subject to title V permitting). As an area source complying with its PTE HAP limits, the source would nonetheless be subject to any applicable area source requirements issued pursuant to CAA section 112 and title V if the EPA has not exempted the area source category from such requirements.

The statute and existing regulations contain compliance date provisions that address some, but not all, situations. For sources that are subject to certain CAA section 112 requirements on the effective date of those requirements, CAA section 112(i)(3)(A) provides that the source must meet the applicable requirements beginning on the effective date of those requirements, but that the EPA may set a later compliance date for existing sources that provides for compliance ''as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard'' and with additional time allowed under certain circumstances as provided in CAA sections 112(i)(3)(B) and 112(i)(4) through (8). For an area source that increases its emissions and becomes a major source after the effective date of an emission standard, the existing regulations address the issue of compliance time frames. *See* 40 CFR 63.6(a)(2) and (c)(5). On the other hand, the existing regulations do not address the issue of compliance time frames for sources that reclassify from major source status to area source status after the effective date of an emission standard.

To address the issue of compliance time frames for sources that reclassify from major source status to area source status, we are proposing regulatory text in the new provision at 40 CFR 63.1(c)(6)(i) under which major sources that reclassify to area source status become subject to applicable area source requirements in 40 CFR part 63 immediately upon becoming an area

EPA has demonstrated that the tribe has jurisdiction in a particular non-reservation area of Indian country.

[39] *See* CAA section 112 (l) ''The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.''

[40] Former major sources that no longer have the ability to emit at major source levels due to the permanent removal of equipment or changes in processes are area sources under the plain language of the statute; therefore, and these sources do not need to obtain additional PTE limits to reclassify to area source status. These sources will need to apply with their corresponding regulatory authority and follow the corresponding authority's procedures for reclassifying from major source status to area source status.

[41] Some individual NESHAP standards in 40 CFR part 63 provide sources the opportunity to become area sources not by limiting total mass emissions directly, but by limiting material use or by taking other measures, which in turn, correlate to emissions below major source levels (*e.g.,* 40 CFR part 63, subpart KK, Printing and Publishing and 40 CFR part 63, subpart JJ, Wood Furniture Manufacturing Operations (limiting HAP usage to below major source thresholds)). We recommend that sources refer to the applicable NESHAP for guidance in determining whether the source meets the major source thresholds.

[42] We recognize that there may be sources that were major sources as of the first substantive compliance date of a MACT standard that, by complying with non-section 112 CAA requirements, became area sources for HAP emissions. In this instance, the EPA proposes that the source obtain enforceable limitations on its HAP PTE to ensure that those emissions remain below major source thresholds.

[43] The CAM regulations at 40 CFR 64.2(b)(1)(i) include an exception for emission limitations or standards proposed by the Administrator after November 15, 1990, pursuant to section 111 or 112 of the CAA. In summary, if a particular unit was subject to just a MACT standard, CAM did not apply. But if the unit was also subject to another emission limit/standard (*e.g.,* SIP limit), then the MACT monitoring provisions would have been determined to be presumptively acceptable to meet CAM for the SIP limit. If the MACT standard is then removed, and the source is still required to have a title V permit, then CAM compliance might require re-evaluation.

[44] As noted above in section IV.D, the source would need to continue to comply with any major source NESHAP requirements currently in the source's title V permit until removed by the permitting authority.

source in those situations where the first substantive compliance date has passed. However, where an area source standard would apply to an existing source upon reclassification from major to area source status and different emission points will need control or different emission controls are necessary to comply with the area source standard or other physical changes are needed to comply with the standard, we are proposing that additional time, (not to exceed 3 years), may be granted by the EPA (or a delegated authority) in a compliance schedule if the source demonstrates that the additional time is necessary and reasonable.

The proposed regulatory provision, 40 CFR 63.1(c)(6)(i), is consistent with the principle underlying CAA section 112(i)(3) compliance schedule for existing sources because it requires sources to comply immediately with the area source standard upon becoming an area source, and authorizes the EPA (or a delegated authority) to grant additional time in a compliance schedule only if it determines that such time is appropriate based on the facts and circumstances. In any event, any extension of time provided pursuant to the proposed text in 40 CFR 63.1(c)(6)(i) cannot exceed 3 years. In the situation where a major source is engaged in the process of reclassifying to area source status after the initial compliance date of the applicable area source NESHAP has passed, and the source concludes that it needs a compliance extension to meet the applicable area source NESHAP requirements, the source must apply for and obtain that compliance extension before completing the process to reclassify as an area source; otherwise, the source will be in violation of the area source NESHAP. A source that is successful in receiving approval of a compliance extension must continue to comply with the major source NESHAP requirements until such time as compliance with the area source NESHAP is achieved.

We solicit comment on the appropriateness of the proposed case-by-case compliance extension date approach discussed above, including, for example, the type of information that should be requested from the source seeking the proposed compliance extension, and whether the limitations proposed above (*i.e.,* the compliance extension is only available if the affected source must undergo a physical change or install additional control equipment to meet the area source NESHAP) are appropriate (Comment C–36). *See* proposed regulations at 40 CFR 63.1(c)(6)(i). We also solicit comment generally on the appropriate process for requesting the compliance extension and on the mechanics of obtaining the compliance extension (Comment C–37). If the area source category is not exempted from the requirements of title V, the request for a compliance extension could be made in the context of the title V permit process. If, however, the area source category at issue is exempt from title V, the source could submit its compliance date extension request to the regulatory authority issuing its PTE HAP limits, provided that the regulatory authority has delegation to implement the area source NESHAP. We further solicit comment on whether the proposed compliance date extension provision in 40 CFR 63.1(c)(6)(i) should be available to major sources that reclassify to area source status prior to the compliance date of an applicable area source standard, to the extent that the remaining time before the compliance date is not sufficient time for the source to comply (Comment C–38).

In 2007, the EPA considered the issue of time frames for compliance with corresponding CAA section 112 standards when sources reclassify between major and area source status more than once. In particular, the EPA looked at whether it is reasonable to require immediate compliance with previously applicable major source NESHAP requirements for sources that reclassify from major to area source status and then revert back to its previous major source status.

As discussed above, the current statutory and regulatory provisions specify the timing for compliance when an area source becomes a major source for the first time. *See* 40 CFR 63.6(c)(5) and (b)(7). Per 40 CFR 63.6(b)(7), when an area source becomes a major source by the addition of equipment or operations that meet the definition of a ''new affected source'' in the relevant standard, the portion of the existing facility that is a new affected source must comply with all requirements of that standard applicable to new sources upon startup. On the other hand, 40 CFR 63.6(c)(5) specifies that, except as provided in paragraph (b)(7), the owner or operator of an area source that increases its emissions of (or its PTE) HAP such that the source becomes a major source shall be subject to relevant standards for existing sources and must comply by the date specified in the major source standards for existing sources that are applicable to that source. If no such compliance date is specified in the standards, the source shall have a period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective.

Sources that reclassify to area source status in most cases, if not all, would achieve and maintain area source status by operating the emission controls or continuing to implement the practices (*i.e.,* use of no-HAP or low-HAP compliant material) they used to meet the major source NESHAP requirements. Sources may, in addition to, or in lieu of, operating emission controls, reduce their production level or hours of operation. The EPA has no information to suggest that a source that reclassifies from major to area source status, regardless of the means employed to attain area source status, would remove the controls used to meet the previous applicable major source NESHAP requirements. We recognize that some major source NESHAP allow alternative compliance options, such as the use of low-HAP materials, but these options should continue to be available to the affected source. Moreover, the addition of equipment or process units to an existing affected source should not change the source's ability to meet the major source NESHAP requirements upon startup of the new equipment or emission unit because the equipment or process units should be accompanied by either a tie-in to existing emission controls or part of the installation of new emission controls. *See* also 40 CFR 63.6(b)(7) (applying to new affected sources). We solicit comment on whether our information and expectations, as stated in this paragraph, are correct (Comment C–39).

For the reasons explained above, in this action the EPA is proposing to add a new provision in 40 CFR 63.1(c)(6)(ii)(A) to specify that a source that reclassifies from major source status to area source status and then later reclassifies back to major source status must meet the major source NESHAP requirements at the time that standard again becomes applicable to the source. This is reasonable because existing affected sources located at the facility that were previously subject to a major source NESHAP should be able to comply with that major source NESHAP immediately upon the requirements again becoming applicable to them. To date, we have identified one set of circumstances where additional time would be necessary for the source to comply with the major source NESHAP in the scenario where a source is reclassifying from area source status to major source status after previously going from major source to area source.

Specifically, there are situations where major source NESHAP rules may

be amended and either become more stringent or apply to additional emission points or regulate additional HAP. For example, under CAA section 112(d)(6), MACT standards must be reviewed every 8 years and revised if necessary. If revisions issued pursuant to CAA section 112(d)(6) increase the stringency of the standards or revise the standards such that they apply to additional emission points or HAP, it may be necessary to allow existing sources that are returning to major source status some additional time to come into compliance with the new major source requirements.

The revision of a NESHAP pursuant to CAA section 112(d)(6) is only one example of a situation where a major source NESHAP rule may be revised. Many types of rule amendments that substantively modify the NESHAP could provide a basis for additional time for compliance. Thus, we are proposing to add a provision in 40 CFR 63.1(c)(6)(ii)(B) that sources that reclassify from major source to area source and then revert to major source status, be allowed additional time for compliance if the major source NESHAP has changed such that the source must undergo a physical change, install additional emission controls, and/or implement new emission control measures. We propose that such sources have the same time period to comply with the revised major source NESHAP as is allowed for existing sources subject to the revised major source NESHAP. The source will need to continue complying with the area source requirements until such time as compliance with the major source requirements is achieved. We solicit comment on this proposed compliance time frame and whether the proposed regulatory text in 40 CFR 63.1(c)(6)(ii)(B) adequately captures the intended exception (Comment C–40).

We solicit comment on the appropriateness of the proposed immediate compliance rule for sources that reclassify between major and area source status more than once and whether such a rule should be finalized (Comment C–41). Further, we solicit comment on whether, if it is finalized, there are other situations, in addition to the one noted above, that would necessitate an extension of the time period specified for compliance with the major source NESHAP requirements (Comment C–42). We further solicit comment on whether we should instead allow all sources that revert back to major source status a specific period of time in which to comply with the major source NESHAP requirements, which would be consistent with the approach provided for in 40 CFR 63.6(c)(5) (Comment C–43). If we promulgate this approach in the final rule, we request comment on whether we should provide the same time period as is already provided for in 40 CFR 63.6(c)(5), or whether a different time period is appropriate and why. To the extent a commenter proposes a compliance time frame, we request that the commenter explain the basis for providing that time frame with enough specificity for the EPA to evaluate the request (Comment C–44). Thus, depending on the comments received and the factual circumstances identified, the options we are considering include: (1) Not finalizing the immediate compliance rule with exceptions, and instead providing all sources that revert back to major source status a defined period of time to comply consistent with the provisions of 40 CFR 63.6(c)(5); and (2) finalizing the proposed immediate compliance rule and adopting additional exceptions to that rule if we receive persuasive and concrete scenarios that would warrant allowing additional time to comply with previously applicable major source NESHAP requirements.[45] If we pursue the former approach, we would likely amend 40 CFR 63.6(c)(5). If we pursue the latter approach and retain the immediate compliance rule but create exceptions in addition to the one noted above, there are two ways to implement the exceptions: (1) Through a case-by-case compliance extension request process or (2) by identifying in the final rule specific exceptions to the immediate compliance rule and providing a time period for compliance for each identified exception.

Under the case-by-case approach, the EPA or delegated regulatory authority could grant limited additional time for compliance upon a specific showing of need. A case-by-case compliance extension request process would call for the owners or operators of sources to submit to the relevant regulatory authority a request that (1) identifies the specific additional time needed for compliance, and (2) explains, in detail, why the source needs additional time to come into compliance with the major source NESHAP. The regulatory authority would review the request and could either approve it in whole, or in part (*i.e.,* by specifying a different compliance time frame or allowing different time frames for different parts of the affected sources) or deny the request. We envision that a request for a compliance extension, if such an option is provided in the final rule, would ordinarily be made in the context of the title V permit application or an application to modify an existing title V permit. Any compliance extension, if granted, would be memorialized in the title V permit. If we finalize the proposed immediate compliance rule with exceptions, we will also consider the option of including in the final rule defined compliance extension time frames for defined factual scenarios, as we have done for the exception described above. Under this approach, if a source satisfies the criteria identified in the final rule, it would automatically be afforded a specified extension of time to comply with the major source NESHAP requirements upon the source, again becoming subject to the NESHAP. This specified extension approach would be useful if there are specific factual scenarios that affect a broad number of sources because defining the compliance extension time frame in the final rule eliminates the burden on regulatory authorities associated with the case-by-case approach.

In submitting your comments on the above-noted issues and proposed 40 CFR 63.6(c)(6) provision, identify, with specificity, the factual circumstances that would warrant a compliance extension, explain why the source would need the extension under the circumstances identified, and explain why the source could not comply with the standard immediately upon reverting to major source status given the identified circumstances (Comment C–45). We specifically solicit comment on our discussion above as to the mechanics of obtaining a compliance extension if a case-by-case approach is finalized, including, for example, the type of information to request from the source seeking the proposed compliance extension, the process to be used to obtain the extension, and any limitations on providing extensions (Comment C–46).[46] We further solicit

[45] The new proposed regulatory provision at 40 CFR 63.1(c)(6)(ii) would be subject to the provisions of 40 CFR 63.6(b)(7). Thus, if a source adds a piece of equipment which results in emissions at levels in excess of the major source thresholds, and that equipment meets the definition of a new affected source under the relevant NESHAP, the source would be subject to the provisions of 40 CFR 63.6(b)(7) and would have to meet the requirements for new sources in the relevant major source NESHAP, including compliance at startup.

[46] Some major sources that switch to area source status may, as an area source, no longer be subject to title V permit requirements and, therefore, apply to their permitting authority to terminate their title V permits. In this situation, the source would need to obtain HAP PTE limits through a regulatory vehicle other than title V. Presumably, such sources would have their title V permit terminated at the same time their enforceable PTE limits become effective. If, however, the area source reverts to major source status, the source will once again have

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comment on the approach of providing a specified compliance extension in the final rule for certain defined factual scenarios (Comment C–47). Regarding this approach, we solicit comment on the nature of the scenario that would warrant such an extension and the specific amount of additional time that would be needed to comply with the major source NESHAP requirements and why such a period of time is needed to comply (Comment C–48). We also request comments on whether a source that cannot immediately comply with previously or newly applicable major source NESHAP requirements at the time it requests reclassification, should be required to continue to comply with the HAP PTE limits until the source can comply with the corresponding major source NESHAP requirements (Comment C–49).

The EPA is also proposing to add a new provision at 40 CFR 63.1(c)(6)(iii) to address the interaction of the reclassification of sources with enforcement actions. Specifically, we are proposing that sources that reclassify from major to area source status and are subject to enforcement investigations or enforcement actions are not absolved from the results of such investigations or the consequences of such actions by becoming area sources. Although sources that are the subject of an investigation or enforcement action may still seek area source status for purposes of future applicability, they are not absolved of any previous or pending violations of the CAA that occurred while they were a major source, and the source must bear the consequences of any enforcement action or remedy imposed upon it, which could include fines, imposition of additional emission reduction requirements, or other remedies for noncompliance. Accordingly, a source cannot use its new area source status as a defense to major source NESHAP violations that occurred while the source was a major source. Similarly, becoming a major source does not absolve a source subject to an enforcement action or investigation for area source violations or infractions from the consequences of any actions occurring when the source was an area source.

to obtain a title V permit. The source would also have to have its enforceable PTE limits terminated to allow it to emit at major source levels. Once the HAP PTE limits no longer apply to the source, the source must comply with all applicable major source NESHAP requirements or have taken appropriate steps to apply for compliance extensions for each applicable major source NESHAP.

2. Definitions

In this action, the EPA is proposing specific criteria that a HAP PTE limit must meet to be effective in ensuring that a source would not emit above the PTE levels for each emission unit in the permit. The EPA is proposing to amend the PTE definition in 40 CFR 63.2, accordingly, by removing the requirement for federally enforceable PTE limits and requiring instead that PTE limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable as described in detail in section IV. B of this proposal. The EPA is proposing to include in 40 CFR 63.2 the definitions of legally enforceable and practicably enforceable. The EPA proposes legally enforceable to mean that an emission limitation or other standards meet the following criteria: (1) Must identify the legal authority under which the limitations or standards are being issued; and (2) must provide the right for the issuing authority to enforce it. The EPA proposes practicably enforceable to mean that an emission limitation or other standards meet the following criteria: (1) Must be written so that it is possible to verify compliance and to document violations when enforcement action is necessary; (2) must specify a technically accurate numerical limitation and identify the portions of the source subject to the limitation. The time frame for the limitation (*e.g.,* hourly, daily, monthly, and annual limits such as annual limits rolled on a monthly basis) taking into account the type of parameter limited (an indirect indicator of emissions such as a continuous monitoring system limit should have a shorter time frame than a direct measurement of HAP emissions to account for the relationship between HAP emissions and the monitored parameter); and (3) must specify the method of determining compliance, including appropriate MRR. We request comments on whether other criteria are needed to ensure the emission limitations are practicably enforceable (Comment C–50).

3. Recordkeeping and Reporting Requirements

The EPA is proposing to amend the recordkeeping requirements for applicability determinations in 40 CFR 63.10(b)(3) by adding text to clarify that this requirement applies to an owner or operator with an existing or new stationary source that is in a source category regulated by a standard established pursuant to CAA section 112, but that is not subject to the relevant standard because of legally and practicably enforceable limitations on the source's HAP PTE. The proposed text also clarifies that the record of the applicability determination must include an emissions analysis (or other information) that demonstrates the owner or operator's conclusion that the source is not subject to major source requirements. The analysis (or other information) must be sufficiently detailed to allow the Administrator to make an applicability finding for the source with regard to the relevant standard or other requirements. The EPA is proposing to remove the time limit for record retention in 40 CFR 63.10(b)(3) so sources that obtain new enforceable PTE limits are required to keep the required record of the applicability determination until the source becomes subject to major source requirements. We request comments on the propose amendment to 40 CFR 63.10(b)(3) removing the time limit for keeping these records and requiring that the records be maintained until the source becomes an affected source as described above (Comment C–51).

The EPA is further proposing to amend the recordkeeping requirements for records submitted through CEDRI by adding 40 CFR 63.10(g) to clarify the records submitted through CEDRI may be maintained in electronic format. This provision does not remove the requirement for facilities to make records, data, and reports available upon request by a delegated air agency or the EPA upon request.

4. Notification Requirements

The EPA is proposing to amend the notification requirements in 40 CFR 63.9(b) so that an owner or operator of a facility must notify the Administrator of any standards to which it becomes subject. With this amendment, the notification requirements of 40 CFR 63.9 will cover both situations where a source reclassifies from major to area source status and where a source reclassifies from major to area and subsequently reverts back to major source status. The EPA is also proposing to clarify that a source that reclassifies must notify the EPA of any changes in the applicability of the standards that the source was subject to per the notification requirements of 40 CFR 63.9(j). The EPA is also proposing to amend the notification requirements in 40 CFR 63.9(b) and (j) to require the notification be submitted electronically through the CEDRI. The EPA is also proposing to amend the General Provisions to add 40 CFR 63.9(k) to include the CEDRI submission procedures. Additionally, the EPA has identified two broad circumstances in

which extensions of the time frame for electronic submittal may be provided. In both circumstances, the decision to accept the claim of needing additional time to submit is within the discretion of the Administrator, and submittal should occur as soon as possible. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a notification by the submittal deadline for reasons outside of their control. The situation where an extension may be warranted due to outages of the EPA's Central Data Exchange or CEDRI that preclude an owner or operator from accessing the system and submitting a required notification is addressed in 40 CFR 63.9(k)(1). The situation where an extension may be warranted due to a force majeure event, which is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents an owner or operator from complying with the requirement to submit electronically as required by this rule, is addressed in 40 CFR 63.9(k)(2). Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility.

The electronic submittal of the notifications addressed in this proposed rulemaking will increase the usefulness of the notification, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance and the applicability of major and area source standards to a facility, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic submittal also eliminates paper-based, manual processes, thereby saving time and resources and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [47] to implement Executive Order 13563 and is in keeping with the EPA's Agency-wide policy [48] developed in response to the White House's Digital Government Strategy.[49] The EPA is also proposing to amend 40 CFR 63.12(c) to specify that a delegated authority may not exempt sources from reporting electronically to the EPA when stipulated by this part. For more information on the benefits of electronic reporting, see the memorandum, ''Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,'' available in Docket ID No. EPA–HQ–OAR–2019–0282.

B. Proposed Changes to Individual NESHAP General Provisions Applicability Tables

We are proposing to amend the General Provisions applicability tables contained within most subparts of 40 CFR part 63 to add a reference to a new paragraph 40 CFR 63.1(c)(6) discussed in the section above and add a reference to reflect the proposed CEDRI submission procedures of 40 CFR 63.9(k) discussed above. We solicit comments on whether any other subparts warrant amendment to reference the new General Provision 40 CFR 63.1(c)(6) or the CEDRI submission procedures in 40 CFR 63.9(k) (Comment C–52).

C. Proposed Changes to Individual NESHAP

The EPA has identified one general category of regulatory provisions in several NESHAP subparts that reflect the 1995 OIAI policy that require revision pursuant to this action. This category of provisions addresses the date by which a major source can become an area source. Accordingly, in this action we are proposing to revise the following provisions: 40 CFR part 63, subpart QQQ at 63.1441; 40 CFR part 63, subpart QQQQQ at 63.9485; 40 CFR part 63, subpart RRRRR at 63.9581; and Table 2 of 40 CFR part 63, subpart WWWW.

We also identified several area source NESHAP containing notification provisions (*i.e.,* initial notification) applicable to existing sources which have passed. The following area source NESHAP contain notification requirements for existing sources with specific deadlines that are in the past: 40 CFR part 63, subpart HHHHHH at 63.11175; 40 CFR part 63, subpart XXXXXX at 63.11519; 40 CFR part 63, subpart YYYYYY at 63.11529; 40 CFR part 63, subpart AAAAAAA at 63.11564; 40 CFR part 63, subpart BBBBBBB at 63.11585; 40 CFR part 63, subpart CCCCCCC at 63.11603. We are proposing to amend these provisions to add language applicable to existing sources that reclassify from major source to area source status. Consistent with other area source NESHAP notification requirements, we propose that, for an existing source that reclassify from major to area source status, the notification shall be submitted no later than 120 calendar days after the source becomes subject to the relevant area source NESHAP requirements.

We further solicit comment on whether there are any other regulatory provisions in any of the individual subparts that would warrant modification or clarification consistent with this proposal (Comment C–53).

VI. Impacts of Proposed Amendments

In this section, we present the findings of the cost, environmental, and economic impacts associated with this action. While the opportunity to reclassify from major to area source status under section 112 of the CAA is available to all major sources of HAP, the EPA has very limited information on how many sources may choose to limit their PTE HAP to below major source thresholds and reclassify to area source status as a result of this action. We outline in section IV of this preamble the series of analyses and considerations a source will undergo to reclassify from major to area source, including: Evaluating actual and potential HAP emissions, technical feasibility of effectively limiting the source's PTE HAP, process to obtain effective PTE limitations, as well as other considerations. Because each source will assess its own situation to determine whether the costs and benefits associated with becoming an area source are advantageous to the source, there are inherent uncertainties in determining the number of sources to include in the illustrative analysis presented here.

The EPA specifically solicited comments in 2007 on the number of potential and likely sources that may avail themselves of the opportunity to reclassify. Many of the commenters on the 2007 proposal stated that the opportunity to reclassify to area source status will mainly benefit manufacturing operations that have been working on technological advances and/or process changes to reduce their

[47] The EPA's ''Final Plan for Periodic Retrospective Reviews,'' August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[48] ''E-Reporting Policy Statement for EPA Regulations,'' September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[49] ''Digital Government: Building a 21st Century Platform to Better Serve the American People,'' May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

emissions. Commenters in 2007 did not provide specific information and data in response to this request that would allow the EPA to analyze the impacts.

Since the inception of the air toxics program under section 112 of the CAA, the EPA has observed significant improvements in technologies and processes that have significantly reduced, or in some cases eliminated, the use of HAP from many operations. These advances include process or procedural changes, equipment or technology modifications, reformulation or redesign of products, and substitution of raw materials. Although the incorporation of such advances will benefit all sources regardless of the size and status, such incorporation at small- to medium-sized major sources can aid those sources to reduce their HAP emissions to below major source thresholds.

Sources that might seek reclassification to area source status can generally be grouped into three categories: (1) Major sources that need to obtain enforceable limits on their PTE HAP to ensure that the emissions do not exceed major source thresholds; (2) sources previously classified as major sources that already have enforceable limits on their HAP emissions such that their PTE is below the major source thresholds; and (3) sources previously classified as major sources that are no longer physically or operationally able to emit HAP in amounts that exceed the major source thresholds (commonly known as true or natural area sources).

As discussed below, commenters on the 2007 proposal asserted that the implementation of the plain reading of the definitions of major and area source in section 112 of the CAA and withdrawal of the OIAI policy will encourage innovation in pollution reduction technologies, engineering, and work practices. For many sources, the opportunity to reclassify to area source status may create an incentive to evaluate their operations and consider changes that can further reduce their HAP emissions to below the major source thresholds if the source views those changes as an opportunity to reduce costs of production, increase productivity, or reduce the opportunity costs of complying with major source NESHAP requirements. For example, sources using surface coatings [50] may see the opportunity to become an area source as an extra incentive to invest in the development of new low- or no-HAP content coatings, inks, and binders. Similarly, sources with boilers and engines may benefit from replacing old boilers and engines with new, more efficient, and clean technologies, which not only could help a source reduce HAP to below the major source thresholds but could also reduce fuel use and associated costs.

The EPA specifically requests information and specific examples of sources that would consider investing in additional emissions reduction measures like changing processes or installing additional emission controls (intrinsic to the source or additional add-on controls), installing new lower emitting equipment, or implementing P2 initiatives to avail themselves of the potential to seek reclassification to area source status (Comment C–54). The Agency is interested both in comments in which the commenters themselves would consider investing in additional emissions reduction measures, and comments identifying specific types of facilities that would be able to invest in additional emissions reduction measures (Comment C–55).

Commenters on the 2007 proposal noted that many sources have undergone facility and/or operational modifications that will ensure maintenance of emission reductions even without the sources remaining subject to major source NESHAP requirements. For these sources, the opportunity to reclassify will result in a reduction in regulatory burden with no potential for HAP emission increases. An example provided in the 2007 comments is that of a gasoline distribution terminal [51] classified as a major source of HAP and subject to 40 CFR part 63, subpart R, NESHAP for Gasoline Distribution Facilities. The site converted from methyl tertiary butyl ether to ethanol to comply with reformulated gasoline requirements and obtained enforceable HAP limitations below the major source thresholds so that two other major source NESHAP rules (Organic Liquids Distribution: 40 CFR part 63, subpart EEEE, and Site Remediation: 40 CFR part 63, subpart GGG) would not be applicable. Because this facility is also a major source of VOC, the site has, and will continue to have, a title V permit. Vapors from loading facilities are currently captured by a vapor recovery system and the tanks are equipped with floating roofs. In light of their existing enforceable PTE limitations, the source could submit a request to their permitting authority to be reclassified as an area source and to remove the 40 CFR part 63, subpart R major source requirements from its title V permit. The facility will still be subject to NSPS 40 CFR part 60, subpart XX, for bulk gasoline terminals and NSPS 40 CFR part 60, subpart Kb, for storage vessels. In addition, the facility will be subject to the Gasoline Distribution area source NESHAP 40 CFR part 63, subpart BBBBBB requirements. The commenter then asserted that emissions will continue to be controlled while allowing a reduction in regulatory burden at the source.

In the section below the EPA presents the potential impacts of the proposed amendments. This action does not mandate any source to reclassify to area source status. An evaluation of the potential to reclassify to area source status involves many source-specific considerations (discussed above and in section IV). Each source must assess its own situation to determine whether the costs and benefits associated with becoming an area source are advantageous to the source. Because of inherent uncertainties in determining how many and which sources may choose to reclassify from major source to area source, we can only present illustrative analyses concerning the impacts of the proposed amendments.

We estimated the potential costs and cost savings associated with this proposed action by determining which sources are likely to have the option to reclassify from major to area source status and then we assessed the potential costs and cost savings. The potential costs and cost savings presented in the proposal cost memorandum and RIA are the results of an illustrative assessment. It is unknown how many sources would choose to take legally and practicably enforceable HAP PTE limits to below major source thresholds and reclassify to area source status. The illustrative assessment is based on the following key assumptions: (1) We estimated that only those facilities whose actual emissions are below 75 percent of the major source thresholds (7.5 tpy for a single HAP and 18.75 tpy for all HAP) would reclassify from major to area source status (this assumption forms the basis for the primary alternative scenario analyzed for this proposal); (2) the costs that we estimated to be incurred by the facilities are the costs associated with permitting actions necessary to obtain area source status; (3) the costs that we estimated to be incurred by permitting authorities are the costs associated with permitting actions necessary to permit facilities as

[50] Coating manufacturing operations covered by NESHAP include: Shipbuilding and repair; wood furniture; aerospace; fiberglass boat; metal coil; paper and other web; metal furniture; large appliances; wooden building parts; plastic parts; fabric; miscellaneous metal parts and products; auto and light duty trucks; and metal can.

[51] EPA–HQ–OAR–2004–0094–0125.

area sources; and (4) the cost savings estimates are based solely on estimated changes in labor burden related to MRR requirements that would either no longer apply or would change based on the specific requirements in the major source and area source rules that apply to a particular source category. In addition, we conducted this illustrative assessment for two alternative scenarios. Alternative scenario 1 assumed that only those facilities whose actual emissions are below 50 percent of the major source thresholds (5 tpy for a single HAP and 12.5 tpy for all HAP) would reclassify from major to area source status. Alternative scenario 2 assumed that sources below 125 percent of the major source thresholds (12.5 tpy for a single HAP and 31.25 tpy for all HAP) would reclassify from major to area source status. As part of the overall analysis of the 125 percent alternative scenario, we examined the potential control costs for major sources in a few source categories that may reduce HAP emissions as part of reclassifying to area HAP sources. Details of this potential control cost analysis are presented in the memorandum, ''Analysis of Illustrative 125% Scenario for MM2A Proposal—Potential Cost Impacts from HAP Major Sources Reducing Emissions as part of Reclassifying to HAP Area Sources,'' which is available in the docket for this action. Discussion of these scenarios and results can be found in the RIA for this proposal. The details of the cost analysis are presented in the memorandum, ''Analysis of Potential Costs and Cost Savings Associated with Facilities Reclassifying as Area Sources,'' which is available in the docket for this action. A summary of the results of our illustrative cost and cost savings illustrative analysis is presented in Table 2.

TABLE 2—RESULTS OF POTENTIAL COSTS AND COST SAVINGS ILLUSTRATIVE ANALYSIS

Coverage	Total number of facilities in source category subject to major source NESHAP	Facilities projected to obtain area source status [1]	Potential net annual cost savings (2014$)
71 source categories for which the EPA had RTR data	3,065	1,621 (52.9%)	$73.4 Million (yr 1).[3] $86.4 Million (yr 2).[4]
Extrapolated source categories (35 categories) [2]	3,034	1,383 (45.6%)	$69.8 Million (yr 1). $80.9 Million (yr 2).
Industrial, commercial, and institutional boilers and process heaters (3 categories) [2].	1,821	908 (49.9%)	$25.8 Million (yr 1). $33.1 Million (yr 2).
Total [5]	7,920	3,912 (49.4%)	$169.0 Million (yr 1).[6] $200.3 Million (yr 2).

[1] Results are for the 75-percent cut-off scenario—whole facility emissions below 75 percent of the major source thresholds (7.5 tpy for one HAP and 18.75 tpy for combined HAP).
[2] Extrapolated using the EPA's Enforcement and Compliance History Online (ECHO) data.
[3] Costs incurred by sources and permitting authority assumed in year 1.
[4] Year 2 impacts are also representative of annual impacts beyond year 2.
[5] This analysis was done source category by source category. The one possibility for double counting is in the permitting costs incurred in year 1, which the EPA applied to each facility in each source category regardless of whether a permit change would cover more than one source category (for facilities subject to more than one major source NESHAP).
[6] The analytic timeline begins in 2020 and continues thereafter for an indefinite period. Year 1 impacts are those for 1 year after 2020, and year 2 impacts are those for the second year after 2020 and annually afterwards.

The EPA also estimated the PV of the illustrative cost savings for the main illustrative scenario and each alternative scenario. The PV is the value of a stream of impacts over time, discounted to the current (or nearly current) year. The PV of the cost savings for the primary illustrative scenario is $2.34 billion (in 2014 dollars) at a discount rate of 7 percent, which is discounted to 2016. At a discount rate of 3 percent, the PV is $6.08 billion (in 2014 dollars), again discounted to 2016. In 2016 dollars, these PVs are $2.39 billion at a 7-percent discount rate and $6.2 billion at a 3-percent discount rate, discounted to 2016. Another measure of the annual cost savings to complement the estimates in Table 2 is the EAV. This annual impact estimate is calculated consistent with the PV. The EAV is $164 million (2014 dollars) and $167 million (2016 dollars) at a 7-percent discount rate for the primary scenario. At a 3-percent discount rate, the EAV is $183 million (2014 dollars) and $187 million (2016 dollars). The PVs for each alternative scenario and discount rate in 2014 and 2016 dollars can be found in the RIA for the proposal.

To assess the potential emission impact associated with the reclassification of sources, the EPA evaluated the sources that the EPA knows have reclassified to area source status consistent with the EPA's plain language reading of the CAA section 112 definitions of ''major'' and ''area'' source since January 2018. The review of these reclassifications provides a representation of the potential real-world impact on emissions by looking at the facts and circumstances of actual reclassification actions. In addition to the evaluation of the reclassification actions, the EPA performed an illustrative assessment for six source categories: Wood Furniture Manufacturing Operations, Surface Coating of Metal Cans, Surface Coating of Miscellaneous Metal Parts and Products, Wet-Formed Fiberglass Mat Production, Hydrochloric Acid (HCl) Production, and Non-Gasoline Organic Liquids Distribution (OLD). The analysis of these six source categories is informative in some respects but is only illustrative and speculative in nature and can only present a range of possible outcomes that is dependent on the assumptions that we made in the assessment. The details and results of the emission analysis are summarized below presented in detail in the emission impact analysis technical support memorandum, which is available in the docket for this action.[52]

The EPA reviewed permits associated with 34 reclassifications to area source status. Of the 34 sources reviewed for this analysis, 21 sources can be classified as coating type sources; five as oil and gas sources; four as fuel

[52] See Technical Support Memorandum (TSM): Emission Impacts Analysis for the Proposed Rulemaking ''Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act.''

combustion/boiler sources, three as chemical sources and one as heavy industry. (*See* Table 2 of Emission Impacts Analysis TSM available in the docket for this action).[53] To assess the potential for emission impacts due to reclassification, the EPA focused the review on the enforceable conditions associated with the HAP PTE limitations for the emission units previously subject to major source NESHAP requirements and whether the sources that reclassified will continue to use the major source NESHAP compliance obligations for these emission units as an enforceable condition on the source's PTE. A summary of the permit review and emission evaluation is presented in Table 2 and Appendix 1 of the Emission Impacts Analysis TSM available in the docket for this action. The EPA's findings from the permit review and emission evaluation is that sources that reclassify to area source status would, in most cases, achieve and maintain area source status by operating the emission controls or continuing to implement the practices they used to comply with the major source NESHAP requirements. Below is an overview of the EPA's findings from the permit review and evaluation:

- Of the 21 coating sources (Facilities #1–21 on Table 2 of Emission Impact Analysis TSM), 20 used compliant materials (low-HAP/no-HAP) to meet applicable major source requirements, and their continued use of compliant materials is an enforceable condition after reclassification. Only one source (Facility #13) used a regenerative thermal oxidizer (RTO) to meet the applicable major source requirements and their continued use of the RTO is an enforceable condition after reclassification. Thus, the EPA does not expect emissions increases from those sources using compliant materials (low-HAP/no-HAP) both before and after reclassification. Similarly, for the coating source using the RTO, the permit for this source continues to require the use of an RTO ensuring a HAP destruction efficiency of 95 percent as an enforceable permit requirement. Therefore, we don't expect emissions increases resulting from the reclassification of this facility.
- All five oil and gas sources (Facilities #22–26 on Table 2 of Emission Impact Analysis TSM), that reclassified or are in the process of reclassifying relied on the use of control technologies to meet applicable major source requirements before reclassification, and their continued use of these control technologies is an enforceable condition after reclassification. Four of these facilities (#22, #24, #25, and #26) were subject to the major source requirements of the Oil and Natural Gas Production NESHAP while one facility (#23) was subject to the major source requirements of the Stationary Reciprocating Internal Combustion Engines (RICE) NESHAP.
  - The facility (#23) previously subject to the major source RICE NESHAP requirements, replaced old engines with new engines equipped with a catalytic oxidizer designed to reduce HAP emissions (formaldehyde by 90 percent) prior to the reclassification. Since reclassification, this facility continues to be subject to enforceable conditions on the operation of the engines and the catalytic oxidizer to reduce formaldehyde by 90 percent. Thus, we don't expect emissions increases resulting from the reclassification of this facility.
  - Of the four facilities that were subject to the major source requirements of the Oil and Natural Gas Production NESHAP, two (#22 and #26) relied on the use of flares and enclosed combustion devices to meet applicable major source requirements before reclassification, and their continued use of these control technologies is required as an enforceable condition after reclassification. The permit for another facility (#24), as proposed, will impose enforceable emission restrictions for an existing installed and operating emissions unit and associated voluntarily installed and operated control device. The proposed enforceable conditions include the operation of an enclosed combustor to control the VOC and HAP emissions from a triethylene glycol dehydrator still vent. If these enforceable conditions are finalized, we don't expect emissions increases resulting from the reclassification of this facility. The last facility in this category (#25) took additional enforceable limits on the amount of low-pressure relief gas vented to the atmosphere to ensure emissions of the individual HAP 2,2,4-trimethylpentane (largest individual HAP for the gas compression/venting operation) emissions are below 10 tpy. This enforceable limitation ensures HAP emissions will not increase as a result of the modification to vent the low-pressure gas directly to the atmosphere instead of being recovered in a vapor recovery unit. Without the enforceable limitations in the amount of low-pressure relief gas vented to the atmosphere, emissions from the gas compression/venting would have increased (uncontrolled PTE) to 10.3 tpy for the largest individual HAP. The actions taken by this facility to reclassify to area source status resulted in emission reductions.
- Of the four fuel combustion/boiler sources (Facilities # 27–30 on Table 2 of Emission Analysis TSM), three of these sources (#27, #28, #29) had emissions above the major source thresholds as reported in the 2014 National Emission Inventory (NEI). To reclassify, these sources either ceased combustion of coal, ceased operation of boilers, or obtained enforceable restrictions on the combustion of natural gas. For each of these three sources, their actions to reclassify resulted in a reduction of HAP emissions. Another source (#30) relied on material limits and operational restrictions on natural gas usage to meet the applicable major source requirements, and the continued use of these compliance methods is required by an enforceable condition after the reclassification. Thus, the EPA does not expect emission increases from the reclassification of this source.
- Two of the chemical sources are gasoline distribution facilities (Facilities #31 and #33 on Table 2 of Emission Analysis TSM). These facilities were subject to 40 CFR part 63, subpart R and relied on vapor flare/vapor combustion to meet the major source requirements before reclassification, and their continued use of this control technology is required as an enforceable condition after reclassification. Since reclassification, their permit continues to require the operation of the vapor flare/vapor combustor at all times when the facility's loading racks are loading gasoline into transports. These sources are now subject to the area source NESHAP requirements in 40 CFR part 63, subpart BBBBBB that regulate emissions from tanks, transfer racks, roof landings, and maintenance. For these facilities, the EPA reviewed the operating parameters associated with the vapor flare/vapor combustion. The permit for one facility (#31) includes a requirement for annual periodic testing in addition to the continuous monitoring of the presence of the pilot flame to ensure that the enclosed combustor is operational when loading operations occur. The annual performance test together with the monitoring of the presence of the flame ensure operation and performance. We,

[53] As part of this review, the EPA identified one source subject to 40 CFR part 63, subpart WWWW (Reinforced Plastic Composite Production). As discussed above in the preamble, 40 CFR part 63, subpart WWWW contains a regulatory provision that reflects the 1995 OIAI policy. In this action, the EPA is proposing to revise Table 2 of subpart WWWW by removing the date after which a major source cannot become an area source. The existing provision will remain in effect until such time as it is revised or removed by final agency action.

therefore, do not expect emission increases due to the reclassification of this source. The other gasoline distribution facility (#33) continues to be subject to flare operating and monitoring requirements in 40 CFR part 60, subpart XX (New Source Performance Standards for Bulk Gasoline Terminals). The flare operating and monitoring requirements in 40 CFR part 60, subpart XX are identical to those that the source was previously subject to under 40 CFR part 63, subpart R. This permit also requires testing for specific HAP associated with the vapor combustor to ensure operation and performance. We do not expect emission increases due to the reclassification of this source.

- As for the incinerator (Facility #32 on Table 2 of Emission Analysis TSM), the source continues to be subject to the same NESHAP requirements in 40 CFR part 63, subpart EEEE as before reclassification, and it has been reclassified for purposes of applicability with 40 CFR part 63, subpart DD (Off-Site Waste Recovery Operations), which covers emissions from tanks and equipment leaks. This source relied on control technologies (fixed roofs with closed vents systems routed to carbon absorption units) as their method of compliance before reclassification and is required by an enforceable condition to continue to operate the same control technologies after reclassification. The source is also subject to Resource Conservation and Recovery Act (RCRA) regulation/permit requirements. The RCRA permit for this facility requires the source to control emissions by venting the tanks through closed vent systems to carbon adsorption units designed and operated to recover the organic vapors vented to them with an efficiency of 95 percent or greater by weight. The tanks shall be covered by a fixed roof and vented directly through the closed vent system to a control device. Therefore, we don't expect emissions increases due to the reclassification of this source.
- As for the lime manufacturing plant (Facility #34 on Table 2 of Emission Analysis TSM), after reclassification this source remains subject to other regulatory obligations, including PM emission limitations, use of a baghouse, and monitored opacity as an operating limit with operation of a COMS. Because of the inherent scrubbing properties of lime and the requirements for the use of a baghouse, we don't expect emissions increases resulting from the reclassification of this facility.

The results of the analysis of these reclassifications show that three sources with NEI 2014 emissions above the major source thresholds took actions that reduced their emissions below what is required by their previously applicable major sources NESHAP and to below the major source thresholds in order to reclassify to area source status. The results also support the conclusion that the remaining 31 sources that reclassified from major to area source status since January 2018 will have no change in emissions. We request comments on the analysis of the reclassification actions presented above and in more details in the Emission Impact Analysis TSM available in the docket (Comment C–56). Specifically, we request comments on whether there are other factual factors to consider for the emission evaluation of these reclassifications (Comment C–57).

In addition to the evaluation of the reclassification actions presented above, the EPA performed an illustrative assessment for six source categories: Wood Furniture Manufacturing Operations, Surface Coating of Metal Cans, Surface Coating of Miscellaneous Metal Parts and Products, Wet-Formed Fiberglass Mat Production, HCl Production, and Non-Gasoline OLD. The analysis of these six source categories is informative in some respects but is only illustrative and speculative in nature and can only present a range of possible outcomes that is dependent on the assumption that we made in the assessment. The following discussion summarizes the illustrative emission impact analysis and results of it. The full discussion of the illustrative analysis, including the rationale for our key assumptions and assessments, is presented in the technical support memo for the emission analysis, which is available in the docket for this action.[54]

Consistent with the review and evaluation of the reclassification actions, the illustrative analysis focuses on whether sources in the evaluated source categories could adjust the types of add-on control equipment used to comply with the major source NESHAP requirements upon reclassification. The EPA considered two set of assumptions for the illustrative analysis. The first set of assumptions aligns with the findings of our permit review presented above in which sources continue to use the same compliance obligations before and after reclassification and add-on controls are not adjusted to decrease control efficiency after the source is reclassified. The second set of assumptions addresses sources that limits and use adjustable add-on controls, estimating possible emission impacts if these sources were allowed by their regulatory authority (*i.e.,* permitting authority) to change the operating parameters of the adjustable add-on controls after reclassifying.

To assess the potential for emission changes if sources taking HAP PTE limitations were to be allowed by their permitting authority to change the operating parameters of adjustable add-on control, we assumed the following:

- For a source category employing adjustable controls, emissions could potentially increase for all facilities with actual emissions below the 75-percent thresholds.
- For sources with only a single HAP reported in the NEI and an adjustable control, a potential increase in emissions was calculated as the difference between 7.5 tpy and the estimate of the single largest HAP. Otherwise, the potential emissions increase was estimated as the larger difference between 18.75 tpy and the estimate of total HAP emissions and between 7.5 tpy and the single HAP emissions.

For our illustrative assessment, we also considered whether other non-HAP regulatory requirements apply to the facilities that could potentially reclassify and increase emissions that would provide some level of control of HAP from the source/pollutants (*i.e.,* NSPS, control techniques guidelines, etc.) and the extent to which those other regulatory requirements would serve as a backstop that would prevent emission increases and whether area source NESHAP requirements would apply to a source that reclassifies. The details of our illustrative emission analysis, including the rationale for our key assumptions and assessments, are presented in the TSM for the emission analysis, which is available in the docket for this action. A summary of the findings of our illustrative emission impact assessment for the six source categories analyzed is presented in Table 3.

The results of our illustrative analysis show that for many facilities, the reclassification from major source to area source status is not expected to result in an increase in that source's HAP emissions. The analysis also shows that for many sources there are backstops in place that would prevent emission increases (*e.g.,* other non-HAP regulatory requirements that also provide for HAP control). The analysis also shows that for some source categories, no emissions increases, and some emission decreases can be

[54] *See* Technical Support Memorandum: Emission Impacts Analysis for the Proposed Rulemaking ''Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act.'' Available in the docket for this rulemaking.

anticipated. Finally, the results of our illustrative analysis show that, for some facilities, there could be a potential for emission increases. However, when the regulatory authority reviews the application for a new or revised permit to reclassify a major source as an area source under section 112 of the CAA, the regulatory authority will consider the current and proposed HAP emissions levels and evaluate the potential for emission increases due to reclassification and whether safeguards are needed to prevent any emission increases due to reclassification.

We solicit comments on our emission analysis (analysis of reclassification actions and illustrative analysis) and illustrative control cost analysis for five source categories discussed above and in the docket for this proposed rule, and in general on the potential impacts on emissions resulting from the reclassification of major sources to area source status (Comment C–58). In particular, the EPA is interested in data and analysis on the number and type of major sources that may reclassify from major source to area source status and whether the HAP emissions from those sources will decrease or increase or stay the same (Comment C–59).

TABLE 3—RESULTS OF POTENTIAL EMISSION IMPACTS ILLUSTRATIVE ANALYSIS

Source category, 40 CFR part 63 subpart	Number of facilities in source category subject to major source NESHAP	Facilities projected to obtain area source status at 75% cut-off scenario/ percent	Range of potential HAP increases (tpy) at 75% cut-off	Additional facilities projected to obtain area source status at 125% cut-off scenario/ percent	Range of potential HAP decreases (tpy) at 125% cut-off
Wood Furniture, subpart JJ	333	250/75%	0	26/8%	0–125
Metal Cans, subpart KKKK	5	1/20%	0	2/40%	0–4
Miscellaneous Metal Parts and Products, subpart MMMM.	371	268/72%	0	46/12%	0–160
Wet Formed Fiberglass, subpart HHHH.	7	5/71%	0–6 single HAP; 0–33 combined HAP.	0	0
HCl Production, subpart NNNNN	19	3/16%	0–11 single HAP; 0–27 combined HAP.	2/11%	0–4
Non-Gasoline OLD, subpart EEEE	177	82/46%	0–1,140 combined HAP	19/11%	0–77

The emission analysis of the 34 reclassification shows for most sources that have reclassified or are in the process of reclassifying the reclassification to area source status will have no change in the sources' emissions. Specifically, the information that we have shows that 31 of 34 sources will have no change on their emissions as a result of reclassification. The analysis also shows that for three sources the actions the reclassification resulted in additional emission reductions.

The illustrative control cost analysis conducted under the 125% scenario considered the potential control costs associated with major sources reducing emissions as part of reclassifying to area sources in five source categories. For two source categories (miscellaneous metal parts and products, and wood furniture manufacturing operations), we find some potential for the cost savings to be greater than the illustrative control costs. More information on the analysis can be found in the Illustrative 125% Scenario Cost Considerations Memorandum that is in the docket for this proposed rulemaking.

Based on the results of the EPA's analysis of the reclassifications of 34 sources and the illustrative control cost analysis of five source categories, this proposed rule may potentially result in both emission reductions and increases from a broad array of affected sources. We are uncertain as to the magnitude, direction, and distribution of changes in emissions across the broad array of affected sources resulting from this rulemaking. As we discuss above and in the docket of this proposed rule, the emissions from different sources will be impacted in different ways. Thus, we are unable to quantify the changes in emissions across these sources. In place of quantitative estimates of the number and economic value of the pollutant changes, we instead characterize these impacts in qualitative terms. For more information on this qualitative characterization, please refer to the benefits analysis included in section 5 of the RIA for this proposed action.

The economic impact analysis (EIA), an analysis that is included in the RIA, focuses on impacts at an industry level and impacts are calculated for the scenario in which only facilities whose actual emissions are below 75 percent of the major source thresholds would reclassify from major to area source status. As part of the EIA, the EPA considered the impact of this rulemaking to small entities (small businesses, governments, and non-profit organizations). Impacts are calculated as compliance costs (savings, in this instance) as a percent of sales for businesses, and of budgets for other organizations. For informational purposes, the RIA includes the Small Business Administration's (SBA) definition of small entities by affected industry categories (defined as North American Industry Classification System) and potential burden reductions from title V and other permitting programs. Since this rule significantly lessens the regulatory burden resulting from ending the OIAI policy, no compliance costs are imposed upon industry categories as a result of this proposal. These avoided costs accrue because some reclassified sources will not be required to obtain or maintain a title V permit or continue meeting major source administrative requirements under section 112 of the CAA. Some of the facilities benefitting from this action are owned by small entities, and these entities along with large entities will experience a reduction in costs from the burden reductions that would take place as a result of this rule.

We find that the results of the EIA for the primary scenario show that the annual cost savings per sales for all affected industries is around 0.1 percent, using the median of these estimates, which is approximately $9.1 billion per affected industry, to determine average impact. The details of the EIA and impacts on employment are presented in the RIA of the MM2A proposal, as well as results of the EIA

for the other two alternative scenarios, which is available in the docket for this action.

VII. Request for Comments

Interested persons may submit comments on any matter that is relevant to this proposed rule. Further, the EPA is expressly soliciting comment on numerous aspects of the proposed rule in various places in this preamble. The EPA has indexed each comment solicitation with an alphanumeric identifier (*e.g.,* ''C–1,'' ''C–2,'' ''C–3'') to provide a consistent framework for effective and efficient provision of comments. Accordingly, the EPA asks that commenters include the corresponding identifier when providing comments relevant to that comment solicitation. The EPA asks that commenters include the identifier in a heading or within the text of each comment (*e.g.,* ''In response to solicitation of comment C–1, . . .'') to make clear which comment solicitation is being addressed. The EPA emphasizes that the Agency is not limiting comments to these identified areas and encourages submission of any other comments relevant to this proposal.

Below we provide a list of the areas the EPA is expressly soliciting comments on. The EPA invites comments:

- On whether there are any other regulatory provisions in any of the individual NESHAP subparts that would warrant modification or clarification consistent with this proposal (Comment C–1 and Comment C–53).
- On all aspects of this proposal, including the EPA's position that the withdrawal of the OIAI policy and the proposed approach gives proper effect to the statutory definitions of ''major source'' and ''area source'' in CAA section 112(a) and is consistent with the plain language and structure of the CAA as well as the impacts of the proposal on costs, benefits, and emissions impacts (Comment C–2).
- On (1) to what extent will theoretical emission increase scenarios actually occur, including (a) what emissions restrictions will be put in place as part of the PTE HAP limits that a major source takes to be reclassified as an area source and (b) whether other regulatory controls are in place and applicable to sources after reclassification that will either continue to restrict the source from emitting above the major source standard or prevent an emissions increase after reclassification; and (2) whether the EPA should adopt regulatory text to establish safeguards to prevent emissions increases following reclassification (Comment C–3).
- With respect on whether the EPA should adopt regulatory text to establish safeguards to prevent emissions increases, the EPA is seeking comment on what legal basis the agency would have for requiring such safeguards (Comment C–4).
- On the EPA's rationale for separating the timing of reclassification from the sufficiency of the PTE limits that support reclassification (Comment C–5).
- On whether a requirement that PTE limits must include safeguards to prevent emissions increases is a reasonable reading of the ambiguous phrase ''potential to emit considering controls'' in light of the other provisions in CAA section 112 (Comment C–6).
- On whether the arguments presented in opposition to EPA's plain language reading on timing are appropriately considered on the question of the sufficiency of the PTE limit and support the conclusion that PTE limits used to support reclassification must not allow sources to increase emissions as a result of reclassification (Comment C–7).
- Assuming that requiring safeguards against emission increases in PTE limits is a reasonable reading of the statute, the EPA is seeking comment on what safeguards should be required (Comment C–8).
- On whether it is reasonable and appropriate to require safeguards against emission increases following reclassification (Comment C–9).
- On the EPA's plain language reading discussed above and to provide specific examples of, and/or provide additional information on these and any other reasons why allowing major sources to reclassify as areas sources would or would not increase emissions from such sources and may even lead to a reduction in their emissions (Comment C–10).
- On whether the Agency's reading is a permissible interpretation of the statute even if it is not the only possible reading (Comment C–11).
- On whether it would be appropriate to include in the General Provisions of 40 CFR part 63 the minimum requirements that a major source of HAP must submit to its regulatory authority when seeking to obtain HAP PTE limitations to reclassify as area sources under section 112 of the CAA (Comment C–13), and on whether adding the same or similar requirements that are now in 40 CFR 49.158(a)(1) to 40 CFR 63.10 would be appropriate to create the minimum requirements that a major source of HAP must submit to its regulatory authority when seeking to obtain PTE HAP limitations to reclassify as area sources under section 112 of the CAA (Comment C–15).
- On whether the EPA should include in the General Provisions to 40 CFR part 63 the hierarchy of acceptable data and methods a source seeking reclassification would use to determine the source PTE. This hierarchy could be the same or similar to the one provided in 40 CFR 49.158(a)(2) (Comment C–14 and Comment C–16).
- On the proposed criteria required for effective HAP PTE limits for purposes of determining whether a source is a major source under 40 CFR 63.2 and whether the EPA's proposed criteria and their corresponding elements are necessary and sufficient to ensure HAP PTE limits are effective to support reclassification of a major source to an area source (Comment C–12, Comment C–17, Comment C–18, Comment C–19, Comment C–26, Comment C–27).
- On the proposed legally enforceable criterion that HAP PTE limits must identify the legal authority under which the limits are being issued, the appropriateness of this requirement, and on whether there are other considerations that warrant being part of the criterion of legal authority to issue HAP PTE limits (Comment C–21).
- On whether state-only or local-only enforcement authority alone is sufficient to impose a credible risk of enforcement and, therefore, ensure compliance with the HAP PTE limits, or whether to be effective, the EPA and/or citizens, through the enforcement authorities in the CAA must also have the authority to enforce the HAP PTE limits that are being used to avoid a federal requirement (Comment C–22).
- On whether enforceability of a PTE limit by the EPA and/or citizens reduces the implementation burden for all parties and provides a level of compliance incentive unmatched by enforcement by only a state or local authority that warrants it to be part of the effectiveness criteria (Comment C–23).
- On the inclusion of the specific considerations for monitoring, discussed above in the General Provisions of 40 CFR part 63 proposed regulatory text defining practicably enforceable (Comment C–24) and on whether other criteria are needed to ensure the emission limitations are practicably enforceable (Comment C–50).
- On whether, as a result of this rulemaking, facility owners or operators of sources that reclassify will cease to properly operate their control devices

where the operation of the control device is needed to restrict the PTE and appropriate MRR are established as enforceable conditions (Comment C–25).

- On whether there are other criteria that should be required for ensuring effectiveness of HAP PTE limits including whether public notice and comment procedures should be part of the required effectiveness criteria (Comment C–20, Comment C–13, Comment C–19).
- On whether to be effective, HAP PTE limits need to undergo public notice and comment procedures (Comment C–28, Comment C–30, Comment C–35).
- On whether HAP PTE limits can be properly and legally established if the limits do not go through public notice and comment procedures (Comment C–29).
- On how requiring public comment and notice procedures for issuance of HAP PTE limits enhance or is needed for ensuring effectiveness of such limits (Comment C–31).
- On whether the concerns raised in the past are still an issue if EPA were to require that HAP PTE limits that will be used as the basis for reclassifying major sources to area source status need to be subject to a public notice and comment procedures (Comment C–32).
- On whether there are specific criteria for deciding under what circumstances a source's proposed HAP PTE limits would need to undergo public review and comment under the state or local program (*e.g.,* controversial or complex sources, sources with actual emissions close to the major source thresholds, etc.) (Comment C–33).
- Given that the EPA recognizes that some state-programs may process HAP PTE limits concurrently with a minor NSR or other permitting action such that the EPA and the interested public would have the opportunity to provide comments on PTE limits in that case, on whether the public notice and comment procedures provided in those circumstances would be sufficient (Comment C–34).
- On the appropriateness of the proposed case-by-case compliance extension date approach, including, for example, the type of information that should be requested from the source seeking the proposed compliance extension and whether the limitations proposed above (*i.e.,* the compliance extension is only available if the affected source must undergo a physical change or install additional control equipment to meet the area source NESHAP) are appropriate (Comment C–36).
- On the appropriate process for requesting the compliance extension and on the mechanics of obtaining the compliance extension (Comment C–37).
- On whether the proposed compliance date extension provision in 40 CFR 63.1(c)(6)(i) should be available to major sources that reclassify to area source status prior to the compliance date of an applicable area source standard, to the extent that the remaining time before the compliance date is not sufficient time for the source to comply (Comment C–38).
- On whether our information and expectations that sources that reclassify to area source status would in most cases, if not all, achieve and maintain area source status by operating the emission controls or continuing to implement the practices (*i.e.,* use of no-HAP or low-HAP compliant coating) they used to meet the major source NESHAP requirements are correct (Comment 39) on the proposed compliance time frame for sources that reclassify from major source to area source and then revert back to major source status, and whether the proposed regulatory text in 40 CFR 63.1(c)(6)(ii)(B) adequately captures the intended exception if the major source standard has changed such that the source must undergo a physical change, install additional emission controls, and/or implement new emission control measures (Comment C–40).
- On the appropriateness of the proposed immediate compliance rule for sources that reclassify between major and area source status more than once and whether such a rule should be finalized, and on whether, if it is finalized, there are other situations in addition to the one noted above that would necessitate an extension of the time period specified for compliance with the major source NESHAP requirements. (Comment C–41, Comment C–42).
- Or whether the EPA should instead allow all sources that revert back to major source status a specific period of time in which to comply with the major source NESHAP requirements which would be consistent with the approach provided for in 40 CFR 63.6(c)(5) and to the extent a commenter proposes a compliance time frame, we request that the commenter explain the basis for providing that time frame with enough specificity for the EPA to evaluate the request (Comment C–43, Comment C–44, Comment C–45).
- On the mechanics of obtaining a compliance extension if a case-by-case approach is finalized, including, for example, the type of information to request from the source seeking the proposed compliance extension, the process to be used to obtain the extension, and any limitations on providing extensions (Comment C–46).
- On the approach of providing a specified compliance extension in the final rule for certain defined factual scenarios (Comment C–47) and on the nature of the scenario that would warrant such an extension, the specific amount of additional time that would be needed to comply with the major source NESHAP requirements and why such a period of time is needed to comply (Comment C–48).
- On whether a source that cannot immediately comply with previously or newly applicable major source NESHAP requirements at the time it requests reclassification should be required to continue to comply with the HAP PTE limits until the source can comply with the corresponding major source NESHAP requirements (Comment C–49).
- On the proposed amendment to remove the time limit for record retention in 40 CFR 63.10(b)(3) so sources that obtain new enforceable PTE limits are required to keep the required record of the applicability determinations until the source becomes subject to major source requirements (Comment C–51).
- On whether any other NESHAP subparts warrant amendment to reference the new General Provision 40 CFR 63.1(c)(6) or the CEDRI submission procedures in 40 CFR 63.9(k) (Comment C–52).
- The EPA specifically requests information and specific examples of sources that would consider investing in additional emissions reduction measures, including changing processes or installing additional emission controls (intrinsic to the source or additional add-on controls), installing new lower emitting equipment, or implementing P2 initiatives to avail themselves of the potential to seek reclassification to area source status (Comment C–54). The Agency is interested both in comments in which the commenters themselves would consider investing in additional emissions reduction measures, and comments identifying specific types of facilities that would be able to invest in additional emissions reduction measures (Comment C–55).
- On the analysis of the reclassification actions presented above and in more details in the Emission Impacts Analysis TSM available in the docket. (Comment C–56) and on whether there are other factual factors to consider for the emission evaluation of these reclassifications (Comment C–57).

• On our emissions analysis (analysis of reclassification actions and illustrative analysis) and illustrative control cost analysis discussed above and in the docket for this proposed rule, and in general on the potential impacts on emissions resulting from the reclassification of major sources to area source status (Comment C–58). In particular, the EPA is interested in data and analysis on the number and type of major sources that may reclassify from major source to area source status and whether the HAP emissions from those sources will decrease or increase or stay the same (Comment C–59).

Finally, as noted above, even though the EPA is expressly soliciting comment on numerous aspects of the proposed rule, the EPA emphasizes that the Agency is not limiting comment to these identified areas and encourages submission of any other comments relevant to this proposal. For any other comments relevant to this proposal, the submission can be identified by identifier (C–other).

VIII. The Statutory and Executive Order Reviews

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

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

This action is an economically significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, the RIA for the proposed MM2A rule, is available in the docket and is summarized in section I.C of this preamble.

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

This action is expected to be an Executive Order 13771 deregulatory action. Details on the estimated potential cost savings of this proposed rule can be found in the RIA that is the EPA's analysis of the potential costs and benefits associated with this action.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. Specifically, this rule requires the electronic reporting of the one-time notification of the already required in 40 CFR 63.9(j) in the case where the facility is notifying of a change in major source status. OMB has previously approved the information collection activities contained in the existing regulations. These amendments would neither require additional reports nor require that additional content be added to already required reports. Therefore, this action would not impose any new information collection burden. Sources reclassifying to area source status may experience some burden reduction as they would no longer be subject to major source NESHAP requirements. Any changes in MRR would be done through the regulatory mechanism of the responsible regulatory authority. It is not possible to identify how many sources would choose to reclassify, nor is it possible to determine what, if any, changes to reporting and recordkeeping would be made. Regulatory authorities may, in fact, choose to establish NESHAP provisions themselves as the enforceable PTE limits and change little or nothing.

Furthermore, approval of an information collection request (ICR) is not required in connection with these proposed amendments. This is because the General Provisions do not themselves require any reporting and recordkeeping activities, and no ICR was submitted in connection with their original promulgation or their subsequent amendment. Any recordkeeping and reporting requirements are imposed only through the incorporation of specific elements of the General Provisions in the individual MACT standards which are promulgated for particular source categories which have their own ICRs.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule.

Small entities that are subject to major source NESHAP requirements would not be required to take any action under this proposal; any action a source takes to reclassify as an area source would be voluntary. In addition, we expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. The only cost that would be incurred by regulatory authorities would be the cost of reviewing a sources' application for area source status and issuing enforceable HAP PTE limits. No small government jurisdictions operate their own air pollution control permitting agencies, so none would be required to incur costs under the proposal. In addition, any costs associated with the reclassification of major sources as area sources (*i.e.,* application reviews and PTE issuance) are expected to be offset by reduced Agency oversight obligations for sources that no longer must meet major source NESHAP requirements.

Based on the considerations above, we have, therefore, concluded that this action will relieve regulatory burden for all regulated small entities that reclassify to area source status. Nevertheless, we continue to be interested in the potential impacts of the proposed amendments on small entities and welcome comments on issues related to such impacts. We also note that a small entity analysis, prepared at the discretion of the EPA, reflecting the relief in regulatory burden was prepared for this proposal and is included in the RIA, which is available in the public docket for this rulemaking. The results of this small entity analysis show relatively small reductions in burden estimate annual costs (about 0.10 percent) as a percentage of sales using the median estimate as the average of impacts.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

F. Executive Order 13132: Federalism

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.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments,

nor preempt tribal law. There are two tribes that currently implement title V permit programs and one that implements an approved TIP for minor source permitting, which also has a major source. As a result, these tribes may have additional actions needed for sources in their jurisdiction. In addition, any tribal government that owns or operates a source subject to major source NESHAP requirements would not be required to take action under this proposal; the provisions in the proposed amendments would be strictly voluntary. In addition, achieving area source status would result in reduced burden on any source that no longer must meet major source NESHAP requirements. Under the proposed amendments, a tribal government with an air pollution control agency to which we have delegated CAA section 112 authority would be required to review permit applications and to modify permits as necessary. However, any burden associated with the review and modification of permits will be offset by reduced Agency oversight obligations for sources no longer required to meet major source requirements. The EPA specifically solicits comment on the proposed amendments from tribal officials and, consistent with EPA policy, intends to specifically offer to consult with the potentially impacted tribes and other tribes on their request.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action does not establish an environmental standard intended to mitigate health or safety risks. This action implements the plain reading of the statutory definitions of major source and area source of section 112 of the CAA and, therefore, is not subject to Executive Order 13045.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this proposal is not likely to have any adverse energy effects.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. The proposed amendments to the General Provisions are procedural changes and does not impact the technology performance nor level of control of the NESHAP governed by the General Provisions.

L. Determination Under Section CAA 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of CAA section 307(d). Section 307(d)(1)(V) of the CAA provides that the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine.''

List of Subjects in 40 CFR Part 63

Environmental protection, Area sources, General provisions, Major sources, Potential to emit, Hazardous air pollutants.

Dated: June 25, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 63 as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation part 63 continues to read as follows:

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

Subpart A—General Provisions

■ 2. Add § 63.1(c)(6) to read as follows:

§ 63.1 Applicability.

* * * * *

(c) * * *

(6) A major source may become an area source at any time by limiting its potential to emit (PTE) hazardous air pollutants, as defined in this subpart, to below the major source thresholds established in § 63.2, subject to the provisions in paragraphs (c)(6)(i) through (iii) of this section. Until the PTE limitations become effective, the source remains subject to major source requirements. After the PTE limitations become effective, the source is subject to any applicable requirements for area sources.

(i) A major source that becomes an area source must meet all applicable area source requirements promulgated under this part immediately upon becoming an area source, provided the first substantive compliance date for the area source standard has passed, except that the regulatory authority may grant additional time, up to 3 years, if the source must undergo physical changes or install additional control equipment in order for the source (or portion thereof) to comply with the applicable area source standard and the EPA (or a delegated authority), determines that such additional time is warranted based on the record. A source seeking additional compliance time must submit a request to the EPA (or a delegated authority), that identifies the area source standard; the steps that must be taken to come into compliance with the standard; the amount of additional time requested to come into compliance with the standard, and a detailed justification supporting the requested additional time. Owners and operators of major sources that become area sources subject to standards under this part must comply with the initial notification requirements of § 63.9(b), unless the source was previously subject to that area source standard and such notification was previously submitted. Owners and operators of major sources that become area sources must also provide to the Administrator any change in the information already provided under § 63.9(b) per § 63.9(j).

(ii)(A) A major source subject to standards under this part that subsequently becomes an area source, and then later becomes a major source again by increasing its emissions to at or above the major source thresholds, must comply with the major source requirements of this part immediately upon becoming a major source again, notwithstanding § 63.6(c)(5), except as noted in paragraph (c)(6)(ii)(B) of this section. Such major sources must comply with the notification requirements of § 63.9(b).

(B) If a source becomes subject to the standard for major sources again, but that standard has been revised since the source was last subject to the standard and, in order to comply, the source must undergo a physical change, install additional emission controls and/or implement new control measures, the owner or operator will have up to the same amount of time to comply as the amount of time allowed for existing sources subject to the revised standard.

(iii) Becoming an area source does not absolve a source subject to an enforcement action or investigation for major source violations or infractions from the consequences of any actions occurring when the source was major. Becoming a major source does not absolve a source subject to an enforcement action or investigation for area source violations or infractions from the consequences of any actions occurring when the source was an area source.

* * * * *

■ 3. Amend § 63.2 by:
■ a. Adding the definition ''Legally enforceable'' in alphabetical order;
■ b. Revising the definition ''Potential to emit''; and
■ c. Adding the definition ''Practicably enforceable'' in alphabetical order.

The additions and revision read as follows:

§ 63.2 Definitions.

* * * * *

Legally enforceable means that an emission limitation or other standard meet the following criteria:

(1) Must identify the legal authority under which the limitation or standards are being issued.

(2) Must provide the right for the issuing authority to enforce it.

* * * * *

Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is legally and practicably enforceable as defined in this subpart (*i.e.,* effective).

Practicably enforceable means that an emission limitation or other standards meet the following criteria:

(1) Must be written so that it is possible to verify compliance and to document violations when enforcement action is necessary.

(2) Must specify a technically accurate numerical limitation and identify the portions of the source subject to the limitation. The time frame for the limitation (*e.g.,* hourly, daily, monthly and annual limits such as annual limits rolled on a monthly basis) must take into account the type of restriction employed (an indirect indicator of emissions such as a CMS limit should have a shorter time frame than a direct measurement to account for the layers of complexity between direct measurement of HAP and the limitation).

(3) Must specify the method of determining compliance, including appropriate monitoring, recordkeeping, and reporting. The monitoring, recordkeeping, and reporting requirements must be sufficient to demonstrate compliance with the emissions limitations of each pollutant.

* * * * *

■ 4. Revise § 63.6(c)(1) to read as follows:

§ 63.6 Compliance with standards and maintenance requirements.

* * * * *

(c) *Compliance dates for existing sources.* (1) After the effective date of a relevant standard established under this part pursuant to section 112(d) or 112(h) of the Act, the owner or operator of an existing source shall comply with such standard by the compliance date established by the Administrator in the applicable subpart(s) of this part. Except as otherwise provided for in section 112 of the Act, in no case will the compliance date established for an existing source in an applicable subpart of this part exceed 3 years after the effective date of such standard. Except as provided in § 63.1(c)(6)(ii) such sources must comply by the date specified in the standards for existing area sources that become major sources.

* * * * *

■ 5. In § 63.9, revise paragraphs (b)(1)(ii) and (j) and add paragraph (k) to read as follows:

§ 63.9 Notification requirements.

* * * * *

(b) * * *

(1) * * *

(ii) If an area source subsequently increases its emissions of hazardous air pollutants (or its potential to emit hazardous air pollutants) such that the source is a major source that is subject to the emission standard or other requirement, such source shall be subject to the notification requirements of this section. Area sources previously subject to major source requirements that again become major sources are also subject to the notification requirements of this paragraph and must submit the notification according to the requirements of paragraph (k) of this section.

* * * * *

(j) *Change in information already provided.* Any change in the information already provided under this section shall be provided to the Administrator within 15 calendar days after the change. The owner or operator of a major source that reclassifies to area source status is also subject to the notification requirements of this paragraph. The owner or operator may use the application for reclassification with the regulatory authority (*e.g.,* permit application) to fulfill the requirements of this paragraph. The owner or operator of a major source that reclassifies to area source status must submit the notification according to the requirements of paragraph (k) of this section.

(k) *Electronic Submission of Notifications or Reports.* If you are required to submit notifications or reports following the procedure specified in this paragraph (k), you must submit notifications or reports to the EPA via CEDRI, which can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*). The notification or report must be submitted by the deadline specified. If you claim some of the information required to be submitted via CEDRI is confidential business information (CBI), submit a complete notification or report, including information claimed to be CBI, to the EPA. Submit the file on a compact disc, flash drive, or other commonly used electronic storage medium and clearly mark the medium as CBI. Mail the electronic medium to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (k).

(1) If you are required to electronically submit a notification or report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (k)(1)(i) through (vii) of this section.

(i) You must have been or will be precluded from accessing CEDRI and submitting a required notification or report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(ii) The outage must have occurred within the period of time beginning five business days prior to the date that the notification or report is due.

(iii) The outage may be planned or unplanned.

(iv) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should

have known, that the event may cause or has caused a delay in reporting.

(v) You must provide to the Administrator a written description identifying:

(A) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(B) A rationale for attributing the delay in submitting beyond the regulatory deadline to EPA system outage;

(C) Measures taken or to be taken to minimize the delay in submitting; and

(D) The date by which you propose to submit, or if you have already met the reporting requirement at the time of the notification, the date you submitted the notification or report.

(vi) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(vii) In any circumstance, the notification or report must be submitted electronically as soon as possible after the outage is resolved.

(2) If you are required to electronically submit a notification or report through CEDRI in the EPA's CDX, you may assert a claim of force majeure for failure to timely comply with the submittal requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (k)(2)(i) through (v) of this section.

(i) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning five business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a notification or report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(ii) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or has caused a delay in submitting through CEDRI.

(iii) You must provide to the Administrator:

(A) A written description of the force majeure event;

(B) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(C) Measures taken or to be taken to minimize the delay in reporting; and

(D) The date by which you propose to submit the notification or report, or if you have already met the submittal requirement at the time of the notification, the date you submitted the notification or report.

(iv) The decision to accept the claim of force majeure and allow an extension to the submittal deadline is solely within the discretion of the Administrator.

(v) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

■ 6. In § 63.10, revise paragraph (b)(3) and add paragraph (g) to read as follows:

§ 63.10 Recordkeeping and reporting requirements.

* * * * *

(b) * * *

(3) If an owner or operator determines that his or her existing or new stationary source is in the source category regulated by a standard established pursuant to CAA section 112, but that source is not subject to the relevant standard (or other requirement established under this part) because of legally and practicably enforceable limitations on the source's potential to emit, or the source otherwise qualifies for an exclusion, the owner or operator must keep a record of the applicability determination on site at the source until the source changes its operations to become an affected source. The record of the applicability determination must be signed by the person making the determination and include an emissions analysis (or other information) that demonstrates the owner or operator's conclusion that the source is unaffected (*e.g.,* because the source is an area source). The analysis (or other information) must be sufficiently detailed to allow the Administrator to make an applicability finding for the source with regard to the relevant standard or other requirement. If applicable, the analysis must be performed in accordance with requirements established in relevant subparts of this part for this purpose for particular categories of stationary sources. If relevant, the analysis should be performed in accordance with EPA guidance materials published to assist sources in making applicability determinations under CAA section 112 if any guidance is available, or industry standards or engineering calculations. The requirements to determine applicability of a standard under § 63.1(b)(3) and to record the results of that determination under this paragraph (b)(3) of this section shall not by themselves create an obligation for the owner or operator to obtain a title V permit.

* * * * *

(g) *Electronic Recordkeeping.* Any records required to be maintained by this part that are submitted electronically via the EPA's CEDRI may be maintained in electronic format. This ability to maintain electronic copies does not affect the requirement for facilities to make records, data, and reports available upon request to a delegated air agency or the EPA as part of an on-site compliance evaluation.

■ 7. Revise § 63.12(c) to read as follows:

§ 63.12 State authority and delegations.

* * * * *

(c) All information required to be submitted to the EPA under this part also shall be submitted to the appropriate state agency of any state to which authority has been delegated under section 112(l) of the CAA, provided that each specific delegation may exempt sources from a certain federal or state reporting requirement with the exception of federal electronic reporting requirements under this part. The Administrator may permit all or some of the information to be submitted to the appropriate state agency only, instead of to the EPA and the state agency.

Subpart F—National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry

■ 8. Table 3 to subpart F of part 63 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding an entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 3 TO SUBPART F OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPARTS F, G, AND H[a] TO SUBPART F

Reference	Applies to subparts F, G, and H	Comment

TABLE 3 TO SUBPART F OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPARTS F, G, AND H[a] TO SUBPART F—Continued

Reference	Applies to subparts F, G, and H	Comment
* * * * * * *		
63.1(c)(6)	Yes.	
* * * * * * *		
63.9(j)	Yes.	Only as related to change to major source status.
63.9(k)	Yes.	
* * * * * * *		
63.10(g)	Yes.	
* * * * * * *		

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not necessarily required.

* * * * *

Subpart J—National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production

■ 9. Amend § 63.215 by revising paragraph (b) introductory text and adding paragraph (b)(4) to read as follows:

§ 63.215 What General Provisions apply to me?

* * * * *

(b) The provisions in subpart A of this part also apply to this subpart as specified in paragraphs (b)(1) through (4) of this section.

* * * * *

(4) The specific notification procedure of § 63.9(j) and (k) relating to a change in major source status and § 63.10(g).

Subpart L—National Emission Standards for Coke Oven Batteries

■ 10. Revise § 63.311(a) to read as follows:

§ 63.311 Reporting and recordkeeping requirements.

(a) *General requirements.* After the effective date of an approved permit in a state under part 70 of this chapter, the owner or operator shall submit all notifications and reports required by this subpart to the state permitting authority except a source which reclassifies to an area source must follow the notification procedures of § 63.9(j) and (k). Use of information provided by the certified observer shall be a sufficient basis for notifications required under § 70.5(c)(9) of this chapter and the reasonable inquiry requirement of § 70.5(d) of this chapter.

* * * * *

Subpart M—National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities

■ 11. Add § 63.324(g) to read as follows:

§ 63.324 Reporting and recordkeeping requirements.

* * * * *

(g) Each owner or operator of a dry cleaning facility that reclassifies from a major source to an area source must follow the procedures of § 63.9(j) and (k) to provide notification of the change in status.

Subpart N–National Emission Standards for Chromium Emissions From Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks

■ 12. Table 1 to subpart N of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART N OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART N

General provisions reference	Applies to subpart N	Comment
* * * * * * *		
63.1(c)(6)	Yes.	
* * * * * * *		
63.9(k)	Yes.	
* * * * * * *		
63.10(g)	Yes.	
* * * * * * *		

Subpart O—Ethylene Oxide Emissions Standards for Sterilization Facilities

■ 13. In § 63.360, amend Table 1 of Section 63.360 by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

§ 63.360 Applicability.

* * * * *

TABLE 1 OF SECTION 63.360—GENERAL PROVISIONS APPLICABILITY TO SUBPART O

Reference	Applies to sources using 10 tons in subpart O[a]	Applies to sources using 1 to 10 tons in subpart O[a]	Comment
* * *	*	* * *	*
63.1(c)(6)		Yes.	
* * *	*	* * *	*
63.9(k)		Yes.	
* * *	*	* * *	*
63.10(g)		Yes.	
* * *	*	* * *	*

[a] See definition.

* * * * *

Subpart Q–National Emission Standards for Hazardous Air Pollutants for Industrial Process Cooling Towers

■ 14. Table 1 to subpart Q of part 63 is amended by revising the entries for §§ 63.9 and 63.10 in numerical order to read as follows:

TABLE 1 TO SUBPART Q OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART Q

Reference	Applies to subpart Q	Comment
* * *	*	* * *
63.9(a), (b)(1), (b)(3), (c), (h)(1), (h)(3), (h)(6), (j), and (k).	Yes.	
* * *	*	* * *
63.10(a), (b)(1), (b)(2)(xii), (b)(2)(xiv), (b)(3), (d), (f), and (g).	Yes.	Section 63.406 requires an onsite record retention of 5 years.
* * *	*	* * *

Subpart R–National Emission Standards for Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations)

■ 15. Table 1 to subpart R of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART R OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART R

Reference	Applies to subpart R	Comment
* * *	*	* * *
63.1(c)(6)	Yes.	
* * *	*	* * *
63.9(k)	Yes.	
* * *	*	* * *
63.10(g)	Yes.	
* * *	*	* * *

Subpart S–National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry

■ 16. Table 1 to subpart S of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART S OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART S [a]

Reference	Applies to subpart S	Comment
* *	* * * * * * *	
63.1(c)(6)	Yes.	
* *	* * * * * * *	
63.9(k)	Yes.	
* *	* * * * * * *	
63.10(g)	Yes.	
* *	* * * * * * *	

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not required.

Subpart T—National Emission Standards for Halogenated Solvent Cleaning

■ 17. Appendix B to subpart T of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

APPENDIX B TO SUBPART T OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART T

Reference	Applies to subpart T		Comments
	BCC	BVI	
* *	* * * * * * *		
63.1(c)(6)	Yes	Yes.	
* *	* * * * * * *		
63.9(k)	Yes	Yes.	
* *	* * * * * * *		
63.10(g)	Yes	Yes.	
* *	* * * * * * *		

* * * * *

Subpart U—National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins

■ 18. Table 1 to subpart U of part 63 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART U OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART U AFFECTED SOURCES

Reference	Applies to subpart U	Explanation
* *	* * * * * * *	
§ 63.1(c)(6)	Yes.	
* *	* * * * * * *	
§ 63.9(j)	Yes	For change in major source status only.
§ 63.9(k)	Yes.	
* *	* * * * * * *	
§ 63.10(g)	Yes.	

TABLE 1 TO SUBPART U OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART U AFFECTED SOURCES—Continued

Reference	Applies to subpart U	Explanation
* * * * * * *		

* * * * *

Subpart W–National Emission Standards for Hazardous Air Pollutants for Epoxy Resins Production and Non-Nylon Polyamides Production

■ 19. Table 1 to subpart W of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART W OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART W

Reference	Applies to subpart W			Comment
	BLR	WSR	WSR alternative standard, and BLR equipment leak standard (40 CFR part 63, subpart H)	
* * * * * * *				
§ 63.1(c)(6)	Yes	Yes	Yes.	
* * * * * * *				
§ 63.9(k)	Yes	Yes	Yes.	
* * * * * * *				
§ 63.10(g)	Yes	Yes	Yes.	
* * * * * * *				

Subpart X—National Emission Standards For Hazardous Air Pollutants From Secondary Lead Smelting

■ 20. Table 1 to subpart X of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART X OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART X

Reference	Applies to subpart X	Comment
* * * * * * *		
63.9(k)	Yes.	
* * * * * * *		
63.10(g)	Yes.	
* * * * * * *		

* * * * *

Subpart Y—National Emission Standards for Marine Tank Vessel Loading Operations

■ 21. Table 1 of § 63.560 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

§ 63.560 Applicability and designation of affected sources.

* * * * *

TABLE 1 TO § 63.560—GENERAL PROVISIONS APPLICABILITY TO SUBPART Y

Reference	Applies to affected sources in subpart Y	Comment
* *	* * * * * *	
63.1(c)(6)	Yes.	
* *	* * * * * *	
63.9(k)	Yes.	
* *	* * * * * *	
63.10(g)	Yes.	
* *	* * * * * *	

Subpart AA—National Emission Standards for Hazardous Air Pollutants from Phosphoric Acid Manufacturing Plants

§§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

■ 22. Appendix A to subpart AA of part 63 is amended by adding entries for

APPENDIX A TO SUBPART AA OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART AA

40 CFR citation	Requirement	Applies to subpart AA	Comment
* *	* * * * * *		
§ 63.1(c)(6)		Yes	None.
* *	* * * * * *		
§ 63.9(k)		Yes	None.
* *	* * * * * *		
§ 63.10(g)		Yes	None.
* *	* * * * * *		

Subpart BB—National Emission Standards for Hazardous Air Pollutants From Phosphate Fertilizers Production Plants

§§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

■ 23. Appendix A to subpart BB of part 63 is amended by adding entries for

APPENDIX A TO SUBPART BB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART BB

40 CFR citation	Requirement	Applies to subpart BB	Comment
* *	* * * * * *		
§ 63.1(c)(6)		Yes	None.
* *	* * * * * *		
§ 63.9(k)		Yes	None.
* *	* * * * * *		
§ 63.10(g)		Yes	None.
* *	* * * * * *		

Subpart CC—National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries

■ 24. In appendix to subpart CC of part 63, Table 6 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

Appendix to Subpart CC of Part 63—Tables

* * * * *

TABLE 6–GENERAL PROVISIONS APPLICABILITY TO SUBPART CC [a]

Reference	Applies to subpart CC	Comment
* *	* * * * *	
63.1(c)(6)	Yes.	
* *	* * * * *	
63.9(j)	Yes.	
63.9(k)	Yes.	
* *	* * * * *	
63.10(g)	Yes.	
* *	* * * * *	

[a] Wherever subpart A specifies ''postmark'' dates, submittals may be sent by methods other than the U.S. Mail (*e.g.,* by fax or courier). Submittals shall be sent by the specified dates, but a postmark is not required.

* * * * *

Subpart DD—National Emission Standards for Hazardous Air Pollutants from Off-Site Waste and Recovery Operations

■ 25. Table 2 to subpart DD of part 63 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART DD OF PART 63—APPLICABILITY OF PARAGRAPHS IN SUBPART A OF THIS PART 63—GENERAL PROVISIONS TO SUBPART DD

Subpart A reference	Applies to subpart DD	Explanation
* *	* * * * *	
63.1(c)(6)	Yes.	
* *	* * * * *	
63.9(j)	Yes	For change in major source status only.
63.9(k)	Yes.	
* *	* * * * *	
63.10(g)	Yes.	
* *	* * * * *	

* * * * *

Subpart EE—National Emission Standards for Magnetic Tape Manufacturing Operations

■ 26. Table 1 to subpart EE of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART EE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EE

Reference	Applies to subpart EE	Comment
* *	* * * * *	
63.1(c)(6)	Yes.	
* *	* * * * *	
63.9(k)	Yes.	

TABLE 1 TO SUBPART EE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EE—Continued

Reference	Applies to subpart EE	Comment
* *	* * * * *	*
63.10(g)	Yes.	
* *	* * * * *	*

Subpart GG—National Emission Standards for Aerospace Manufacturing and Rework Facilities

■ 27. Table 1 to subpart GG of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART GG OF PART 63–GENERAL PROVISIONS APPLICABILITY TO SUBPART GG

Reference	Applies to affected sources in subpart GG	Comment
* *	* * * * *	*
63.1(c)(6)	Yes.	
* *	* * * * *	*
63.9(k)	Yes.	
* *	* * * * *	*
63.10(g)	Yes.	
* *	* * * * *	*

Subpart HH—National Emission Standards for Hazardous Air Pollutants From Oil and Natural Gas Production Facilities

■ 28. In appendix to subpart HH of part 63, Table 2 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

Appendix to Subpart HH of Part 63—Tables

* * * * *

TABLE 2 TO SUBPART HH OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART HH

General provisions reference	Applicable to subpart HH	Explanation
* *	* * * * *	*
§ 63.1(c)(6)	Yes.	
* *	* * * * *	*
§ 63.9(k)	Yes.	
* *	* * * * *	*
§ 63.10(g)	Yes.	
* *	* * * * *	*

Subpart JJ—National Emission Standards for Wood Furniture Manufacturing Operations

■ 29. Table 1 to subpart JJ of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART JJ OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART JJ

Reference	Applies to subpart JJ	Comment
* *	* * * * *	
63.1(c)(6)	Yes.	
* *	* * * * *	
63.9(k)	Yes.	
* *	* * * * *	
63.10(g)	Yes.	
* *	* * * * *	

Subpart KK—National Emission Standards for the Printing and Publishing Industry

■ 30. Table 1 to subpart KK of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART KK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KK

General provisions reference	Applicable to subpart KK	Comment
* *	* * * * *	
§ 63.1(c)(6)	Yes.	
* *	* * * * *	
§ 63.9(k)	Yes.	
* *	* * * * *	
§ 63.10(g)	Yes.	
* *	* * * * *	

Subpart LL—National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants

■ 31. Appendix A to subpart LL of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

Appendix A to Subpart LL of Part 63—Applicability of General Provisions

Reference sections(s)	Requirement	Applies to subpart LL	Comment
* *	* * * * *		
63.1(c)(6)	Becoming an area source	Yes.	
* *	* * * * *		
63.9(k)	Electronic reporting procedures	Yes	Only as specified in 63.9(j).
* *	* * * * *		
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	* * * * *		

Subpart MM—National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills

■ 32. Table 1 to subpart MM of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART MM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MM

General provisions reference	Summary of requirements	Applies to subpart MM	Explanation
* *	* *	* *	* *
63.1(c)(6)	Becoming an area source	Yes.	
* *	* *	* *	* *
63.9(k)	Electronic reporting procedures	Yes	Only as specified in 63.9(j).
* *	* *	* *	* *
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	* *	* *	* *

Subpart CCC—National Emission Standards for Hazardous Air Pollutants for Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration Plants

■ 33. Table 1 to subpart CCC of part 63 is amended by adding entries for §§ 63.9(j), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART CCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART CCC

Reference	Applies to subpart CCC	Explanation
* *	* *	* *
63.9(j)	Yes.	
63.9(k)	Yes.	
* *	* *	* *
63.10(g)	Yes.	
* *	* *	* *

Subpart DDD—National Emission Standards for Hazardous Air Pollutants for Mineral Wool Production

■ 34. Table 1 to subpart DDD of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART DDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART DDD OF PART 63

General provisions citation	Requirement	Applies to subpart DDD?	Explanation
* *	* *	* *	* *
§ 63.1(c)(6)	Becoming an area source	Yes.	
* *	* *	* *	* *
§ 63.9(k)		Yes.	

TABLE 1 TO SUBPART DDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART DDD OF PART 63—Continued

General provisions citation	Requirement	Applies to subpart DDD?	Explanation
* *	* *	* *	* *
§ 63.10(g)	Additional CMS Reports Excess Emission/CMS Performance Reports COMS Data Reports Recordkeeping/Reporting Waiver Recordkeeping for electronic reporting.	Yes.	
* *	* *	* *	* *

Subpart EEE—National Emission Standards for Hazardous Air Pollutants From Hazardous Waste Combustors

■ 35. Table 1 to subpart EEE of part 63 is amended by adding an entry for § 63.9(k) to read as follows:

TABLE 1 TO SUBPART EEE OF PART 63—GENERAL PROVISIONS APPLICABLE TO SUBPART EEE

Reference	Applies to subpart EEE	Explanation
* *	* *	* *
63.9(k)	Yes.	
* *	* *	* *

Subpart GGG—National Emission Standards for Pharmaceuticals Production

■ 36. Table 1 to subpart GGG of part 63 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART GGG OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART GGG

General provisions reference	Summary of requirements	Applies to subpart GGG	Comments
* *	* *	* *	* *
63.1(c)(6)	Becoming an area source	Yes.	
* *	* *	* *	* *
63.9(j)	Change in information provided	Yes.	For change in major source status only
63.9(k)	Electronic reporting procedures	Yes.	Only as specified in 63.9(j)
* *	* *	* *	* *
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	* *	* *	* *

Subpart HHH—National Emission Standards for Hazardous Air Pollutants From Natural Gas Transmission and Storage Facilities

■ 37. Table 2 to subpart HHH of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

APPENDIX: TABLE 2 TO SUBPART HHH OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART HHH

General provisions Reference	Applicable to subpart HHH	Explanation
* *	* * * * * * *	
§ 63.1(c)(6)	Yes.	
* *	* * * * * * *	
§ 63.9(k)	Yes.	
* *	* * * * * * *	
§ 63.10(g)	Yes.	
* *	* * * * * * *	

Subpart III—National Emission Standards for Hazardous Air Pollutants for Flexible Polyurethane Foam Production

■ 38. Table 1 to subpart III of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART III OF PART 63—APPLICABILITY GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART III

Subpart A reference	Applies to subpart III	Comment
* *	* * * * * * *	
§ 63.9(k)	Yes.	
* *	* * * * * * *	
§ 63.10(g)	Yes.	
* *	* * * * * * *	

Subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins

■ 39. Table 1 to subpart JJJ of part 63 is amended by adding an entry for §§ 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART JJJ OF PART 63–APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJ AFFECTED SOURCES

Reference	Applies to subpart JJJ	Explanation
* *	* * * * * * *	
§ 63.1(c)(6)	Yes.	
* *	* * * * * * *	
§ 63.9(j)	Yes	For change in major source status only
§ 63.9(k)	Yes.	
* *	* * * * * * *	
§ 63.10(g)	Yes.	
* *	* * * * * * *	

Subpart LLL—National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry

■ 40. Table 1 to subpart LLL of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Requirement	Applies to subpart LLL	Explanation
* * * * * * *			
63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart MMM—National Emission Standards for Hazardous Air Pollutants for Pesticide Active Ingredient Production

■ 41. Table 1 to subpart MMM of part 63 is amended by adding an entry for §§ 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART MMM OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART MMM

Reference to subpart A	Applies to subpart MMM	Explanation
* * * * * * *		
§ 63.1(c)(6)	Yes.	
* * * * * * *		
§ 63.9(j)	Yes	For change in major source status only, 63.1368(h) specifies procedures for other notification of changes.
§ 63.9(k)	Yes.	
* * * * * * *		
63.10(g)	Yes.	
* * * * * * *		

Subpart NNN—National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing

■ 42. Table 1 to subpart NNN of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9–(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART NNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART NNN

General provisions citation	Requirement	Applies to subpart NNN?	Explanation
* * * * * * *			
§ 63.1(c)(6)		Yes.	
* * * * * * *			
§ 63.9(k)		Yes.	

TABLE 1 TO SUBPART NNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART NNN—Continued

General provisions citation	Requirement	Applies to subpart NNN?	Explanation
* *	* *	* *	* *
§ 63.10(g)	Additional CMS Reports Excess Emission/CMS Performance Reports COMS Data Reports Recordkeeping/Reporting Waiver Recordkeeping for electronic reporting.	Yes.	
* *	* *	* *	* *

Subpart OOO—National Emission Standards for Hazardous Air Pollutant Emissions: Manufacture of Amino/Phenolic Resins

■ 43. Table 1 to subpart OOO of part 63 is amended by adding an entry for § 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART OOO OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART OOO AFFECTED SOURCES

Reference	Applies to subpart OOO	Explanation
* *	* *	* *
63.1(c)(6)	Yes.	
* *	* *	* *
63.9(j)	Yes.	For change in major source status only.
63.9(k)	Yes.	
* *	* *	* *
63.10(g)	Yes.	
* *	* *	* *

Subpart PPP—National Emission Standards for Hazardous Air Pollutant Emissions for Polyether Polyols Production

■ 44. Table 1 to subpart PPP of part 63 is amended by adding an entry for §§ 63.1(c)(6) in numerical order, revising the entry for § 63.9(j), and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART PPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPP AFFECTED SOURCES

Reference	Applies to subpart PPP	Explanation
* *	* *	* *
63.1(c)(6)	Yes.	
* *	* *	* *
63.9(j)	Yes.	For change in major source status only.
63.9(k)	Yes.	
* *	* *	* *
63.10(g)	Yes.	
* *	* *	* *

Subpart QQQ—National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelting

■ 45. Revise § 63.1441 to read as follows:

§ 63.1441 Am I subject to this subpart?

You are subject to this subpart if you own or operate a primary copper smelter that is (or is part of) a major source of hazardous air pollutant (HAP) emissions, and your primary copper smelter uses batch copper converters as defined in § 63.1459. Your primary copper smelter is a major source of HAP if it emits or has the potential to emit any single HAP at the rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year.

■ 46. Table 1 to subpart QQQ of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

* * * * *

TABLE 1 TO SUBPART QQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQ

Citation	Subject	Applies to subpart QQQ	Explanation
* *	*	* *	* *
§ 63.10 (g)	Recordkeeping for electronic reporting.	Yes.	
* *	*	* *	* *

Subpart RRR—National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production

■ 47. Appendix A to subpart RRR of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

Appendix A to Subpart RRR of Part 63—General Provisions Applicability to Subpart RRR

Citation	Requirement	Applies to subpart RRR	Comment
* *	*	* *	* *
§ 63.1(c)(6)	Becoming an area source	Yes.	
* *	*	* *	* *
§ 63.9(k)	Electronic reporting procedures	Yes.	
* *	*	* *	* *
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	*	* *	* *

Subpart TTT—National Emission Standards for Hazardous Air Pollutants for Primary Lead Smelting

■ 48. Table 1 to subpart TTT of part 63 is amended by adding entries for §§ 63.9(j), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART TTT OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART TTT

Reference	Applies to subpart TTT	Comment
* *	*	* * * *
63.9(j)	Yes.	
63.9(k)	Yes.	
* *	*	* * * *
63.10(g)	Yes.	
* *	*	* * * *

Subpart UUU—National Emission Standards for Hazardous Air Pollutants for Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units

■ 49. Table 44 to subpart UUU of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

* * * * *

TABLE 44 TO SUBPART UUU OF PART 63—APPLICABILITY OF NESHAP GENERAL PROVISIONS TO SUBPART UUU

Citation	Subject	Applies to subpart UUU	Explanation
* *	*	* * *	* *
§ 63.1(c)(6)	Becoming an area source	Yes.	
* *	*	* * *	* *
§ 63.9(k)	Electronic reporting procedures	Yes.	
* *	*	* * *	* *
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	*	* * *	* *

Subpart VVV—National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works

■ 50. Table 1 to subpart VVV of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART VVV OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV

General provisions reference	Applicable to subpart VVV	Explanation
* *	*	* * * *
§ 63.1(c)(6)	Yes.	
* *	*	* * * *
§ 63.9(k)	Yes.	
* *	*	* * * *
§ 63.10(g)	Yes.	
* *	*	* * * *

Subpart XXX—National Emission Standards for Hazardous Air Pollutants for Ferroalloys Production: Ferromanganese and Silicomanganese

■ 51. Table 1 to subpart XXX of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART XXX OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART XXX

Reference	Applies to subpart XXX	Comment
* *	*	* * * *
§ 63.9(k)	Yes.	
* *	*	* * * *
§ 63.10(g)	Yes.	
* *	*	* * * *

Subpart DDDD—National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products

■ 52. Table 10 to subpart DDDD of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART DDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDD

Citation	Subject	Brief description	Applies to subpart DDDD
* *	*	* *	* *
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures	Yes.
* *	*	* *	* *
§ 63.10(g)	Recordkeeping for electronic reporting.	Recordkeeping for electronic reporting.	Yes.
* *	*	* *	* *

Subpart EEEE—National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline)

■ 53. Table 12 to subpart EEEE of part 63 is amended by revising the entry for § 63.9(j) and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 12 TO SUBPART EEEE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEE

Citation	Subject	Brief description	Applies to subpart EEEE
* *	*	* *	* *
§ 63.9(j)	Change in Previous Information	Must submit within 15 days after the change.	Yes for change to major source status, other changes are reported in the first and subsequent compliance reports.
§ 63.9(k)	Electronic reporting procedures	Procedure to report electronically for notification in 63.9(j).	Yes.
* *	*	* *	* *
§ 63.10(g)	Recordkeeping for electronic reporting.		Yes.

.

Subpart FFFF—National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing

■ 54. Table 12 to subpart FFFF of part 63 is amended by revising the entry for § 63.9(j) and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF

Citation	Subject	Explanation
* *	*	* * *
§ 63.9(j)	Change in previous information	Yes for change in major source status, otherwise § 63.2520(e) specifies reporting requirements for process changes.
§ 63.9(k)	Electronic reporting procedures	Yes, as specified in 63.9(j).

TABLE 12 TO SUBPART FFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFF—Continued

Citation	Subject	Explanation
* * * * * * *		
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.
* * * * * * *		

Subpart GGGG—National Emission Standards for Hazardous Air Pollutants: Solvent Extraction for Vegetable Oil Production

■ 55. Table 1 to § 63.2870 is amended by adding entries for §§ 63.9(j), 63.9(k), and 63.10(g) in numerical order to read as follows:

§ 63.2870 What Parts of the General Provisions apply to me?

* * * * *

TABLE 1 TO § 63.2870—APPLICABILITY OF 40 CFR PART 63, SUBPART A, TO 40 CFR PART 63, SUBPART GGGG

General provisions citation	Subject of citation	Brief description of requirement	Applies to subpart	Explanation
* * * * * * *				
§ 63.9(j)	Notification requirements	Change in previous information.	Yes.	
§ 63.9(k)	Notification requirements	Electronic reporting procedures.	Yes.	
* * * * * * *				
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *				

Subpart HHHH—National Emission Standards for Hazardous Air Pollutants for Wet-Formed Fiberglass Mat Production

■ 56. Table 2 to subpart HHHH of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART HHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART HHHH

Citation	Requirement	Applies to subpart HHHH	Explanation
* * * * * * *			
§ 63.1(c)(6)		Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart IIII—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks

■ 57. Table 2 to subpart IIII of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART IIII OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART IIII OF PART 63

* * * * * * *

Citation	Subject	Applicable to subpart IIII	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart JJJJ—National Emission Standards for Hazardous Air Pollutants: Paper and Other Web Coating

■ 58. Table 2 to subpart JJJJ of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART JJJJ OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART JJJJ

* * * * * * *

General provisions reference	Applicable to subpart JJJJ	Explanation
* * * * * * *		
§ 63.1(c)(6)	Yes.	
* * * * * * *		
§ 63.9(k)	Yes.	
* * * * * * *		
§ 63.10(g)	Yes.	
* * * * * * *		

Subpart KKKK—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Cans

■ 59. Table 5 to subpart KKKK of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 5 TO SUBPART KKKK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKK

* * * * * * *

Citation	Subject	Applicable to subpart KKKK	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	

TABLE 5 TO SUBPART KKKK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKK—Continued

Citation	Subject	Applicable to subpart KKKK	Explanation
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart MMMM—National Emission Standards for Hazardous Air Pollutants for Surface Coating of Miscellaneous Metal Parts and Products

■ 60. Table 2 to subpart MMMM of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART MMMM OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART MMMM OF PART 63

Citation	Subject	Applicable to subpart MMMM	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart NNNN—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Large Appliances

■ 61. Table 2 to subpart NNNN of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART NNNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART NNNN

Citation	Subject	Applicable to subpart NNNN	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart OOOO—National Emission Standards for Hazardous Air Pollutants: Printing, Coating, and Dyeing of Fabrics and Other Textiles

■ 62. Table 3 to subpart OOOO of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 3 TO SUBPART OOOO OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART OOOO

* * * * * * *

Citation	Subject	Applicable to subpart OOOO	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart PPPP—National Emission Standards for Hazardous Air Pollutants for Surface Coating of Plastic Parts and Products

■ 63. Table 2 to subpart PPPP of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

* * * * *

TABLE 2 TO SUBPART PPPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPPP OF PART 63

* * * * * * *

Citation	Subject	Applicable to subpart PPPP	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart QQQQ—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Wood Building Products

■ 64. Table 4 to subpart QQQQ of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 4 TO SUBPART QQQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQQ OF PART 63

* * * * * * *

Citation	Subject	Applicable to subpart QQQQ	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	

TABLE 4 TO SUBPART QQQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQQ OF PART 63—Continued

Citation	Subject	Applicable to subpart QQQQ	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart RRRR—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Furniture

■ 65. Table 2 to subpart RRRR of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART RRRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART RRRR

Citation	Subject	Applicable to subpart	Explanation
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart SSSS—National Emission Standards for Hazardous Air Pollutants: Surface Coating of Metal Coil

■ 66. Table 2 to subpart SSSS of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART SSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSS

General provisions reference	Applicable to subpart SSSS	Explanation
* * * * * * *		
§ 63.1(c)(6)	Yes.	
* * * * * * *		
§ 63.9(k)	Yes.	
* * * * * * *		
§ 63.10(g)	Yes.	
* * * * * * *		

Subpart TTTT—National Emission Standards for Hazardous Air Pollutants for Leather Finishing Operations

■ 67. Table 2 to subpart TTTT of part 63 is amended by adding entries for §§ 63.9(j), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART TTTT OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART TTTT

General provisions citation	Subject of citation	Brief description of requirement	Applies to subpart	Explanation
*	*	*	*	*
§ 63.9(j)	Notification requirements	Change in previous information.	Yes.	
§ 63.9(k)	Notification requirements	Electronic reporting procedures.	Yes.	
*	*	*	*	*
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.	
*	*	*	*	*

Subpart UUUU—National Emission Standards for Hazardous Air Pollutants for Cellulose Products Manufacturing

■ 68. Table 8 to subpart UUUU of part 63 is amended by revising entry 7 to read as follows:

TABLE 8 TO SUBPART UUUU OF PART 63—REPORTING REQUIREMENTS

You must submit a compliance report, which must contain the following information . . .	and you must submit the report . . .
*	*
7. the report must contain any changes in information already provided, as specified in § 63.9(j), except changes in major source status must be reported per § 63.9(j);	
*	*

■ 69. Table 10 to subpart UUUU of part 63 is amended by revising the entry for § 63.9(j) and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART UUUU OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART UUUU

Citation	Subject	Brief description	Applies to subpart UUUU
*	*	*	*
§ 63.9(j)	Change in previous information	Must submit within 15 days of the change.	Yes, except the notification for all but change in major source status must be submitted as part of the next semiannual compliance report, as specified in Table 8 to this subpart.
§ 63.9(k)	Electronic reporting procedures	Procedure for electronically reporting the notification required by 63.9(j).	Yes, as specified in 63.9(j).

TABLE 10 TO SUBPART UUUU OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART UUUU—Continued

Citation	Subject	Brief description	Applies to subpart UUUU
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Electronically reported data may be stored electronically.	Yes.
* * * * * * *			

Subpart VVVV—National Emission Standards for Hazardous Air Pollutants for Boat Manufacturing

■ 70. Table 8 to subpart VVVV of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 8 TO SUBPART VVVV OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (40 CFR PART 63, SUBPART A) TO SUBPART VVVV

Citation	Requirement	Applies to subpart VVVV	Explanation
* * * * * * *			
§ 63.1(c)(6)		Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart WWWW—National Emissions Standards for Hazardous Air Pollutants: Reinforced Plastic Composites Production

■ 71. Table 2 to subpart WWWW of part 63 is amended by revising entry 1 to read as follows:

TABLE 2 TO SUBPART WWWW OF PART 63—COMPLIANCE DATES FOR NEW AND EXISTING REINFORCED PLASTIC COMPOSITES FACILITIES

If your facility is . . .	And . . .	Then you must comply by this date . . .
* * * * * * *		
1. An existing source	a. Is a major source on or before the publication date of this subpart.	April 21, 2006.
* * * * * * *		

■ 72. Table 15 to subpart WWWW of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 15 TO SUBPART WWWW OF PART 63—APPLICABILITY OF GENERAL PROVISIONS (SUBPART A) TO SUBPART WWWW OF PART 63

The general provisions reference . . .	That addresses . . .	And applies to subpart WWWW of part 63 . . .	Subject to the following additional information . . .
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart XXXX—National Emissions Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing

■ 73. Table 17 to subpart XXXX of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 17 TO SUBPART XXXX OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO THIS SUBPART XXXX

Citation	Subject	Brief description of applicable sections	Applicable to subpart XXXX?	
			Using a control device	Not using a control device
* * * * * * *				
§ 63.9(k)	Notification	Electronic reporting procedures.	Yes	Yes.
* * * * * * *				
§ 63.10(g)	Recordkeeping	Recordkeeping for report submitted electronically.	Yes	Yes.
* * * * * * *				

Subpart YYYY—National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines

■ 74. Table 7 to subpart YYYY of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 7 TO SUBPART YYYY OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART YYYY

Citation	Requirement	Applies to subpart YYYY	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart ZZZZ—National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines

■ 75. Table 8 to subpart ZZZZ of part 63 is amended by adding entries for §§ 63.9(k) and § 63.10(g) in numerical order to read as follows:

TABLE 8 TO SUBPART ZZZZ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART

General provisions citation	Subject of citation	Applies to subpart	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart AAAAA—National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants

■ 76. Table 8 to subpart AAAAA of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

* * * * *

TABLE 8 TO SUBPART AAAAA OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART AAAAA

Citation	Summary of requirement	Am I subject to this requirement?	Explanations
* * * * * * *			
§ 63.1(c)(6)	Becoming an area source	Yes.	
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart CCCCC—National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks

■ 77. Table 1 to subpart CCCCC of part 63 is amended by adding entry for § 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART CCCCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART CCCCC

Citation	Subject	Applies to Subpart CCCCC?	Explanations
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart DDDDD—National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters

■ 78. Table 10 to subpart DDDDD of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART DDDDD OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART DDDDD

Citation	Subject	Applies to subpart DDDDD
* * * * * * *		
63.10(g)	Recordkeeping for reports submitted electronically.	Yes.
* * * * * * *		

Subpart EEEEE—National Emission Standards for Hazardous Air Pollutants for Iron and Steel Foundries

■ 79. Table 1 to subpart EEEEE of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART EEEEE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEEE

Citation	Subject	Applies to Subpart EEEEE?	Explanations
* * * * * * *			
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart FFFFF—National Emission Standards for Hazardous Air Pollutants for Integrated Iron and Steel Manufacturing Facilities

■ 80. Table 4 to subpart FFFFF of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

TABLE 4 TO SUBPART FFFFF OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART FFFFF

Citation	Subject	Applies to Subpart FFFFF	Explanations
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart GGGGG—National Emission Standards for Hazardous Air Pollutants: Site Remediation

■ 81. Table 3 to subpart GGGGG of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 3 TO SUBPART GGGGG OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART GGGGG

Citation	Subject	Brief description	Applies to subpart GGGGG
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per 63.9(j).	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Electronically reported data may be stored electronically.	Yes.
* * * * * * *			

Subpart HHHHH—National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing

■ 82. Table 10 to subpart HHHHH of part 63 is amended by revising the entry for § 63.9(j) and adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART HHHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART HHHHH

Citation	Subject	Explanation
* * * * * * *		
§ 63.9(j)	Change in previous information	Yes for change in major source status, otherwise § 63.8075(e)(8) specifies reporting requirements for process changes.
§ 63.9(k)	Electronic reporting procedures	Yes, as specified in 63.9(j).
* * * * * * *		
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.
* * * * * * *		

Subpart IIIII—National Emission Standards for Hazardous Air Pollutants: Mercury Emissions From Mercury Cell Chlor-Alkali Plants

■ 83. Table 10 to subpart IIIII of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART IIIII OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART IIIII

Citation	Subject	Applies to subpart IIIII	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart JJJJJ—National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing

■ 84. Table 10 to subpart JJJJJ of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 10 TO SUBPART JJJJJ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART JJJJJ

Citation	Subject	Brief description	Applies to subpart JJJJJ?
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per 63.9(j).	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Electronically reported data may be stored electronically.	Yes.
* * * * * * *			

Subpart KKKKK—National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing

■ 85. Table 11 to subpart KKKKK of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 11 TO SUBPART KKKKK OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART KKKKK

Citation	Subject	Brief description	Applies to subpart KKKKK?
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per 63.9(j).	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Electronically reported data may be stored electronically.	Yes.
* * * * * * *			

Subpart LLLLL—National Emission Standards for Hazardous Air Pollutants: Asphalt Processing and Asphalt Roofing Manufacturing

■ 86. Table 7 to subpart LLLLL of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 7 TO SUBPART LLLLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART LLLLL

Citation	Subject	Brief description	Applies to subpart LLLLL
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Electronic reporting procedures for notifications per 63.9(j).	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Electronically reported data may be stored electronically.	Yes.
* * * * * * *			

Subpart MMMMM—National Emission Standards for Hazardous Air Pollutants: Flexible Polyurethane Foam Fabrication Operations

■ 87. Table 7 to subpart MMMMM of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 7 TO SUBPART MMMMM OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART MMMMM

Citation	Requirement	Applies to subpart MMMMM	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart NNNNN—National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production

■ 88. Table 7 to subpart NNNNN of part 63 is amended by adding entries for §§ 63.9(k) and § 63.10(g) in numerical order to read as follows:

TABLE 7 TO SUBPART NNNNN OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART NNNNN

Citation	Requirement	Applies to subpart NNNNN	Explanation
* * * * * * *			
§ 63.9(k)	Electronic reporting procedures	Yes.	
* * * * * * *			
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* * * * * * *			

Subpart PPPPP—National Emission Standards for Hazardous Air Pollutants for Engine Test Cells/Stands

■ 89. Table 7 to subpart PPPPP of part 63 is amended by adding entries for §§ 63.1(c)(6), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 7 TO SUBPART PPPPP OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART PPPPP

Citation	Subject	Brief description	Applies to subpart PPPPP
* * * * * * *			
§ 63.1(c)(6)	Applicability	Becoming an area source	Yes.
* * * * * * *			
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.
* * * * * * *			

Subpart QQQQQ—National Emission Standards for Hazardous Air Pollutants for Friction Materials Manufacturing Facilities

■ 90. Revise § 63.9485(a) to read as follows:

§ 63.9485 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a friction materials manufacturing facility (as defined in § 63.9565) that is (or is part of) a major source of hazardous air pollutants (HAP) emissions. Your friction materials manufacturing facility is a major source of HAP if it emits or has the potential to emit any single HAP at a rate of 9.07 megagrams (10 tons) or more per year or any combination of HAP at a rate of 22.68 megagrams (25 tons) or more per year.

* * * * *

■ 91. Table 1 to subpart QQQQQ of part 63 is amended by adding entries for §§ 63.9(j), 63.9(k), and 63.10(g) in numerical order to read as follows:

TABLE 1 TO SUBPART QQQQQ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART QQQQQ

Citation	Subject	Applies to subpart QQQQQ?	Explanation
* *	* *	*	* *
§ 63.9(j)	Changes to information already provided.	Yes.	
§ 63.9(k)	Electronic reporting procedures	Yes.	
* *	* *	*	* *
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	* *	*	* *

Subpart RRRRR—National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing

■ 92. Revise § 63.9581 to read as follows:

§ 63.9581 Am I subject to this subpart?

You are subject to this subpart if you own or operate a taconite iron ore processing plant that is (or is part of) a major source of hazardous air pollutant (HAP) emissions. Your taconite iron ore processing plant is a major source of HAP if it emits or has the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year.

■ 93. Table 2 to subpart RRRRR of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 2 TO SUBPART RRRRR OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART RRRRR OF PART 63

* * * * * * *

Citation	Subject	Applies to subpart RRRRR	Explanation
* *	* *	*	* *
§ 63.9(k)	Electronic reporting procedures	Yes.	
* *	* *	*	* *
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	* *	*	* *

Subpart SSSSS—National Emission Standards for Hazardous Air Pollutants for Refractory Products Manufacturing

■ 94. Table 11 to subpart SSSSS of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 11 TO SUBPART SSSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSSS

* * * * * * *

Citation	Subject	Brief description	Applies to subpart SSSSS
* *	* *	*	* *
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes.
* *	* *	*	* *
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.

TABLE 11 TO SUBPART SSSSS OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART SSSSS—Continued

Citation	Subject	Brief description	Applies to subpart SSSSS
*	*	*	*

Subpart TTTTT—National Emissions Standards for Hazardous Air Pollutants for Primary Magnesium Refining

■ 95. Table 5 to subpart TTTTT of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

TABLE 5 TO SUBPART TTTTT OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART TTTTT OF PART 63

Citation	Subject	Applies to subpart TTTTT	Explanation
*	*	*	*
63.10(g)	Recordkeeping for electronic reporting.	Yes.	
*	*	*	*

Subpart UUUUU—National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units

■ 96. Table 9 to subpart UUUUU of part 63 is amended by adding an entry for § 63.10(g) in numerical order to read as follows:

TABLE 9 TO SUBPART UUUUU OF PART 63—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART UUUUU

Citation	Subject	Applies to subpart UUUUU
*	*	*
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes
*	*	*

Subpart WWWWW—National Emission Standards for Hospital Ethylene Oxide Sterilizers

■ 97. Table 1 to subpart WWWWW of part 63 is amended by removing the entry for § 63.9(d)-(j), and adding entries in alphanumerical order for §§ 63.9(d)–(i), 63.9(j)–(k), and 63.10(g) to read as follows:

TABLE 1 TO SUBPART WWWWW OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART WWWWW

Citation	Subject	Applies to subpart WWWWW	Explanation
*	*	*	*
§ 63.9(d)–(i)	Other notifications	No.	
§ 63.9(j)–(k)	Change in information already submitted Electronic reporting.	Yes.	
*	*	*	*
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	

TABLE 1 TO SUBPART WWWWW OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART WWWWW—Continued

Citation	Subject	Applies to subpart WWWWW	Explanation
* * * * * * *			

Subpart BBBBBB—National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities

■ 98. Table 3 to subpart BBBBBB of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 3 TO SUBPART BBBBBB OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Subject	Brief description	Applies to subpart BBBBBB
* * * * * * *			
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.

Subpart CCCCCC—National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities

■ 99. Table 3 to subpart CCCCCC of part 63 is amended by adding entries for §§ 63.9(k) and § 63.10(g) in numerical order to read as follows:

TABLE 3 TO SUBPART CCCCCC OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Subject	Brief description	Applies to subpart CCCCCC
* * * * * * *			
§ 63.9(k)	Notifications	Electronic reporting procedures	Yes.
* * * * * * *			
§ 63.10(g)	Recordkeeping	Recordkeeping for electronic reporting.	Yes.
* * * * * * *			

Subpart HHHHHH—National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources

■ 100. Revise § 63.11175(a) introductory text to read as follows:

§ 63.11175 What notifications must I submit?

(a) Initial Notification. If you are the owner or operator of a paint stripping operation using paint strippers containing MeCl and/or a surface coating operation subject to this subpart, you must submit the initial notification required by § 63.9(b). For a new affected source, you must submit the Initial Notification no later than 180 days after initial startup or July 7, 2008, whichever is later. For an existing affected source, you must submit the initial notification no later than January 11, 2010 or no later than 120 days after the source becomes subject to this subpart. The initial notification must provide the information specified in paragraphs (a)(1) through (8) of this section.

* * * * *

Subpart XXXXXX—National Emission Standards for Hazardous Air Pollutants Area Source Standards for Nine Metal Fabrication and Finishing Source Categories

■ 101. Revise § 63.11519(a)(1) introductory text to read as follows:

§ 63.11519 What are my notifications, recordkeeping, and reporting requirements?

(a) What notifications must I submit?—(1) *Initial notification.* If you are the owner or operator of an area source in one of the nine metal

fabrication and finishing source categories, as defined in § 63.11514, you must submit the initial notification required by § 63.9(b), for a new affected source no later than 120 days after initial startup or November 20, 2008, whichever is later. For an existing affected source, you must submit the initial notification no later than July 25, 2011 or no later than 120 days after the source becomes subject to this subpart. Your initial notification must provide the information specified in paragraphs (a)(1)(i) through (iv) of this section.

* * * * *

Subpart YYYYYY—National Emission Standards for Hazardous Air Pollutants for Area Sources: Ferroalloys Production Facilities

■ 102. Revise § 63.11529(a) to read as follows:

§ 63.11529 What are the notification, reporting, and recordkeeping requirements?

(a) *Initial notification.* You must submit the initial notification required by § 63.9(b)(2) no later than 120 days after December 23, 2008 or no later than 120 days after the source becomes subject to this subpart. The initial notification must include the information specified in § 63.9(b)(2)(i) through (b)(2)(iv).

* * * * *

Subpart AAAAAAA—National Emission Standards for Hazardous Air Pollutants for Area Sources: Asphalt Processing and Asphalt Roofing Manufacturing

■ 103. Revise § 63.11564(a)(2) to read as follows:

§ 63.11564 What are my notification, recordkeeping, and reporting requirements?

(a) * * *

(2) As specified in § 63.9(b)(2), if you have an existing affected source, you must submit an initial notification not later than 120 calendar days after December 2, 2009 or no later than 120 days after the source becomes subject to this subpart.

* * * * *

Subpart BBBBBBB—[Amended]

■ 104. Revise § 63.11585(b)(1) to read as follows:

§ 63.11585 What are my notification, recordkeeping, and reporting requirements?

* * * * *

(b) * * *

(1) Initial notification of applicability. If you own or operate an existing affected source, you must submit an initial notification of applicability as required by § 63.9(b)(2) no later than April 29, 2010 or no later than 120 days after the source becomes subject to this subpart. If you own or operate a new affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 120 days after initial start-up of operation or April 29, 2010, whichever is later. The initial notification of applicability must include the information specified in § 63.9(b)(2)(i) through (iii).

* * * * *

Subpart CCCCCCC—National Emission Standards for Hazardous Air Pollutants for Area Sources: Paints and Allied Products Manufacturing

■ 105. Revise § 63.11603(a)(1) introductory text to read as follows:

§ 63.11603 What are the notification, recordkeeping, and reporting requirements?

(a) * * *

(1) Initial notification of applicability. If you own or operate an existing affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than June 1, 2010, or no later than 120 days after the source becomes subject to this subpart. If you own or operate a new affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 180 days after initial start-up of the operations or June 1, 2010, whichever is later. The notification of applicability must include the information specified in paragraphs (a)(1)(i) through (iii) of this section.

* * * * *

Subpart HHHHHHH—National Emission Standards for Hazardous Air Pollutant Emissions for Polyvinyl Chloride and Copolymers Production

■ 106. Table 4 to subpart HHHHHHH of part 63 is amended by adding entries for §§ 63.9(k) and 63.10(g) in numerical order to read as follows:

TABLE 4 TO SUBPART HHHHHHH OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO PART 63

Citation	Subject	Applies to subpart HHHHHHH	Comment
* *	*	* * *	*
§ 63.9(k)	Electronic reporting procedures	Yes.	
* *	*	* * *	*
§ 63.10(g)	Recordkeeping for electronic reporting.	Yes.	
* *	*	* * *	*

[FR Doc. 2019–14252 Filed 7–25–19; 8:45 am]

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Part IV

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets; Final Rule

DEPARTMENT OF ENERGY

FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM19–2–000; Order No. 861]

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets

Issued July 18, 2019.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is modifying its regulations regarding the horizontal market power analysis required for market-based rate sellers that study certain Regional Transmission Organization (RTO) or Independent System Operator (ISO) markets and submarkets therein. This modification relieves such sellers of the obligation to submit indicative screens to the Commission in order to obtain or retain authority to sell energy, ancillary services and capacity at market-based rates. The Commission's regulations continue to require market-based rate sellers that study an RTO, ISO, or submarket therein, to submit indicative screens for authorization to make capacity sales at market-based rates in any RTO/ISO market that lacks an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation. For those RTOs and ISOs that do not have an RTO/ISO-administered capacity market, Commission-approved RTO/ISO monitoring and mitigation is no longer presumed sufficient to address any horizontal market power concerns for capacity sales where there are indicative screen failures. Sellers studying RTO/ISO markets that do not have an RTO/ISO-administered capacity market would be relieved of the requirement to submit indicative screens to the Commission if they sought market-based rate authority limited to sales of energy and/or ancillary services in those markets.

DATES: This rule will become effective September 24, 2019.

FOR FURTHER INFORMATION CONTACT:
Ashley Dougherty (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8851

Mary Ellen Stefanou (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8989

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman; Cheryl A. LaFleur, Richard Glick, and Bernard L. McNamee.

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets

Docket No. RM19–2–000

Order No. 861

Final Rule

(Issued July 18, 2019)

Table of Contents

I. Introduction

1. On December 20, 2018, the Federal Energy Regulatory Commission (Commission) issued a notice of proposed rulemaking (NOPR) [1] proposing to modify § 35.37(c) of its regulations regarding the horizontal market power analysis for market-based

[1] *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets,* 165 FERC ¶ 61,268 (2018) (NOPR).

rate sellers [2] studying certain Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets.[3] The proposed modification would relieve Sellers of the requirement to submit indicative screens to the Commission in order to obtain or retain authority to sell energy, ancillary services and capacity at market-based rates when studying RTO/ISO markets with RTO/ISO-administered energy, ancillary services, and capacity markets that are subject to Commission-approved RTO/ISO monitoring and mitigation. Under the proposal, the Commission did not propose to relieve Sellers studying RTOs or ISOs that do not have an RTO/ISO-administered capacity market from submitting indicative screens to sell capacity in those markets at market-based rates. However, under the proposal Sellers studying such markets would be relieved of the requirement to submit indicative screens to the Commission if they sought market-based rate authority limited to sales of energy and/or ancillary services in those markets.[4]

2. The Commission also proposed to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market.

3. The Commission received 18 comments in response to the NOPR.[5] A list of commenters and the abbreviated names used in this final rule is attached as Appendix A.

4. In this final rule, we adopt the proposal from the NOPR and provide clarification, as discussed below.

II. Background

5. The Commission allows power sales at market-based rates if the Seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.[6] Section 35.37 of the Commission's regulations requires market-based rate Sellers to submit indicative screens as part of a market power analysis: (1) When seeking market-based rate authority; (2) every three years for Category 2 Sellers; [7] and (3) at any other time the Commission requests a Seller to submit an analysis.

6. In Order No. 697, the Commission adopted two indicative screens for assessing horizontal market power: The pivotal supplier screen and the wholesale market share screen.[8] The Commission has stated that passing both screens establishes a rebuttable presumption that the Seller does not possess horizontal market power, while failing either screen creates a rebuttable presumption that the Seller has horizontal market power.[9] Generally, Sellers that are located in and are members of an RTO/ISO may consider the geographic area under the control of the RTO/ISO as the default relevant geographic market for purposes of the indicative screens.[10] In Order No. 697–A, the Commission adopted a rebuttable presumption that existing RTO/ISO mitigation is sufficient to address any market power concerns created by indicative screen failures in an RTO/ISO.[11]

7. On July 19, 2014, in a NOPR that culminated in the issuance of Order No. 816,[12] the Commission proposed certain changes and clarifications in order to streamline and improve the market-based rate program's processes and procedures.[13] Specifically, as relevant for the purposes of the instant rulemaking, the Commission proposed in the Order No. 816 NOPR to allow Sellers in RTO/ISO markets to address horizontal market power issues in a streamlined manner that would not involve the submission of indicative screens if the Seller relies on Commission-approved monitoring and mitigation to prevent the exercise of market power.[14] Under that proposal, RTO/ISO sellers [15] would state that they are relying on such monitoring and mitigation to address the potential for market power issues that they might have, provide an asset appendix, and describe their generation and transmission assets. The Commission would retain its ability to require a market power analysis, including indicative screens, from any Seller at any time.[16]

8. When the Commission issued Order No. 816, it stated that it was not prepared at that time to adopt the proposal regarding RTO/ISO sellers, but that it would further consider the issues raised by commenters and transferred the record on that issue to Docket No. AD16–8–000 for possible consideration in the future as the Commission may deem appropriate.[17] The Commission reviewed and considered that record in preparing the NOPR proposal.

III. Discussion

A. Assurance of Just and Reasonable Rates

9. In proposing to relieve RTO/ISO sellers of the requirement to submit indicative screens to the Commission in markets with RTO/ISO-administered energy, ancillary services, and capacity markets subject to Commission-approved monitoring and mitigation, the Commission emphasized that it would continue to ensure that market-based rates are just and reasonable.[18] However, commenters raise concerns that the proposal compromises the

[2] The term ''Seller'' is defined as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates. 18 CFR 35.36(a)(1).

[3] The term ''RTO/ISO markets'' in this final rule includes any submarkets therein.

[4] At this time, California Independent System Operator Corporation (CAISO) and Southwest Power Pool, Inc. (SPP) do not have Commission-approved RTO/ISO capacity markets that include Commission-approved market monitoring and mitigation.

[5] Although the Commission did not request reply comments, several commenters nonetheless submitted reply comments. The Commission rejects such reply comments.

[6] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 119 FERC ¶ 61,295, at PP 62, 399, 408, 440, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, 123 FERC ¶ 61,055, *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697–B, 125 FERC ¶ 61,326 (2008), *order on reh'g,* Order No. 697–C, 127 FERC ¶ 61,284 (2009), *order on reh'g,* Order No. 697–D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910 (9th Cir. 2011), *cert. denied, sub nom. Public Citizen, Inc.* v. *FERC,* 567 U.S. 934 (2012).

[7] Category 1 Seller means a Seller that: (1) Is either a wholesale power marketer or wholesale power producer that owns, controls or is affiliated with 500 MW or less of generation in aggregate per region; (2) does not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or has been granted waiver of the requirements of Order No. 888); (3) is not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the Seller's generation assets; (4) is not affiliated with a franchised public utility in the same region as the Seller's generation assets; and (5) does not raise other vertical market power issues. Sellers that are not Category 1 are designated as Category 2 Sellers and are required to file updated market power analyses. 18 CFR 35.36(a)(2).

[8] Order No. 697, 119 FERC ¶ 61,295 at P 62.

[9] *Id.* PP 33, 62–63.

[10] Where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket becomes a default relevant geographic market for Sellers located within the submarket for purposes of the horizontal market power analysis. *See id.* PP 15, 231.

[11] Order No. 697–A, 123 FERC ¶ 61,055 at P 111.

[12] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 816, 153 FERC ¶ 61,065 (2015), *order on reh'g* Order No. 816–A, 155 FERC ¶ 61,188 (2016).

[13] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* 147 FERC ¶ 61,232, at P 10 (2014) (Order No. 816 NOPR).

[14] *See id.* PP 35–36.

[15] RTO/ISO sellers are Sellers that have an RTO/ISO market as a relevant geographic market.

[16] Order No. 816 NOPR, 147 FERC ¶ 61,232 at P 36.

[17] Order No. 816, 153 FERC ¶ 61,065 at P 27.

[18] NOPR, 165 FERC ¶ 61,268 at PP 61–70.

Commission's ability to ensure just and reasonable rates because, they argue, it eliminates data necessary for detecting the presence of market power, and it results in an improper sub-delegation of the Commission's statutory responsibility to the RTO/ISO.[19] We have carefully considered these arguments, but disagree for the reasons discussed below. Accordingly, we adopt the changes to § 35.37(c) of the Commission's regulations, as proposed in the NOPR.

1. Availability of Data Necessary for Effective Review of Seller Market Power

a. Comments

10. Opponents of the NOPR raise concerns that the proposal would deprive the Commission and intervenors/complainants of data that is necessary for assessing market power. They add that the proposal is contrary to the Commission's statement in Order No. 697–A that, even where RTO/ISO monitoring and mitigation is in place, the indicative screens provide ''critical information regarding the potential market power of Sellers in the market.'' [20]

11. TAPS and AAI/APPA/NRECA both state that the courts have relied on *ex ante* market power screening in upholding the Commission's use of market-based rates, and both argue that the indicative screens play an essential role in the Commission's *ex ante* market power analysis, which ''consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power).'' [21] TAPS argues that the ''rigorous screening process to detect market power'' and collection of seller-specific data were critical to the court's upholding of the Commission's market-based rate program in Order No. 697.[22] Similarly, AAI/APPA/NRECA argue that courts have specifically relied on the existence of seller-specific, *ex ante* market power screening in upholding the Commission's use of market-based rates.[23]

12. TAPS and AAI/APPA/NRECA argue that the efficacy of the other existing market-based rate requirements and procedural avenues would be undermined by the elimination of the indicative screens. For example, TAPS notes that the Commission and others may always scrutinize a Seller's asset appendix, but the indicative screens enable them to better understand this information in the context of particular markets.[24] Similarly, AAI/APPA/NRECA note that a Seller's asset appendix and affiliate information offer ''a ballpark idea of the share of generation capacity owned or controlled by a [S]eller and its affiliates'' but is ''divorced from any analytical framework designed to identify a [S]eller's ability to exercise market power.'' [25] AAI/APPA/NRECA also state that the proposal would deprive the Commission of important data and analysis that is complementary to the Commission's merger analysis, transmission policy, and policies relating to certification of natural gas pipelines that also have interests in generation assets.[26]

13. AAI/APPA/NRECA and TAPS argue that the Commission should retain its case-by-case approach for determining whether market power mitigation is sufficient to address market power concerns.[27] TAPS explains that ''[e]ven in those instances where, based on RTO monitoring and mitigation, the Commission has ultimately granted [market-based rate] authority despite screen failures, it nevertheless has done so with at least an initial understanding of the degree of potential market power the particular [S]eller may have.'' [28]

14. Public Citizen believes that the NOPR interferes with the public's right to inspect, comment, and protest Federal Power Act (FPA) section 205 [29] rate filings such that ''at the time of a [s]ection 205 [market-based rate] application, any member of the public with concerns about market power wielded by the applicant would now be required to lodge their challenge with the relevant RTO tariff in a completely different proceeding.'' [30]

15. While recognizing that market monitors are required under Order No. 719 to submit annual and quarterly reports, AAI/APPA/NRECA state that the reporting requirements are not uniform and are left to the discretion of the RTO/ISO monitor.[31] In particular, they note that the market monitors are not obligated to collect and report individual entity market shares and market concentration data.

16. TAPS asserts that the lack of indicative screen information will hinder the ability of affected parties and the Commission to meet the evidentiary burden required to challenge market-based rate filings.[32] AAI/APPA/NRECA share this concern and believe that the NOPR increases the burden for entities seeking to challenge a Seller's market-based rate authority. They note that under the current framework, the sufficiency of RTO/ISO market monitoring and mitigation is only placed at issue *after* a Seller fails one or both of the indicative screens, resulting in a presumption that the Seller has market power. In contrast, under the proposal, a party challenging market-based rate authority would be required to demonstrate, *as a threshold matter,* that the Seller has market power.[33]

b. Commission Determination

17. At the outset, we note that the Commission's prior decision in Order No. 697–A to retain the indicative screens for Sellers in RTO/ISO markets is not controlling here. The Commission may evaluate the continuing reasonableness of a prior policy or determination and subsequently reach a different conclusion.[34] We reach a different conclusion here in part based on our finding that the proposal does not eliminate data necessary for the effective review of a Seller's market power.

18. We also disagree with TAPS and AAI/APPA/NRECA's assertion that the courts, in upholding the Commission's ability to approve market-based rates, have found that indicative screens play an essential role in the Commission's *ex ante* analysis. While the courts have found that an *ex ante* finding of the absence of market power, coupled with sufficient post-approval reporting requirements, ensures that market-based rates are just and reasonable, the courts have recognized that the Commission's market-based rate analysis looks at whether a seller lacks market power or has taken sufficient steps to mitigate

[19] TAPS at 20–21; AAI/APPA/NRECA at 29.

[20] AAI/APPA/NRECA at 15 (citing Order No. 697–A, 123 FERC ¶ 61,055 at P 109); TAPS at 7 (citing same).

[21] AAI/APPA/NRECA at 7; TAPS at 5 (quoting *Cal. ex rel. Lockyer* v. *FERC,* 383 F.3d 1006, 1013 (9th Cir. 2004) (*Lockyer*).

[22] TAPS at 5 (citing *Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910, 917 (9th Cir. 2011) (*Mont. Consumer Counsel*).

[23] AAI/APPA/NRECA at 7 (citing *Blumenthal* v. *FERC,* 552 F.3d 875, 882 (D.C. Cir. 2009) (*Blumenthal*).

[24] TAPS at 13.

[25] AAI/APPA/NRECA at 17.

[26] *Id.* at 26.

[27] TAPS at 22.

[28] *Id.* at 8.

[29] 16 U.S.C. 824d.

[30] Public Citizen at 3.

[31] AAI/APPA/NRECA at 16.

[32] TAPS at 13.

[33] AAI/APPA/NRECA at 28.

[34] *New Jersey Bd. of Pub. Utils.* v. *FERC,* 744 F.3d 74, 100 (3rd Cir. 2014) (noting that ''[c]ourts have repeatedly held that an agency may alter its policies despite the absence of a change in circumstances.'' (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983)); *Tennessee Gas Pipeline Co.,* 105 FERC ¶ 61,120, at P 35 (2003) (the Commission's prior acceptance of tariff provisions does not preclude the Commission from reconsidering its policies), *aff'd Tennessee Gas Pipeline Co.* v. *FERC,* 400 F.3d 23 (D.C. Cir. 2005).

it.[35] The use of indicative screens is not the only permissible approach the Commission may employ to assess market power before authorizing market-based rates, nor are indicative screens essential to the Commission's determination of whether market power is mitigated.

19. Contrary to AAI/APPA/NRECA's assertion, the Commission is not ''distancing itself'' from oversight of competitive issues arising in wholesale markets. Sellers continue to be required to submit notices of change in status and market power analyses, which include a demonstration regarding vertical market power, affiliate information, and an asset appendix. Additionally, Sellers continue to be required to submit Electric Quarterly Reports (EQR). EQR reporting is a vital tool for determining whether Sellers may be exercising market power because it shows the volumes and prices at which Sellers are transacting; as such, it can be used to determine a Seller's market share of sales and relative prices.

20. We are not aware of an instance to date where an intervenor or complainant has used indicative screen data as part of a challenge to the market power of an RTO/ISO seller. Nevertheless, even without the screen data, the information that continues to be required under § 35.37 is useful to those seeking to challenge a Seller's market-based rate authority. We disagree with TAPS's suggestion that this information is of limited value without the indicative screens. The asset appendices also provide detailed information on a Seller's generation portfolio, including affiliated generation and long-term power purchase agreements. Through the triennial update process,[36] a potential intervenor can review contemporaneous information on a Seller's generation portfolio and can aggregate this information to get an indication of an individual Seller's size relevant to the market. Moreover, data on total market size is available from other public sources such as reports from the U.S. Energy Information Administration.

21. Public Citizen is mistaken in its view that challengers to a market-based rate filing would have to lodge their objections with the relevant RTO/ISO tariff in a different proceeding.[37] Any objections to a Seller's market-based rate authority can and should occur as a direct response to an initial application, a change in status filing, a triennial update, or in a proceeding instituted under FPA section 206.[38] The Commission will consider all relevant information in the record when determining whether the Seller can obtain or retain market-based rate authority. This will continue to occur notwithstanding the existence of Commission-approved monitoring and mitigation.

22. The public and the Commission will continue to have access to a Seller's ownership information, vertical market power analysis, asset appendix, and EQRs, as well as to the market monitors' reports. For example, PJM IMM notes that its quarterly State of the Market reports contain a comprehensive listing of market power concerns.[39] Anyone may use this information in support of a challenge to a Seller's market-based rate authority. The Commission would then consider this and other information to determine whether the Seller may obtain or retain market-based rate authority. In addition, contrary to Public Citizen's argument that ''once [market-based rate] authority is granted, [the Commission] is unlikely to take it away,'' the standard for obtaining and retaining market-based rate authority is the same. The Commission can and does institute FPA section 206 proceedings when potential market power concerns arise.[40]

23. In addition, the Commission conducts independent, *ex post* analyses using public and non-public data to assess market behavior in RTO/ISO markets. The Commission can examine transaction level data (*e.g.,* resource supply offers) using data provided pursuant to Order No. 760 to conduct such oversight.[41]

24. Regarding concerns that the market monitors' reports are not ''uniform,'' we note that the RTOs/ISOs themselves are not uniform and that a ''one size fits all'' report format is unnecessary. The more relevant question is whether the reports contain a comprehensive review of market performance. To the extent intervenors/complainants identify relevant information the reports are lacking, they can raise such concerns as part of a challenge to a Seller's market-based rate authority and request that the Commission require the Seller to submit indicative screens.

25. We acknowledge that, under the proposal that we adopt herein, a successful challenge to Seller's market-based rate authority will involve two demonstrations: (1) That the Seller has market power and (2) that such market power is not addressed by existing Commission-approved RTO/ISO market monitoring and mitigation.

26. Regarding the second demonstration, a challenge to existing Commission-approved RTO/ISO market monitoring and mitigation would be no different than what the Commission articulated in Order No. 697–A, where it established the rebuttable presumption that Commission-approved market monitoring and mitigation was sufficient to address market power concerns. There, the Commission explicitly recognized that ''intervenors may challenge that presumption. Depending on the nature of the evidence submitted by an intervenor, the Commission will consider whether to institute a separate FPA section 206 proceeding to investigate whether the existing RTO/ISO mitigation continues to be just and reasonable.'' [42]

27. With respect to the first demonstration as to whether a Seller has market power, we are sympathetic to the concern that, to the extent intervenors/complainants successfully rebut the presumption as to the sufficiency of market monitoring and mitigation, they will not have indicative screen information which would otherwise have established a presumption of market power one way or the other. In this situation, the Commission retains authority to require the Seller to submit indicative screens or other evidence to help evaluate whether the Seller has market power.

2. No Sub-Delegation of Statutory Responsibility

a. Comments

28. Opponents of the proposal renew many of the legal arguments raised in the Order No. 816 proceeding. AAI/APPA/NRECA argue that RTOs/ISOs cannot lawfully substitute for the Commission's regulation of wholesale

[35] *See Lockyer,* 383 F.3d at 1013; *Blumenthal,* 552 F.3d at 882; *Mont. Consumer Counsel,* 659 F.3d at 916.

[36] Only Category 2 Sellers are required to submit triennial updated market power analyses. 18 CFR 35.37(a)(1). Category 2 Sellers likely will have more of a presence in the market than Category 1 Sellers and are considered more likely to either fail one or more of the indicative screens or pass by a smaller margin than those that will qualify as Category 1 Sellers, or may present circumstances that could pose vertical market power issues. Order No. 697, 119 FERC ¶ 61,295 at P 852; 18 CFR 35.36(a)(2), (a)(3).

[37] Public Citizen at 3.

[38] 16 U.S.C. 824e.

[39] PJM IMM at 4–5.

[40] *See, e.g., Nevada Power Co.,* 155 FERC ¶ 61,249 (2016); *FortisUS Energy Corp.,* 150 FERC ¶ 61,153 (2015); *Alabama Power Co.,* 151 FERC ¶ 61,071 (2015); *Duke Power,* 109 FERC ¶ 61,270 (2004).

[41] *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators,* Order No. 760, 139 FERC ¶ 61,053 (2012).

[42] Order No. 697–A, 123 FERC ¶ 61,055 at P 5.

electricity markets required by the FPA. They assert the RTOs/ISOs are not public agencies or regulators and cannot serve as the Commission's surrogate. Similarly, Public Citizen contends that the proposal weakens oversight by transferring regulatory control to private consulting firms (referring specifically to the market monitors).[43]

29. AAI/APPA/NRECA point to a recent Court of Appeals for the District of Columbia Circuit (D.C. Circuit) opinion where the court ''emphasized the distinction between the PJM IMM, which 'is not a creature of statute and operates under no affirmative duty imposed by public law,' and a public regulator such as the Commission.'' [44] AAI/APPA/NRECA also point to the D.C. Circuit's opinion in *Exelon Corp.* v. *FERC,* issued eight days after the NOPR, and its holding ''that only the Commission—not the ISO or its market monitor—had authority to evaluate whether a capacity Seller's offer was just and reasonable under the FPA or instead constituted unlawful physical withholding and should be subject to mitigation.'' [45]

b. Commission Determination

30. We agree that it is the Commission, and not the market monitors or the RTOs/ISOs, that bears responsibility for ensuring that rates are just and reasonable under the FPA. Under the proposal, which we adopt in this final rule, it is the Commission—and not the RTO/ISO or its associated market monitor—that determines whether an entity can obtain or retain market-based rate authority. In performing mitigation, the RTO/ISO or market monitor does not usurp the Commission's role or act as its surrogate but rather implements Commission-approved tariff provisions. Thus, the Commission is the entity determining whether granting a Seller market-based rate authority would result in just and reasonable rates.

31. The *Exelon* case relied on by AAI/APPA/NRECA is inapposite to this rulemaking. That proceeding involved a disputed tariff provision under which the ISO New England Inc. market monitor would review a capacity supplier's retirement bid and, if it determined that the bid was unsupported, would substitute a ''mitigated'' bid that would then be submitted to the Commission for approval under FPA section 205. On remand from the D.C. Circuit, the Commission explained that its review of an FPA section 205 filing would consider the entirety of the record and that it would accept the capacity supplier's bid so long as the capacity supplier persuades the Commission that its bid is just and reasonable, despite contrary assertions by the market monitor.[46] Nothing in *Exelon* calls into question the Commission's ability to rely on Commission-approved RTO/ISO monitoring and mitigation market rules to address market power concerns. The Commission will continue to review a Seller's filing under FPA section 205 based on the entirety of the record and will grant market-based rate authority if the Seller demonstrates that it lacks the ability to exercise market power.

B. Retention of Screens for Capacity Sellers in CAISO and SPP

1. CAISO

a. Comments

32. Several commenters request extending the proposal to grant relief from submitting the indicative screens to capacity Sellers in the CAISO market, while other commenters support the Commission's proposal to retain the requirement that Sellers submit indicative screens for capacity sales in CAISO.

33. Calpine, EEI, Indicated Generation Investors, PG&E, Competitive Suppliers, and SoCal Edison urge the Commission to extend the proposal to grant relief from submitting the indicative screens to capacity sellers in CAISO.[47] Calpine identifies ''structural safeguards'' in California that protect against the exercise of horizontal market power in the sale of capacity. Calpine explains that these safeguards are provided through the combination of the California Public Utilities Commission (CPUC)-administered Resource Adequacy program, CAISO Tariff requirements imposed on sellers of Resource Adequacy capacity and, ultimately, on CAISO-administered backstop capacity procurement programs, including the Capacity Procurement Mechanism and Reliability Must-Run Agreements. Calpine argues that the Commission-approved settlement for the bid cap in the capacity backstop market establishes ''presumptively just and reasonable price caps for capacity, even in a competitive market.'' [48]

34. Competitive Suppliers maintain that ''[b]etween [Capacity Procurement Mechanism] to address capacity deficiency issues when they arise, and the [Reliability Must-Run] process to mandate service from units that would otherwise retire, CAISO has backstop mechanisms that cap prices—initially at a representation of going forward fixed costs in the case of [Capacity Procurement Mechanism], and ultimately at full cost-of-service with [Reliability Must-Run].'' [49] Competitive Suppliers also suggest that the Commission could extend its ruling in Order No. 784,[50] which permits a Seller to make market-based sales of certain ancillary services if the sale results from a competitive solicitation, to sales of capacity in CAISO. Competitive Suppliers propose, consistent with the process specified in Order No. 784, that a Seller be allowed to make market-based sales of capacity in CAISO if it demonstrates that the sale of capacity results from a competitive solicitation that meets the guidelines articulated in Order No. 784 (transparency, definition, evaluation, oversight, and competitiveness).

35. SoCal Edison states that while CAISO does not have a centralized capacity market, the CPUC and CAISO together have designed and implemented a Resource Adequacy framework, which provides similar monitoring and mitigation measures found in centralized capacity markets.[51] SoCal Edison argues that although CAISO is currently evaluating its Reliability Must-Run and Capacity Procurement Mechanism processes, such changes should not be viewed as an indication that the current processes are inferior to the Commission's horizontal market power screens.[52] SoCal Edison states that if the Commission does not eliminate the requirement for Sellers to submit

[43] Public Citizen at 4–5 (also noting that the market monitors do not have corporate control protections to safeguard the public interest).

[44] AAI/APPA/NRECA at 19 (citing *Old Dominion Elec. Coop.* v. *FERC,* 892 F.3d 1223, 1234 (D.C. Cir. 2018)).

[45] *Id.* at 19–20 (citing *Exelon Corp.* v. *FERC,* 911 F.3d 1236 (D.C. Cir. 2018) (*Exelon*)).

[46] *ISO New England Inc.,* 166 FERC ¶ 61,060, at P 8 (2019).

[47] Calpine at 4–5 (identifying structural safeguards in California that protect against the exercise of horizontal market power in the sale of capacity); EEI at 5–6 (mitigation methods exist in CAISO's Capacity Procurement Mechanism which address market power in the capacity sales); Indicated Generation Investors at 9–10 (''There is no credible case to be made that the presence or absence of a particular type of forward capacity market itself defines whether exercises of market power are prevented.''); PG&E at 3–4; Competitive Suppliers at 5–7; SoCal Edison at 3–6 (CAISO's Resource Adequacy framework provides similar monitoring and mitigation measures found in centralized capacity markets).

[48] Calpine at 7.

[49] Competitive Suppliers at 6.

[50] *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies,* Order No. 784, 144 FERC ¶ 61,056 (2013), *order on clarification,* Order No. 784–A, 146 FERC ¶ 61,114 (2014).

[51] SoCal Edison at 4.

[52] *Id.* at 5.

indicative screens for capacity sales in CAISO, it recommends a technical conference to consider how CAISO's market monitoring and mitigation of capacity sales can be modified such that the requirement to submit indicative screens can be eliminated prior to the submission of the next triennial for the Southwest region due in December 2021, or how the indicative screens can be modified to reflect the Resource Adequacy reserve margin obligations and capacity procurement in CAISO.[53]

36. Other commenters support the proposal to retain the requirement that Sellers submit indicative screens for capacity sales in CAISO.[54] CAISO DMM ''strongly supports the NOPR's provisions relating to capacity market sales in the CAISO'' [55] and notes that a bilateral capacity sales market that supports resource adequacy is overseen by the CPUC, but it is not directly subject to Commission-approved RTO/ISO monitoring. CAISO DMM explains that CAISO's backstop procurement processes help to set a ceiling on resources' bilateral capacity contract compensation, similar to the way system-wide offer caps set ceilings in ISO-administered capacity markets; ''[h]owever, these backstop procurement processes do not mitigate market power like the Commission-approved market power mitigation in those capacity markets.'' [56]

37. TAPS comments that the indicative screens are especially important for capacity sales in RTOs that do not administer a capacity market because ''there is no basis for presuming the sufficiency of monitoring and mitigation absent Commission-approval of particular measures for the specific market.'' [57] TAPS also supports the proposal to eliminate the rebuttable presumption that RTO market monitoring and mitigation is sufficient with respect to capacity sales where there is no RTO/ISO administered capacity markets.[58]

b. Commission Determination

38. We adopt the NOPR proposals to require capacity sellers in CAISO to continue to submit indicative screens and to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in CAISO.

39. Although the majority of capacity sales within CAISO are made through the Resource Adequacy program, we note that these sales are not reviewed, approved, or monitored by CAISO. The CPUC reviews and approves capacity purchases by load serving entities via the Resource Adequacy program pursuant to resource requirements established by the CPUC, but these purchases are not necessarily the result of competitive solicitations. There is no transparent market price determined under Commission-approved rules for capacity in CAISO comparable to the market price for capacity established by RTOs/ISOs with centralized capacity markets.[59]

40. With regard to the soft offer cap for the Capacity Procurement Mechanism cited by Calpine and other commenters, we note that the soft offer cap is an estimate of the cost of new entry and does not necessarily reflect a mitigated, ''going forward'' cost of any existing generator and does not address concerns regarding local market power. Although the soft offer cap is helpful, it does not provide mitigation comparable to the mitigation applied in the RTO/ISO administered capacity markets.

41. We disagree with Competitive Suppliers' comment that a Seller be allowed to make market-based rate sales of capacity in CAISO if it demonstrates that the sale of capacity results from a competitive solicitation that meets the guidelines articulated in Order No. 784 ((1) transparency; (2) definition; (3) evaluation; (4) oversight; and (5) competitiveness) as a meaningful alternative to the requirement to submit screens. Order No. 784 describes an auction process that, if satisfied, would enable a Seller to sell certain ancillary services at market-based rates on a case-by-case basis.[60] The first four guidelines comprise the *Edgar-Allegheny*[61] guidelines that must be adequately addressed for Commission acceptance of an affiliate sale. Order No. 784 established an additional criteria—competitiveness. To meet the competitiveness criteria, sellers are required to submit evidence showing the absence of market power in the ancillary service market. Therefore, were the Order No. 784 guidelines applied here, a Seller would be obligated to submit screens, a comparable study, or other evidence that demonstrates a lack of market power in the capacity market to comply with the competitiveness guideline.

42. Lastly, we do not think it is necessary to hold a technical conference to consider how CAISO's market monitoring and mitigation of capacity sales can be modified such that the requirement to submit indicative screens can be eliminated prior to the next triennial for the Southwest region due in December 2021, or how the indicative screens can be modified to reflect the Resource Adequacy reserve margin obligations and capacity procurement in CAISO.[62] We note that relief from the requirement to submit screens may be extended to capacity sellers in CAISO in the future, if CAISO develops an ISO-administered capacity market that is subject to Commission-approved market monitoring and mitigation.

2. SPP

a. Comments

43. Certain commenters request extending the proposal to grant relief from submitting the indicative screens to capacity sellers in the SPP market.[63]

44. Evergy/Xcel assert that SPP's lack of an RTO-administered capacity market does not mean that capacity sellers in SPP can exercise market power. Evergy/Xcel state that other safeguards exist in SPP, such as transparent energy pricing, comprehensive must-offer requirements, vigorous independent market monitoring, and Commission-accepted mitigation measures.[64] Evergy/Xcel also point to other safeguards, such as state regulators' oversight and review of capacity sales in retail rate cases, the Commission's authority to require the submission of indicative screens, the continued submission of EQRs, and the continued ability to file complaints under FPA section 206.[65]

45. Evergy/Xcel state that the Commission rejected proposed

[53] *Id.* at 7.

[54] CAISO DMM at 10–11; TAPS at 19–20 (noting that the indicative screens are especially important for capacity sales in RTOs that do not administer a capacity market); *see also* ELCON at 7–8 (''capacity markets present a fundamental challenge to horizontal market power detection and mitigation'').

[55] CAISO DMM at 10.

[56] *Id.* at 11.

[57] TAPS at 19–20.

[58] *Id.*

[59] Capacity sales in CAISO are reported in EQRs but that data, on its own, does not provide a meaningful market price given the different vintage, length, product characteristics, and terms and conditions of the contracts under which capacity is sold in CAISO.

[60] *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies,* Order No. 784, 144 FERC ¶ 61,056, at P 95 (2013), *order on clarification,* Order No. 784–A 146 FERC ¶ 61,114 (2014).

[61] *Boston Edison Co. Re: Edgar Electric Energy Company,* 55 FERC ¶ 61,382 (1991); *Allegheny Energy Supply Company, LLC,* 108 FERC ¶ 61,082 (2004) (*Edgar-Allegheny*).

[62] SoCal Edison at 7.

[63] Evergy/Xcel at 7–12; EEI at 5–6. Indicated Generation Investors do not specifically reference SPP in their comments but state (at 8–9) that markets ''in addition to the named Northeastern market'' should be included in the relief that the NOPR proposes.

[64] Evergy/Xcel at 8.

[65] *Id.* at 9–10.

mitigation in MISO, finding that the Minimum Offer Price Rule that would mitigate against the potential exercise of market power by buyers of capacity was unnecessary because of the predominance of vertically-integrated utilities and bilateral contracting and minimal use of the voluntary MISO capacity market. Evergy/Xcel maintain that these same factors apply to SPP, as it ''mostly consists of vertically-integrated utilities with a small number of independent generators.'' According to Evergy/Xcel, while '''most' capacity is transacted bilaterally or self-supplied in MISO, *all* capacity in SPP is transacted bilaterally or self-supplied. Thus 'most' capacity transactions in MISO are not subject to direct monitoring or mitigation, just as in SPP.'' [66]

b. Commission Determination

46. We adopt the NOPR proposals to require capacity sellers in SPP to continue to submit indicative screens and to eliminate the rebuttable presumption that Commission-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in SPP.

47. We disagree with Evergy/Xcel that certain safeguards present in SPP justify removal of the requirement to submit screens for capacity sales. While these safeguards are important, they do not fully allay the concerns about the lack of an RTO-administered capacity market with Commission-approved monitoring and mitigation. For example, the must-offer requirement as a safeguard is not relevant here because it applies to energy sales, not capacity sales. Furthermore, as discussed in the NOPR, while we acknowledge state review [67] of SPP capacity sales, we conclude that it is not sufficient oversight to extend relief to capacity sellers that would otherwise study the SPP market. As we found above with respect to CAISO, there is no transparent market price determined under Commission-approved rules for capacity in SPP comparable to the market price for capacity established by RTOs/ISOs with centralized capacity markets.

48. We acknowledge that SPP is similar to MISO in that it mostly consists of vertically-integrated utilities with a small number of independent generators. However, MISO conducts annual capacity auctions subject to Commission-approved monitoring and mitigation, thereby disciplining the price of bilateral capacity sales and providing capacity buyers with protections that are not available in SPP. The SPP market lacks a transparent market price for capacity and SPP does not review or mitigate capacity prices.

C. Clarifications for Capacity Sellers in CAISO and SPP

a. Comments

49. Calpine asks that the Commission make the following clarification in Paragraph 51 of the NOPR ''that, in the event of indicative screen failures, the CAISO (or SPP) Seller's evidentiary burden is limited to demonstrating that it lacks market power in *capacity* markets, or to propose satisfactory mitigation for *capacity* sales, but that the CAISO (or SPP) Seller may still rely on a rebuttable presumption that it lacks market power in energy and ancillary services markets as a result of Commission-approved market monitoring and mitigation provisions in the CAISO (or SPP) Tariff.'' [68]

50. Powerex states that the NOPR introduces an ambiguity about which markets a Seller would be required to evaluate for purposes of making capacity sales. Specifically, Paragraph 49 of the NOPR states that the Commission proposes ''to require any Seller seeking to sell capacity at the market-based rates in CAISO or SPP, either as a bundled or unbundled product or on a short-term or long-term basis, to submit the indicative screens.'' [69] Powerex asserts that ''[r]ead literally, the foregoing statement would require all [market-based rate] sellers wishing to sell capacity in CAISO or SPP to study these markets as a relevant market and to submit the indicative screens, even though many [market-based rate] sellers making sales in CAISO and SPP do *not* presently submit indicative screens for those markets because they do not own or control generation in those markets and because those markets are not first-tier markets.'' As such, Powerex believes Paragraph 49's ''expansive language requiring 'any seller' seeking to sell capacity in CAISO or SPP to submit indicative screens is ambiguous and potentially over-broad.'' [70]

b. Commission Determination

51. We agree with Calpine that the addition of ''capacity'' appropriately clarifies Paragraph 51 of the NOPR. Therefore, we clarify that in the event of indicative screen failures, the CAISO (or SPP) Seller's evidentiary burden is limited to demonstrating that it lacks market power in capacity markets, or to proposing a satisfactory mitigation plan that is specific to capacity sales. Additionally, we note that the CAISO (or SPP) Seller may still rely on the rebuttable presumption that it lacks market power in energy and ancillary services markets as a result of Commission-approved market monitoring and mitigation.

52. We agree with Powerex that Paragraph 49's language requiring ''any seller'' seeking to sell capacity in CAISO or SPP to submit indicative screens is unclear. We clarify that the proposal adopted in the final rule requires that any RTO/ISO seller that would normally study CAISO or SPP as a relevant market, and that seeks to offer capacity at market-based rates in those markets, either as a bundled or unbundled product or on a short-term or long-term basis, must submit the indicative screens to demonstrate that it will not have market power in capacity sales.

D. Retention of Screens for EIM

1. Comments

53. While the Commission did not include in its proposal any changes for Sellers that study the Western Energy Imbalance Market (EIM), CAISO DMM and EIM Entities submitted comments in which they seek clarification that the proposal will apply to participants in the EIM and advocate for this result.[71] Specifically, EIM Entities argue that because the EIM is part of CAISO's real-time energy market and is subject to Commission-approved market monitoring and mitigation, indicative screens should not be required for purposes of obtaining or retaining market-based rate authority in the EIM.[72]

54. EIM Entities state that the EIM has become an increasingly liquid market that offers competitive supply from a significant number of participants. They argue that the EIM is structurally competitive, asserting that ''[t]he DMM has presented analysis and the Commission has affirmed in multiple EIM orders that the EIM is structurally competitive due to absence of pivotal suppliers and low frequency of price separation,'' and in those intervals where potential structural market power could exist, it would be mitigated by CAISO's real-time bid mitigation procedures.[73] EIM Entities also argue that the requirement to perform

[66] *Id.* at 11–12.

[67] In the SPP region, capacity costs are recovered in the rate bases of franchised public utilities and, therefore, are subject to state regulatory review.

[68] Calpine at 9 (emphasis in original).

[69] NOPR, 165 FERC ¶ 61,268 at P 49.

[70] Powerex at 5.

[71] EIM Entities at 1; CAISO DMM at 8; *see also* EEI at 2 (requesting extension of relief to Sellers in the EIM).

[72] EIM Entities at 7.

[73] *Id.* at 7–8.

indicative screens, as well as congestion and price separation analysis, on five-minute dispatch intervals in the EIM is ''complex and financially burdensome to EIM entities.'' [74] Finally, EIM Entities note that CAISO has implemented improvements to the accuracy of its mitigation regime that serve to reduce instances of either over or under-mitigation.[75]

55. CAISO DMM states that, unlike the local market power mitigation procedures applied within the CAISO, the automated market power mitigation procedures applied to each EIM balancing authority area provide effective market power mitigation on a system-wide level across each individual EIM balancing area.[76] Therefore, CAISO DMM believes that the EIM should be treated as an energy market that is subject to Commission-approved market monitoring and mitigation.

2. Commission Determination

56. We will not extend the relief proposed in the NOPR to Sellers in the EIM at this time. While the Commission has accepted the use of CAISO's real-time local market power mitigation process in the EIM,[77] the Commission has not held that market monitoring and mitigation in the EIM is sufficient to address market power concerns, and the NOPR did not propose to expand the relief from the requirement to submit screens in the EIM or seek comment on the sufficiency of the mitigation.

E. Bilateral Sales

1. Comments

57. Several commenters assert that monitoring and mitigation does not ensure just and reasonable rates for bilateral sales of electricity in RTO/ISO markets.[78] AAI/APPA/NRECA argue that ''[t]he NOPR provides no factual or legal support for its claims that private monitoring and mitigation of RTO/ISO markets will indirectly ensure just and reasonable rates in non-RTO/ISO markets'' and ''no prior Commission order or court decision supports this proposition.'' [79] AAI/APPA/NRECA argue that the NOPR's claim that RTO/ISO markets will discipline market power in long-term bilateral markets is ''unsubstantiated and illogical.'' [80] AAI/APPA/NRECA state that purchases from RTO/ISO-run capacity auctions are not a substitute for self-supply arrangements and long-term bilateral capacity purchases needed by a load-serving entity seeking to provide rate stability for its retail customers.[81]

58. TAPS asserts that there is no basis for assuming that voluntary RTO/ISO capacity markets are substitutes for bilateral transactions, especially for load-serving entities that rely heavily on bilateral transactions to meet their resource requirements.[82] According to TAPS, spot markets and one-year capacity products do not provide a sufficient benchmark against which to compare prices in bilateral markets, given the non-substitutable nature of these products.[83] TAPS asserts that the one-year product sold on mandatory capacity markets is not an adequate substitute for long-term bilateral contracts and the NOPR makes no claims to the contrary.[84] According to TAPS, just as a night at an Airbnb is not a substitute for the purchase of a home, the price of a night at an Airbnb does not provide a benchmark against which to compare the price of purchasing a home.[85] TAPS also criticizes the NOPR's finding that bilateral markets for energy and capacity should be competitive so long as RTO/ISO energy and capacity markets are competitive, and monitoring and mitigation sufficiently protects against the exercise of market power in these markets. TAPS argues that the Commission makes no showing that RTO/ISO energy and capacity markets are competitive.[86] TAPS argues that even if one were to credit the NOPR's contention that competitive auction prices discipline bilateral sales (to some unspecified degree), this reasoning runs ''directly afoul'' of the court precedent stating that the Commission cannot rely upon market forces as a basis for approving market-based rate transactions.[87]

2. Commission Determination

59. We find that Commission-approved RTO/ISO monitoring and mitigation will enable the Commission to retain sufficient oversight of bilateral sales in RTO/ISO markets. We disagree with AAI/APPA/NRECA and TAPS's suggestion that the Commission's statement that RTO/ISO mitigation can effectively discipline bilateral transactions is ''unsubstantiated.'' In the NOPR, the Commission acknowledged that purchases in short-term RTO/ISO energy and capacity markets are not necessarily perfect substitutes for long-term bilateral purchases of energy and/or capacity. However, AAI/APPA/NRECA and TAPS make an unsupported logical leap in suggesting that these products are not substitutable at all, and therefore prices in the RTO/ISO-administered energy and capacity markets do not discipline or provide a useful benchmark against which to compare prices offered in bilateral markets within RTOs/ISOs. These products may be imperfect substitutes but that does not mean that there is no relationship between prices in RTO/ISO-administered markets and bilateral markets. As the Commission found in Order No. 697–A, ''[i]n RTO/ISOs, buyers have access to centralized, bid-based short-term markets which will discipline a seller's attempt to exercise market power in long-term contracts because the would-be buyer can always purchase from the short-term market if a seller tries to charge an excessive price.'' [88]

60. RTO/ISO-administered capacity auctions establish prices for prospective deliveries of capacity—the firm supply needed by load-serving entities. PJM's capacity auctions, for example, establish prices for capacity to be delivered in three years. We find that such prices, along with RTO/ISO-administered energy prices and other liquid and frequently traded products, such as standardized forward contracts, provide a benchmark against which to compare prices offered in the market for long-term bilateral contracts.[89]

61. We also note that the Commission has consistently found that long-term markets for energy and capacity are competitive in the absence of barriers to entry.[90] TAPS does not provide any

[74] *Id.* at 10.

[75] *Id.* at 12–13.

[76] CAISO DMM at 8–9.

[77] *See Cal. Indep. Sys. Operator Corp.,* 147 FERC ¶ 61,231, *order on reh'g, clarification, and compliance,* 149 FERC ¶ 61,058 (2014).

[78] APPA/AAI/NRECA at 23; TAPS at 19.

[79] AAI/APPA/NRECA at 24.

[80] *Id.* at 25.

[81] *Id.*

[82] TAPS at 15–16.

[83] *Id.*

[84] *Id.* at 16.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 18 (citing *Lockyer,* 383 F.3d at 1013).

[88] Order No. 697–A, 123 FERC ¶ 61,055 at P 285.

[89] RTOs/ISOs periodically calculate the cost of new entry or ''CONE'' to provide a benchmark price for new capacity. CONE is a measure of the revenue needed to recover the cost of a new generating unit, typically a gas-fired combustion turbine or combined cycle unit, net of energy revenues. While this is an administratively determined cost, it provides another useful benchmark that buyers can use to assess prices offered in the long-term bilateral market.

[90] Order No. 697, 119 FERC ¶ 61,295 at P 114; *see also* Order No. 697–A, 123 FERC ¶ 61,055 at P 279; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 77 FERC ¶ 61,080), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046

Continued

evidence that RTO/ISO markets suffer from barriers to entry.

62. Contrary to TAPS's contention, eliminating the requirement for Sellers to submit screens in certain RTOs/ISOs is not inconsistent with *Lockyer* because the Commission is not ''relying on market forces alone'' to ensure that these bilateral sales result in just and reasonable rates. In addition to RTO/ISO mitigation measures, RTO/ISO sellers engaged in these bilateral sales remain subject to EQR reporting requirements, which comprise part of the post-approval reporting requirements that reassured the court that the Commission was *not* relying on market forces alone.[91] As the U.S. Court of Appeals for the Ninth Circuit recognized, the Commission conducts ongoing analysis of *ex post* transactional EQR and other market data to detect indications of market power in the wholesale electricity markets ''to determine whether rates were 'just and reasonable' and whether market forces were truly determining the price.'' [92] Additionally, as is currently the case, in the event someone is aware of a situation where a Seller is exercising market power in a bilateral transaction in an RTO/ISO geographic area, evidence of that exercise of market power, for example an analysis of EQR data, could serve as the basis of a complaint or a protest. The Commission is not aware of any such challenges since the issuance of Order No. 697.

F. Current Status and Effectiveness of RTO/ISO Monitoring and Mitigation

1. Comments

63. ELCON tentatively supports the proposal in the NOPR but questions the effectiveness of RTO/ISO monitoring and mitigation and suggests that the Commission could do more to elucidate the impact of horizontal market power on price formation in the RTOs/ISOs. Specifically, ELCON conditionally supports the NOPR, but only if the Commission explicitly and fully retains its authority to take direct action to prevent potential exercise of horizontal market power and simultaneously initiates a review of the effectiveness of RTO/ISO market monitoring and mitigation practices when issuing the final rule.[93] ELCON argues that ultimately it would be more productive if, instead of focusing on the indicative screens, Commission staff resources were redirected toward robust examination of dynamic horizontal market power, monitoring, and mitigation in the RTOs/ISOs.[94] ELCON states that the Commission should bolster RTO/ISO and Commission reporting to provide more transparency and analytic insights on the influence of horizontal market power in price formation, which includes more refined markup estimates and the aggregate and localized cost to load effects.[95] ELCON suggests that the Commission could initiate this process with a notice of inquiry and technical conference, before proceeding to the RTO/ISO specific determinations that would be necessary to achieve such action.[96]

64. In contrast, Competitive Suppliers urge the Commission to avoid holding market power mitigation to an ''unreasonable standard,'' noting that existing market power mitigation protocols are better suited to prevent the exercise of market power than static indicative screens and that market power mitigation protocols will necessarily evolve with experience and changes in market fundamentals. Competitive Suppliers argue that the Commission should not delay implementing its proposal to relieve Sellers of the burden to file indicative screens while it waits for the mitigation protocols to cross the ''elusive finish line represented by the standard that market power mitigation is 'complete.' '' [97]

2. Commission Determination

65. We disagree with ELCON that it is necessary to initiate a formal review of the effectiveness of RTO/ISO monitoring and mitigation practices concurrent with this final rule. The Commission has previously accepted each RTO/ISO's market monitoring and mitigation provisions as just and reasonable. Moreover, as discussed in the NOPR, market power mitigation in RTOs/ISOs uses more granular data than the indicative screens.[98] The indicative screens use static data from a historical study year to evaluate a Seller's ability to exercise market power in the relevant market (*i.e.,* at the balancing authority area/market, or submarket, level). In contrast, RTO/ISO mitigation uses interval-specific market and operational data to identify, in real-time, binding transmission constraints that create conditions that could result in the emergence of local market power. Removing the indicative screens does not affect the RTOs/ISOs' application of the market power monitoring and mitigation provisions in their markets.

66. Moreover, nothing in this final rule precludes an RTO/ISO from filing to amend the existing market power mitigation provisions if improvement is needed. Indeed, in recent years, improvements have been made to market monitoring and mitigation protocols in all RTO/ISO markets.[99] The Commission will continue to scrutinize RTO/ISO market monitoring and mitigation provisions and take necessary action, as appropriate, should any issues arise.

G. Other Issues Raised By Commenters

1. Change in Status and Triennial Updates

a. Comments

67. EEI requests that the Commission eliminate the requirement for change in status reporting and reconsider the continued need for the triennial market power update for all Sellers relying on Commission-approved market monitoring and mitigation.[100] EEI asks the Commission to clarify the characteristics it relies upon in granting market-based rate authority. To the extent information is not relied upon by

(1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002); *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 118 FERC ¶ 61,119, *order on reh'g,* Order No. 890–A, 121 FERC ¶ 61,297 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228, *order on clarification,* Order No. 890–D, 129 FERC ¶ 61,126 (2009).

[91] *See Lockyer,* 383 F.3d at 1014.

[92] *Id.*

[93] ELCON at 3.

[94] *Id.* at 10.

[95] *Id.*

[96] *Id.*

[97] Competitive Suppliers at 3–4.

[98] NOPR, 165 FERC ¶ 61,269 at P 28.

[99] *See, e.g., Cal. Indep. Sys. Operator Corp.,* 157 FERC ¶ 61,091 (2016) (adding a new mitigation run for each five-minute real-time dispatch interval to address the potential for under-mitigation); *Cal. Indep. Sys. Operator Corp.,* 143 FERC ¶ 61,078 (2013) (replacing a static competitive path assessment with a dynamic competitive path assessment in the hour-ahead scheduling process and the real-time market to better evaluate whether transmission constraints are competitive); *Midcontinent Indep. Sys. Operator, Inc.,* 161 FERC ¶ 61,268 (2017) (establishing Dynamic Narrow Constrained Areas); *ISO New England, Inc.,* 155 FERC ¶ 61,029 (2016) (addressing the potential exercise of market power associated with the retirement of existing resources); *PJM Interconnection, L.L.C.,* 158 FERC ¶ 61,133 (2017) (revising the market power mitigation methodology for resources committed in the day-ahead market to update their offers in real-time, for the purposes of mitigation, electing to use the offer that results in the lowest cost to the PJM system); *PJM Interconnection, L.L.C.,* Docket No. ER18–252–000 (Dec. 18, 2017) (delegated order) (applying market power tests to resources that are committed out-of-market and to resources that self-schedule in real-time); *Sw. Power Pool, Inc.,* 165 FERC ¶ 61,242 (2018) (streamlining the process by which Frequently Constrained Areas are designated); *N.Y. Indep. Sys. Operator, Inc.,* Docket No. ER18–1168–000 (May 14, 2018) (delegated order) (revising the market power mitigation provisions to address cases where Sellers submit inaccurate fuel type or fuel price information in fuel cost adjustments).

[100] EEI at 8–9.

the Commission in its initial grant of market-based rate authorization, EEI contends that it also is not relevant to changes in status and Sellers should not be required to submit it.[101]

68. EEI points to how the Commission currently requires that change in status reporting and triennial market power updates include information on any new affiliations with entities that own, operate, or control transmission facilities. EEI argues that ''[s]o long as the affiliated transmission facilities are turned over to the operational control of an RTO/ISO, subject to an Open Access Transmission Tariff (OATT) or have received a waiver of the OATT requirement, [market-based rate] sellers should not be required to report such information as changes in status.'' [102] EEI adds that the same principles justify eliminating reporting of inputs to power production. According to EEI, ''[s]uch inputs would comprise part of the price that is controlled by the Commission-approved market monitoring and mitigation, thereby addressing any market power concerns.'' [103]

69. Similarly, SoCal Edison argues that RTO/ISO sellers who are exempt from submitting screens under the proposal should also be relieved of the requirement to file a change in status for any net increases of generation in their portfolios. In SoCal Edison's view, an increase in generation would not affect the characteristics the Commission relied upon in granting the Seller market-based rate authority because, under the proposal, the Commission is no longer relying on any particular amount of generating capacity when granting market-based rate authority.[104]

70. Contrary to these comments, AAI/APPA/NRECA urge the Commission to gather more information from Sellers and advocate for removing the current stay of the requirement in 18 CFR 35.37(a)(2) that Sellers submit an organizational chart. AAI/APPA/NRECA contend that the organizational chart requirement should be reinstituted regardless of whether the Commission adopts the NOPR, but particularly if the Commission eliminates the indicative screen requirement based in part on ''the availability of other data regarding horizontal market power.'' [105]

b. Commission Determination

71. We reject, as beyond the scope of this proceeding, EEI's and SoCal Edison's requests to eliminate the requirement for change in status reporting and to reconsider the continued need for the triennial market power updates. The Commission did not propose to eliminate or change the triennial or change in status requirements and did not request comment on such a proposal.

72. Similarly, we deny as beyond the scope of this proceeding, AAI/APPA/NRECA's request that the Commission remove the current stay of the requirement in 18 CFR 35.37(a)(2) that Sellers submit an organizational chart.[106]

2. Rights of Market Monitors

a. Comments

73. Both OPSI and PJM IMM request that the Commission definitively state that independent market monitors have the right to file FPA section 206 complaints, including complaints against an RTO/ISO for the independent market monitor's relevant region. OPSI states that the right to file FPA section 206 complaints is needed ''to ensure effective and comprehensive market power mitigation and public confidence in the markets.'' [107] PJM IMM emphasizes that market monitors' ability to initiate an FPA section 206 proceeding when markets are not competitive is a critical part of the NOPR's reliance on effective market monitoring to support market-based rates.[108]

74. PJM IMM also asserts that adequate market power monitoring and mitigation ''requires that market monitors have equal standing with the RTO and its membership to file tariff revisions to the market monitoring and mitigation sections of the tariff.'' [109] PJM IMM suggests that the Commission could achieve equal standing by requiring that all filings to change monitoring and mitigation fall under FPA section 206, as opposed to the current practice of allowing RTOs/ISOs to file changes under FPA section 205. PJM IMM states that the FPA section 206 approach ''would allow the Commission to choose the most effective monitoring and mitigation practices, ensuring that markets remain competitive and ensuring that market based rates are justified.'' [110]

b. Commission Determination

75. We find that OPSI and the PJM IMM's request that the Commission definitively state that independent market monitors have the right to file FPA section 206 complaints is beyond the scope of this proceeding. The Commission did not make, or request comment on, such a proposal.

76. We similarly find PJM IMM's suggestion that all filings to change monitoring and mitigation fall under FPA section 206 to be beyond the scope of this rulemaking, as the Commission did not make, or request comment on, such a proposal.

3. Corporate Character Reporting

a. Comments

77. Public Citizen asserts that the Commission should establish corporate character reporting standards for market-based rate applications. Public Citizen states that under the Commission's current regulations, there is no requirement that an applicant disclose adjudications, criminal convictions, or adverse legal or regulatory rulings against it. Public Citizen maintains that the lack of corporate character reporting requirements ''leaves the Commission vulnerable to approving market-based rate authority to an entity that may have a demonstrated track record of frequent and serious legal violations.'' [111]

b. Commission Determination

78. We find that Public Citizen's request for establishing corporate character reporting requirements for market-based rate applications to be beyond the scope of this proceeding. The Commission did not propose to establish corporate character reporting requirements or request comment on such a proposal.

4. Data Collection NOPR and Market Power NOI

a. Comments

79. AAI/APPA/NRECA argue that the Commission should not act on this NOPR before it has acted on a related pending rulemaking in Docket No. RM16–17–000 (Data Collection NOPR) and a notice of inquiry in Docket No. RM16–21–000 (Market Power NOI). AAI/APPA/NRECA argue that the NOPR, if adopted, would reduce the information available to the Commission for assessing and monitoring the ability of Sellers to exercise market power at the same time the Commission is evaluating whether the Commission's existing market power

[101] *Id.* at 9.

[102] *Id.* at 10–11.

[103] *Id.* at 11.

[104] SoCal Edison at 9–10.

[105] AAI/APPA/NRECA at 18 (citing NOPR, 165 FERC ¶ 61,268 at P 27).

[106] We note that the Commission is concurrently issuing a final rule in Docket No. RM16–17–000 that eliminates the requirement that Sellers submit an organizational chart. *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Order No. 860, 168 FERC ¶ 61,039 (2019).

[107] OPSI at 4–5.

[108] PJM IMM at 7.

[109] *Id.* at 6.

[110] *Id.*

[111] Public Citizen Comments at 5.

information requirements and analyses are sufficient.[112]

b. Commission Determination

80. We are not persuaded by, and therefore reject AAI/APPA/NRECA's assertion that the Commission should first act on the Data Collection NOPR and Market Power NOI proceedings before acting on the instant NOPR. We see no reason why the Commission must first act in those proceedings before taking action to remove the screen requirement as proposed in the NOPR. Any actions taken in the Data Collection NOPR and Market Power NOI will not impact the implementation of the removal of the screen requirement. As noted above, the Commission will continue to monitor RTO/ISO mitigation provisions on an ongoing basis and take necessary action, as appropriate. In addition, we note that a final rule in Docket No. RM16–17–000 is being issued concurrently with this final rule.[113]

IV. Information Collection Statement

81. The Paperwork Reduction Act (PRA)[114] requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB's regulations[115] require approval of certain information collection requirements contained in final rules published in the **Federal Register**.[116] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to the collection of information unless the collection of information display a valid OMB control number.

82. The final rule revises the requirements for Sellers seeking to obtain or retain market-based rate authority that study certain RTOs, ISOs, or submarkets therein, as discussed above. The Commission anticipates that the revisions, once effective, would reduce regulatory burdens.[117] The Commission will submit the reporting requirements to OMB for its review and approval under section 3507(d) of the PRA.[118]

83. While the Commission expects that the revisions adopted in this final rule will reduce the burdens on affected entities, the Commission nonetheless solicited public comments regarding the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. Specifically, the Commission asked that any revised burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the estimates are generated. The Commission did not receive any comments concerning its burden or cost estimates.

84. Section 35.37 of the Commission's regulations currently requires Sellers to submit a horizontal market power analysis when seeking to obtain or retain market-based rate authority.[119] The final rule will implement a streamlined procedure that will eliminate the requirement for Sellers to file the indicative screens as part of a horizontal market power analysis for RTO/ISO markets with RTO/ISO-administered energy, ancillary services, and capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation. In any RTO/ISO market that does not have an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation, Sellers would continue to be required to submit indicative screens for authorization to make capacity sales. Eliminating the requirement to file indicative screens in certain markets will reduce the burden of filing a horizontal market power analysis for a large portion of Sellers when filing triennial updated market power analyses, initial applications for market-based rate authority, and notices of change in status.

85. *Burden Estimate:* The estimated burden and cost for the requirements are as follows.

BURDEN REDUCTIONS IN FINAL RULE, RM19–2–000[120]

Requirement	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost per response	Total annual burden hours & cost	Annual cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Market Power Analysis in New Applications for Market-based Rates for RTO/ISO Sellers.	72	1	72	−230 hrs. −$21,620	−16,560 hrs. −$1,556,640	−$21,620
Triennial Market Power Analysis Updates for RTO/ISO Sellers.	33	1	33	−230 hrs. −$21,620	−7,590 hrs. −$713,460	−$21,620
Total	.....	.....	105	.....	−24,150 hrs. −$2,270,100	

86. After implementation of the proposed changes, the total estimated annual reduction in cost burden to respondents is $2,270,100 [24,150 hours * $94 = $2,270,100].[121]

Title: FERC–919, Market Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities.

Action: Revision of Currently Approved Collection of Information.

[112] AAI/APPA/NRECA Comments at 30.

[113] Order No. 860, 168 FERC ¶ 61,039.

[114] 44 U.S.C. 3507(d).

[115] 5 CFR 1320.

[116] *See* 5 CFR 1320.12.

[117] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[118] 44 U.S.C. 3507(d).

[119] 18 CFR 35.37.

[120] Although some Sellers may include the indicative screens when submitting a change in status filing, this is not required by the Commission's regulations. Thus, we estimate that the change in burden for change in status filings is *de minimis. See* 18 CFR 35.42.

[121] The estimated hourly cost (salary plus benefits) provided in this section are based on the figures for May 2018 posted by the Bureau of Labor Statistics for the Utilities sector (available at *http://www.bls.gov/oes/current/naics2_22.htm*) and updated March 2019 for benefits information (at *http://www.bls.gov/news.release/ecec.nr0.htm*). The hourly estimates for salary plus benefits are:

Economist: $70.83/hour

Electrical Engineer: $68.17/hour

Lawyer: $142.86/hour

The average hourly cost of the three categories is $93.95 [($70.83+$68.17+$142.86)/3]. The Commission rounds it up to $94.00/hour.

OMB Control No.: 1902–0234.

Respondents: Public utilities, wholesale electricity sellers, businesses, or other for profit and/or nonprofit institutions.

Frequency of Responses:

Initial Applications: On occasion.

Updated Market Power Analyses: Updated market power analyses are filed every three years by Category 2 Sellers seeking to retain market-based rate authority.

Change in Status Reports: On occasion.

Necessity of the Information:

Initial Applications: In order to obtain market-based rate authority, the Commission must first evaluate whether a Seller has the ability to exercise market power. Initial applications help inform the Commission as to whether an entity seeking market-based rate authority lacks market power or has adequately mitigated any market power, and whether sales by that entity will be just and reasonable.

Updated Market Power Analyses: Triennial updated market power analyses allow the Commission to monitor market-based rate authority to detect changes in market power or potential abuses of market power. The updated market power analysis permits the Commission to determine that continued market-based rate authority will still yield rates that are just and reasonable.

Change in Status Reports: The change in status requirement permits the Commission to ensure that rates and terms of service offered by market-based rate Sellers remain just and reasonable.

Internal Review: The Commission has reviewed the reporting requirements and made a determination that revising the reporting requirements will ensure the Commission has the necessary data to carry out its statutory mandates, while eliminating unnecessary burden on industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimate associated with the information requirements.

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

88. Comments concerning the collection of information and the associated burden estimates may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: *oira_submission@omb.eop.gov.* Comments submitted to OMB should refer to FERC–919 (OMB Control No. 1902–0234).

V. Environmental Analysis

89. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[122] The Commission has categorically excluded certain Docket Number RM19–2–000 actions from this requirement as not having a significant effect on the human environment.[123] The actions proposed here fall within the categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, or do not substantially change the effect of legislation or regulations being amended.[124] In addition, this final rule is categorically excluded as an electric rate filing submitted by a public utility under Federal Power Act sections 205 and 206.[125] As explained above, this final rule, which addresses the issue of electric rate filings submitted by public utilities for market-based rate authority, is clarifying in nature. Accordingly, no environmental assessment is necessary and none has been prepared in this final rule.

VI. Regulatory Flexibility Act

90. The Regulatory Flexibility Act of 1980 (RFA)[126] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a final rule and minimize any significant economic impact on a substantial number of small entities. In lieu of preparing a regulatory flexibility analysis, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities.

91. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[127] The SBA size standard for electric utilities is based on the number of employees, including affiliates.[128] Under SBA's current size standards, an electric utility (one that falls under NAICS codes 221122 [electric power distribution], 221121 [electric bulk power transmission and control], or 221118 [other electric power generation]) [129] are small if it, including its affiliates, employs 1,000 or fewer people.[130]

92. Out of the 2,500 market-based rate Sellers who are potential respondents subject to the requirements proposed by this final rule, the Commission estimates approximately 74 percent of the affected entities (or approximately 1,850) are small entities. We estimate that none of the 1,850 small entities to whom the final rule apply will incur additional cost because these small entities will no longer be required to file indicative screens causing a reduction in burden, not an increase.

93. The final rule will eliminate some requirements and reduce burden on entities of all sizes (public utilities seeking and currently possessing market-based rate authority). Implementation of the final rule is expected to reduce total annual burden by 24,150 hours per year or 9.66 hours per entity with a related reduced cost of $2,270,100 per year or $908.04 per entity to the industry when filing triennial market power analyses and market power analyses in new applications for market-based rates, and will further reduce burden when filing notices of change in status.

94. As discussed in Order No. 697,[131] current regulations regarding market-based rate Sellers under Subpart H to Part 35 of Title 18 of the Code of Federal Regulations exempt many small entities from significant filing requirements by designating them as Category 1 Sellers. Category 1 Sellers are exempt from triennial updates and may use simplifying assumptions, such as Sellers with fully-committed generation may submit an explanation that their generation is fully committed in lieu of submitting indicative screens, that the Commission allows Sellers to utilize in

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

[123] 18 CFR 380.4.

[124] 18 CFR 380.4(a)(2)(ii).

[125] 18 CFR 380.4(a)(15).

[126] 5 U.S.C. 601–612.

[127] 13 CFR 121.101.

[128] *Id.* 121.201.

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

[130] 13 CFR 121.201 (Sector 22—Utilities).

[131] Order No. 697, 119 FERC ¶ 61,295 at PP 1126–1129.

submitting their horizontal market power analysis.

95. The final rule will relieve Sellers in certain RTO/ISO markets of the requirement to submit indicative screens and will reduce the burden on those Sellers, including small entities. The changes to the Commission's regulations are estimated to cause a reduction of 41 percent in total annual burden to Sellers when filing triennial market power analyses and market power analyses in new applications for market-based rates, including small entities.

96. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

VII. Document Availability

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

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

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

VIII. Effective Date and Congressional Notification

100. This final rule is effective September 24, 2019. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a major rule as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.[132] This rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Kimberly D. Bose,

Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35, chapter I, title 18, Code of Federal Regulations, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 35.37 [Amended]

■ 2. Amend § 35.37 as follows:

■ a. Redesignate paragraph (c)(5) as (c)(7); and

■ b. Add new paragraph (c)(5) and paragraph (c)(6).

The additions read as follows:

§ 35.37 Market power analysis required.

* * * * *

(c) * * *

(5) In lieu of submitting the indicative market power screens, Sellers studying regional transmission organization (RTO) or independent system operator (ISO) markets that operate RTO/ISO-administered energy, ancillary services, and capacity markets may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power Sellers may have in those markets.

(6) In lieu of submitting the indicative market power screens, Sellers studying RTO or ISO markets that operate RTO/ISO-administered energy and ancillary services markets, but not capacity markets, may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power that Sellers may have in energy and ancillary services. However, Sellers studying such RTOs/ISOs would need to submit indicative market power screens if they wish to obtain market-based rate authority for wholesale sales of capacity in these markets.

* * * * *

Note: The following appendix will not be published in the Code of Federal Regulations.

Appendix A

List of Commenters and Acronyms

Commenter	Short name/acronym
American Antitrust Institute, American Public Power Association, and National Rural Electric Cooperative Association.	AAI/APPA/NRECA.
California Independent System Operator—Department of Market Monitoring	CAISO DMM.
Calpine Corporation	Calpine.
EDF Renewables, Inc	EDF Renewables.
Edison Electric Institute	EEI.
EIM Entities (Arizona Public Service Company, Avista Corporation, Idaho Power Company, NV Energy, Inc., PacifiCorp, and Portland General Electric Company).	EIM Entities.
Electric Power Supply Association and Independent Energy Producers Association	Competitive Suppliers.
Electricity Consumers Resource Council	ELCON.
Evergy Companies (Westar Energy, Inc., Kansas City Power & Light Company, and KCP&L Greater Missouri Operations Company) and Xcel Energy Services Inc.	Evergy/Xcel.
FirstEnergy Service Company	FirstEnergy.
Indicated Generation Investors (Southwest Generation Operating Company, LLC, Ares EIF Management, LLC, Northern Star Generation Services Company LLC, Astoria Energy LLC and Astoria Energy II LLC, and Coronal Management, LLC).	Indicated Generation Investors.
Monitoring Analytics, LLC	PJM IMM.
Organization of PJM States, Inc	OPSI.
Pacific Gas and Electric Company	PG&E.
Powerex Corp	Powerex.

[132] 5 U.S.C. 804(2).

Commenter	Short name/acronym
Public Citizen	Public Citizen.
Southern California Edison Company	SoCal Edison.
Transmission Access Policy Study Group	TAPS.

[FR Doc. 2019–15716 Filed 7–25–19; 8:45 am]

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Part V

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM16–17–000; Order No. 860]

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its regulations governing market-based rates for public utilities. The Commission will collect certain information currently filed in the electric market-based rate program in a consolidated and streamlined manner through a relational database. The relational database construct modernizes the Commission's data collection processes, eliminates duplications, and renders information collected through its market-based rate program usable and accessible for the Commission. The Commission will not adopt the proposal from the NOPR to collect Connected Entity data from market-based rate Sellers and entities trading virtual or holding financial transmission rights in this final rule. With respect to the market-based rate program, the Commission will adopt changes that reduce and clarify the scope of ownership information that Sellers must provide as part of their market-based rate filings. In addition, the Commission will modify its regulations to change the information required in a Seller's asset appendix as well as the format through which such information must be submitted. The revised regulations will require a Seller to update the relational database on a monthly basis to reflect any changes that have occurred but will also extend the change in status filing requirement to a quarterly filing obligation. Finally, the Commission will modify its regulations to eliminate the requirement that Sellers submit corporate organizational charts.

DATES: This rule will become effective October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Carol Johnson (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8521, *Carol.Johnson@ferc.gov*.

Byron Corum (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6555, *Byron.corum@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

1. On July 21, 2016, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) [1] proposing to revise its regulations to collect certain data for analytics and surveillance purposes from Sellers [2] and certain other participants in the organized wholesale electric markets subject to the Commission's jurisdiction pursuant to the FPA.[3] The Commission also proposed to change certain aspects of the substance and format of information submitted for market-based rate purposes. The Commission commenced the instant rulemaking in order to modernize its data collection processes, eliminate duplication, ease compliance burdens, and render information collected through its programs more usable and accessible for the Commission.

2. As such, the revisions proposed included new requirements for entities, other than those described in FPA section 201(f),[4] that trade virtual products [5] or that hold financial transmission rights (FTR) [6] (collectively, Virtual/FTR Participants) and for Sellers to report certain information about their legal and financial connections to other entities (Connected Entity Information) to assist the Commission in its analytics and surveillance efforts. The Commission further proposed to consolidate and streamline the data collection through the creation of a relational database.[7] The Commission also proposed to collect certain information currently submitted by Sellers in the relational database, reasoning that the relational database would allow for the automatic generation of an asset appendix and organizational chart that is specific to each Seller. Given this functionality, the Commission also proposed to eliminate the requirement in Order No. 816 that Sellers submit corporate organizational charts.[8] Lastly, the Commission proposed other revisions to the market-based rate program.

3. The Commission received 31 comments in response to the NOPR. A list of commenters, including the abbreviated names used in this final rule, is attached as an appendix to this final rule.

4. In this final rule, we adopt the approach to data collection proposed in the NOPR, with several modifications and clarifications as discussed below. We adopt the proposal to collect market-based rate information in a relational database but decline to adopt the proposal to require Sellers and Virtual/FTR Participants to submit Connected Entity Information.[9] Notwithstanding this decision, we note that the market-based rate information will assist the Commission in administering both its market-based rate and analytics and surveillance programs.

5. The relational database construct that we adopt in this final rule provides for a more modern and flexible format for the reporting and retrieval of information. Sellers will be linked to their market-based rate affiliates through common ultimate upstream affiliate(s).[10] Through this linkage, the relational database will allow for the automatic generation of a complete asset appendix based solely on the information submitted into the relational database.

6. To allow for this functionality, we will require Sellers to submit into the relational database certain information concerning their upstream affiliates, generation assets, long-term firm sales and purchases, vertical assets, category status, the specific markets in which the Seller is authorized to sell operating reserves, and whether the Seller is subject to mitigation or other limitations. We also adopt the NOPR proposal requiring Sellers to submit their indicative screen information in extensible markup language (XML) format, which will enable the information to be included in the

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[1] *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Notice of Proposed Rulemaking, 156 FERC ¶ 61,045 (2016) (NOPR). The instant proceeding was the outgrowth of two prior rulemaking proceedings that had previously been withdrawn and superseded. *See Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators,* Notice of Proposed Rulemaking, 152 FERC ¶ 61,219 (2015) (Connected Entity NOPR); *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators,* Withdrawal of Proposed Rulemaking and Termination of Rulemaking Proceeding, 156 FERC ¶ 61,046 (2016); *Ownership Information in Market-Based Rate Filings,* Notice of Proposed Rulemaking, 153 FERC ¶ 61,309 (2015) (Ownership NOPR); *Ownership Information in Market-Based Rate Filings,* Withdrawal of Proposed Rulemaking and Termination of Rulemaking Proceeding, 156 FERC ¶ 61,047 (2016).

[2] A Seller is defined as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act (FPA). 18 CFR 35.36(a)(1); 16 U.S.C. 824d.

[3] The organized wholesale electric markets subject to the Commission's jurisdiction refers to the markets operated by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) operating in the United States. These RTOs and ISOs include: PJM Interconnection, L.L.C. (PJM), New York Independent System Operator, Inc. (NYISO), ISO New England Inc. (ISO–NE), California Independent System Operator Corporation (CAISO), Midcontinent Independent System Operator, Inc. (MISO), and Southwest Power Pool, Inc. (SPP).

[4] 16 U.S.C. 824(f).

[5] Virtual trading involves sales or purchases in an RTO/ISO day-ahead market that do not go to physical delivery. By making virtual energy sales or purchases in the day-ahead market and settling these positions in the real-time, any market participant can arbitrage price differences between the two markets. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 119 FERC ¶ 61,295, at P 921 n.1047, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, 123 FERC ¶ 61,055, *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697–B, 125 FERC ¶ 61,326 (2008), *order on reh'g,* Order No. 697–C, 127 FERC ¶ 61,284 (2009), *order on reh'g,* Order No. 697–D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Public Citizen, Inc.* v. *FERC,* 567 U.S. 934 (2012).

[6] The term ''FTR'' as used in the NOPR was intended to cover not only Financial Transmission Rights, a term used by PJM, ISO–NE, and MISO, but also Transmission Congestion Contracts in NYISO, Transmission Congestion Rights in SPP, and Congestion Revenue Rights in CAISO. *See* NOPR, 156 FERC ¶ 61,045 at P 1 n.6.

[7] A relational database is a database model whereby multiple data tables relate to one another via unique identifiers. A relational database contains a table for each type of object (*e.g.,* generation assets), with each row in the table containing information about a single instance of that object (*e.g.,* a particular generation unit) and each column representing a particular attribute of that object (*e.g.,* a generation unit's capacity rating). Relational databases are structured to allow for easy data retrieval while avoiding inconsistencies and redundancies.

[8] *See Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g,* Order No. 816–A, 155 FERC ¶ 61,188 (2016). The organizational chart requirement was suspended in Order No. 816–A ''until the Commission issues an order at a later date addressing this requirement.'' Order No. 816–A, 155 FERC ¶ 61,188 at P 47. The relevant organizational chart requirements currently appear in §§ 35.37(a)(2) and 35.42(c) of the Commission's regulations.

[9] Given our decision not to pursue collection of Connected Entity Information in this final rule, the remainder of this final rule focuses on the proposals and comments regarding the collection of market-based rate information and other proposed changes to the market-based rate program.

[10] In the NOPR, the Commission proposed the term ''ultimate affiliate owner.'' NOPR, 156 FERC ¶ 61,045 at P 8. Herein, we replace this proposed term with ''ultimate upstream affiliate'' to reflect that an ultimate upstream affiliate could have control, but not ownership of a Seller. We define ultimate upstream affiliate as the furthest upstream affiliate(s) in the ownership chain—*i.e.,* each of the upstream affiliate(s) of a Seller, who itself does not have 10 percent or more of its outstanding securities owned, held or controlled, with power to vote, by any person (including an individual or company). As discussed below, we codify this definition of ''ultimate upstream affiliate'' by amending § 35.36(a) of the Commission's regulations. We made corresponding changes to the regulations in §§ 35.37(a)(1), 35.37(a)(2), and 35.42(a)(v) to reflect this new term. For clarity, in this final rule we will use the terms ''upstream affiliate'' and ''ultimate upstream affiliate'' in place of ''affiliate owner'' and ''ultimate affiliate owner'' when referencing the NOPR proposal and comments.

relational database. Services will be available to automatically generate tabular indicative screen results based on this information, and the Seller will be able to reference these screen results as part of its initial application and, where appropriate, its triennial market power update or change in status filing.

7. The submission of generator-specific generation information and long-term firm sales information represent new substantive requirements to the market-based rate program but are counterbalanced by other revisions to the program that will reduce burden on Sellers. These revisions include reducing the amount of ownership information that Sellers need to provide, eliminating the requirement to provide corporate organizational charts, and eliminating the requirement to demonstrate ownership passivity where the Seller has made an affirmative statement concerning passive ownership interests. The automated generation of a Seller's asset appendix will also reduce burden to the extent that Sellers will no longer be required to report the assets of their market-based rate affiliates.

8. In this final rule, we provide more detail on the relational database construct and how entities can interact with the relational database to make submissions and prepare market-based rate filings. We also modify the reporting requirements for updates, including timing of change in status filings and quarterly database updates. Among other things, all updates to the relational database will be due on the 15th day of the month following a change. In light of these monthly relational database updates, we will require that Sellers file notices of change in status on a quarterly basis rather than within 30 days of any such changes, thus potentially reducing the number of change in status filings required of Sellers throughout the year. We also discuss modifications to the data dictionary provided in the NOPR (NOPR data dictionary) and provide a new version of the data dictionary (MBR Data Dictionary), which will be available on the Commission's website. As discussed below, the MBR Data Dictionary may undergo minor or non-material changes on occasion. The process for making minor or non-material changes to the MBR Data Dictionary will be the same as that used for the Electric Quarterly Report (EQR) data dictionary. As is the process for EQR, any significant changes to the reporting requirements or the MBR Data Dictionary will be proposed in a Commission order or rulemaking, which would provide an opportunity for comment.[11] We will also post on the Commission's website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. The revised regulatory text from this final rule will take effect on October 1, 2020. However, submission obligations will follow the implementation schedule discussed below.

II. Submission of Information Through a Relational Database

A. Commission Proposal

9. In the NOPR, the Commission proposed to create a relational database that would accommodate the needs of both the Commission's market-based rate and analytics and surveillance programs. The Commission proposed that information would be submitted into the relational database using an XML schema.[12] The Commission stated that the XML schema would permit filers to assemble an XML filing package that includes all of the necessary attachments, including the cover letter and any related market-based rate tariffs.[13] The Commission intended that, upon the receipt of the filing, the XML schema could be parsed [14] into its component parts, with certain information placed into its eLibrary system and other information submitted into the new database, where it could be made available for review by the Commission and other interested parties.[15]

B. Comments

10. Commenters generally expressed approval of the Commission's proposal to collect market-based rate information in a relational database but also suggested certain changes and clarifications.[16] EPSA commends the Commission for taking proactive steps to consolidate its various data collection and streamlining efforts and proposals.[17] Similarly, Independent Generation states that it generally supports the proposal to limit ownership reporting and notes that, correctly interpreted, the proposal would significantly reduce the burden of collecting, monitoring and reporting extensive information concerning corporate relationships that do not relate to the reporting entity's jurisdictional activities.[18]

11. NextEra agrees that the creation of the relational database could ultimately help streamline the reporting process and reduce the amount of information submitted to the Commission in many filings.[19] TAPS also supports the Commission's objectives to render market-based rate information more usable and accessible, better understand the financial and legal connections among market participants and other entities, and streamline information collection through a relational database.[20]

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[11] *See Filing Requirements for Electric Utility Service Agreements,* 155 FERC ¶ 61,280, at P 5, *order on reh'g,* 157 FERC ¶ 61,180, at PP 40–43 (2016).

[12] As the Commission previously explained, XML schemas facilitate the sharing of data across different information systems, particularly via the internet, by structuring the data using tags to identify particular data elements. The tagged information can be extracted and separately searched. *See Electronic Tariff Filings,* Order No. 714, 124 FERC ¶ 61,270, at P 12 & n.8 (2008). The Commission currently collects other data, including EQRs and eTariffs using XML. *See* Order No. 714, 124 FERC ¶ 61,270 (using XML for eTariff filings); *see also Revised Public Utility Filing Requirements,* Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filings,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *clarification order,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 125 FERC 61,103 (2008) (using XML for EQRs).

[13] NOPR, 156 FERC ¶ 61,045 at P 14.

[14] Parse means to capture the hierarchy of the text in the XML file and transform it into a form suitable for further processing. Order No. 714, 124 FERC ¶ 61,270 at n.9.

[15] The Commission also stated that the mechanics and formatting for data submission by filers would be provided on the Commission's website. NOPR, 156 FERC ¶ 61,045 at P 14.

[16] *See e.g.,* APPA at 6 (''[t]he streamlined method of submitting the data to the relational database appears to provide benefits to [Sellers], the Commission and its staff, and the public.''); EPSA at 2 (commending the Commission for ''taking proactive steps to consolidate its various data collection and streamlining efforts and proposals'').

[17] EPSA at 2; *see also* APPA at 5–6 (also recommending specific changes). The proposals are referenced in n.1 above.

[18] Independent Generation at 3–4 (''It is essential that the rule be narrowly tailored to capture entities with ultimate decision-making authority over FERC-jurisdictional activities without sweeping in countless intermediate, passive, or non-controlling entities that have no influence over such activities. Further, aligning the Connected Entity ownership reporting requirement with the [market-based rate] program ownership reporting requirement (also focused on ultimate affiliate owners) will reduce reporting errors and omissions and increase the usefulness of the information collected.'').

[19] NextEra at 9 (''However, there is significant uncertainty about how this system would be implemented, and the initial burden of uploading and verifying data is likely to be significant.'').

[20] TAPS at 5; *see also id.* at 7 (''But the proposed streamlined reporting requirements and transition to a relational database represent significant changes to the [market-based rate] reporting regime, and prudence dictates that they be accompanied by

Continued

12. However, these and other commenters express concern about the proposed collection and reporting requirements and suggest certain changes to the NOPR. For example, APPA seeks clarification that the relational database will maintain historical data and not just a snapshot of current information.[21] EEI argues that the required reporting of affiliates, ownership, and vertical assets in XML should eliminate the need for narratives on these subjects in new market-based rate applications, triennial updates, and change in status filings.[22]

13. Independent Generation seeks clarification regarding the relationship between the Commission's relational database and eTariff filing system. In particular, Independent Generation asks whether market-based rate filings with tariffs would be submitted through both systems using different software or if the systems will interact to reduce duplicate filings.[23] EEI states that there is a lack of clarity regarding the data submission process.[24]

14. EPSA and others raise concerns about the proposed implementation and suggest alternative timelines, as discussed further in the Implementation and Timing of this final rule.

C. Commission Determination

15. We adopt the proposal in the NOPR to collect market-based rate information through a relational database and revise language in § 35.37(a) to reference the relational database requirements.[25] We note that commenters have not opposed the relational database as a construct in and of itself, but instead raise questions and concerns as to implementation and burden. We have attempted, where possible, to rely on existing requirements to avoid duplication and to make requirements as clear and simple as possible. We address commenters' specific concerns regarding implementation and information to be submitted in the sections that follow. However, we take this opportunity to clarify the submission and filing mechanics for the relational database and to describe how the relational database will interact with the Commission's eTariff and eLibrary systems. EEI's request for more clarity regarding the data submission process and Independent Generation's comment concerning the relationship between the eTariff filing system and relational database have prompted us to re-examine the single submission reporting obligation proposed in the NOPR. Upon further consideration, we have concluded that the single submission approach is not practical and instead adopt a modified two-step approach, as described below.

16. The existing eTariff XML schema does not contain fields for information that would be generated as output from the relational database (*e.g.,* the asset appendix and indicative screens).[26] Modifying the existing eTariff schema would incur significant expense as such modifications would also necessitate the modification of the eTariff filing process procedures and could compromise the existing system for all eTariff users, including entities outside the scope of this rulemaking. We will therefore adopt a two-step submittal and filing process for Sellers that leaves the eTariff system unchanged. As will be detailed on the Commission's website, the first step will involve the submission of information in XML into the relational database.[27] The relational database receives this information, which is then used to produce a retrievable asset appendix and indicative screens that the Seller, the Commission, and interested parties can access via serial numbers. Through the second step of the process, the Seller will submit its market-based rate filing through eFiling [28] and will provide the serial numbers for its asset appendices and indicative screens in its transmittal letter, as further discussed below.

17. In response to APPA, we clarify that the relational database will preserve historical information, some of which will be made available through the system.[29]

III. Obtaining a Legal Entity Identifier (LEI)

A. Commission Proposal

18. In the NOPR, the Commission proposed requiring that all entities that must submit information into the database obtain and maintain a Legal Entity Identifier (LEI),[30] and report it to the Commission in its XML submission for inclusion in the relational database.[31]

B. Comments

19. Multiple commenters request that the Commission allow entities to use a Company Identifier (CID) or Commission-generated identifier if they would not otherwise be required to obtain an LEI for other regulatory purposes.[32] Working Group states that it does not object to a global identification system, like the LEI system, but believes that a Commission-assigned unique identifier is equally sufficient. Working Group and IECA request that the Commission require LEIs only if the reporting entity has already obtained one for other purposes.[33] Similarly, EPSA recommends an option for physical market-only sellers to rely on Commission-assigned unique IDs in lieu of reporting LEIs in the event that there are significant changes to the costs, processes, or sources for obtaining LEIs.[34]

20. Independent Generation adds that the burden of obtaining an LEI is not justified. It notes that this burden would entail: (1) Applying to a third-party LEI vendor and undergoing a due diligence verification process (in addition to the Commission-related processes imposed under the rule); (2) executing one or more contracts with the LEI vendor; (3) maintaining books, billing records, correspondence invoices, and accounts with the LEI vendor; and (4) keeping the LEI vendor informed of any material changes (separate and apart from notifying the Commission).[35] IECA also contends that the Commission has underestimated the cost and burden of ''proliferating LEI filings and renewals

additional backstops and safeguards so that the Commission can ensure just and reasonable wholesale power rates.'').

[21] APPA at 7–9.

[22] EEI at 22; *see also id.* at 19–22 (suggesting five other changes to reduce burden).

[23] Independent Generation at 15.

[24] EEI at 7–8.

[25] The NOPR proposed revisions to § 35.37(a)(1) to require that Sellers submit certain ownership information for input into the relational database. As discussed in the Ownership Information section of this final rule, we have further reduced the scope of ownership information required to be submitted, as reflected in the revised regulatory text changes to § 35.37(a)(2) that we adopt herein. Further, we revise § 35.37(a)(2) from what was proposed in the NOPR to explicitly require the submission of asset information, indicative screen information, category status information, the specific markets in which the Seller is authorized to sell operating reserves, and whether the Seller is subject to mitigation or other limitations.

[26] As discussed in the Asset Appendix section of this final rule, data submitted into the relational database will be used to auto-generate a Seller's asset appendix based on the information that is submitted into the relational database.

[27] Prior to submitting information into the relational database, Sellers must be registered with the Commission, as detailed on the Commission's website.

[28] This includes eFilings that use eTariff.

[29] Further information on this function will be detailed in an implementation guide that will become available after publication of this final rule.

[30] An LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System.

[31] NOPR, 156 FERC ¶ 61,045 at P 56.

[32] *See e.g.,* EPSA at 17; IECA at 17; Independent Generation at 9; Power Trading Institute at 6; Working Group at 17.

[33] Working Group at 17; IECA at 17.

[34] EPSA at 17.

[35] Independent Generation at 9–10.

within a corporate family.'' [36] Before implementing a program that mandates the use of outside vendors and the associated expense, Independent Generation urges the Commission to take steps to improve its existing CID and expand that system to other entities covered under the rule that are not market-based rate sellers.[37]

21. EEI and IECA argue that the regulatory text should be revised to reflect the requirement that Sellers obtain an LEI if they do not already have one.[38]

22. Designated Companies state that reporting entities should have the option to either use an LEI or a Commission-created unique identifier for their upstream affiliates.[39]

C. Commission Determination

23. We decline to adopt the proposal that Sellers must obtain and maintain an LEI and instead adopt commenters' suggestion to allow Sellers to use their CIDs.[40] A separate identifier, like the LEI, would have been necessary to allow Virtual/FTR Participants to file information into the database. However, given our decision within this final rule to not require the Connected Entity Information, only Sellers will be required to submit information into the database. Because Sellers are already required to obtain and retain a CID, we find that it would be unnecessarily burdensome and duplicative to require Sellers to obtain and retain a separate identifier.

24. However, we will retain the ability for Sellers to identify their affiliates using their affiliates' LEIs, if the affiliate does not have a CID.[41] While we expect Sellers to use their affiliates' CIDs if available, we understand some affiliates may not have, and will not be eligible to receive a CID. In such cases, Sellers must provide their affiliates' LEI, if available. Further, as discussed below, to aid Sellers in identifying affiliates that neither have a CID or an LEI, we are creating a third identifier that we refer to in this final rule as the FERC generated ID.[42] Although Sellers will use their CIDs to make submissions into the database, they will identify their affiliates through reference to their affiliates' CIDs, LEIs or FERC generated IDs.

IV. Substantive Changes to Market-Based Rate Requirements

A. Asset Appendix

1. New Format

a. Commission Proposal

25. In the NOPR, the Commission proposed to require the submission of the asset appendix [43] in XML format instead of the currently required workable electronic spreadsheet format. This would allow the asset appendix information to be included in the relational database. Also, the Commission proposed that each Seller would no longer report assets owned by its affiliates with market-based rate authority.[44] Since information on a Seller's ultimate upstream affiliates would be included in the relational database, that information could be retrieved to create an asset appendix for the Seller that includes all of the assets of its affiliates with market-based rate authority. This would be possible because the Seller's assets would be linked with those assets owned by the Seller's market-based rate affiliates [45] who would have separately submitted information about their assets into the relational database.

26. In the NOPR, the Commission proposed that the asset appendix would be placed into eLibrary as part of the Seller's filing. Since the Seller would not be directly responsible for *all* information in the asset appendix (*i.e.,* because some of that information used to generate the complete asset appendix will have been reported by its affiliates), the Commission proposed that the Seller incorporate by reference its affiliates' most recent relational database submittals or otherwise acknowledge that the information from its affiliates' relational database submittals would be included as part of the Seller's asset appendix.[46]

27. The Commission also recognized that a Seller's current asset appendix could include assets that are owned or controlled by an affiliate that does not have market-based rate authority, such as a generating plant owned by an affiliate that only makes sales at cost-based rates. The Commission explained that if a Seller does not have a requirement to submit the information related to the affiliated generating plant into the relational database, that information could be ''lost.'' To avoid this problem, the Commission proposed to require that the Seller include in its relational database submission any assets that are owned or controlled by an affiliate that does not have market-based rate authority.[47]

28. The Commission also sought comment on an alternative approach whereby Sellers would continue to provide information on all of their affiliates' assets when submitting asset appendix information for the relational database.[48]

b. Comments

29. APPA, EDF, GE, and NextEra support the Commission's proposal that Sellers report into the relational database their assets and long-term power purchase agreements (PPAs) as well as the assets and long-term PPAs of any non-market-based rate affiliate.[49] EEI states that while it does not oppose the Commission's proposal to require each Seller to report its own generation assets into the relational database, it is too burdensome to have each Seller in a corporate family report the same ''non-market-based rate assets'' and should not be adopted.[50] EEI suggests that the Commission consider creating a new table that focuses on assets of non-market-based rate affiliates [51] and that the Commission rename the vertical assets table in the MBR Data Dictionary as ''Vertical Assets Owned by Filer'' to reflect the NOPR, which does not

[36] IECA at 19.

[37] Independent Generation at 9.

[38] EEI at 7; IECA at 4.

[39] Designated Companies at 5.

[40] CID stands for Company Identifier. All eTariff filings and certain form filings require that filers use Company Identifiers issued by the Commission. *See https://www.ferc.gov/docs-filing/company-reg.asp.*

[41] As discussed elsewhere in this final rule, to allow for the automatic generation of a Seller's asset appendix, a Seller must identify certain affiliates to the extent they are ultimate upstream affiliates or non-market based rate affiliates with reportable assets.

[42] The FERC generated ID is a new form of identification that we are creating alongside this final rule to serve as an identifier for reportable entities that do not have a CID or LEI. The system will allow Sellers to obtain unique FERC generated ID(s) for their affiliates. Additional information on the mechanics of this process one will be made available on the Commission's website prior to the October 1, 2020 effective date of this final rule. We require affiliates to be identified using their CID if they have one. If the affiliate does not have a CID, the Seller must the LEI if available, and if the affiliate has neither, the FERC generated ID must be provided.

[43] The Commission requires Sellers to submit an asset appendix that contains information regarding the generation assets, long-term firm purchases, and vertical assets that they and all of their affiliates own or control. Order No. 697, 119 FERC ¶ 61,295 at Appendix B; Order No. 816, 153 FERC ¶ 61,065 at P 20.

[44] This proposal was specific to the relational database requirement to provide asset appendix information. This does not relieve Sellers from the requirements to consider and discuss affiliates' assets as part of their horizontal and vertical market power analyses.

[45] Sellers with common upstream ultimate affiliates can be linked through the services that interact with the relational database.

[46] NOPR, 156 FERC ¶ 61,045 at PP 31, 33.

[47] *Id.* P 32.

[48] *Id.* P 34.

[49] APPA at 10–11; EDF at 8–9; GE at 15; NextEra at 11–12.

[50] EEI at 19.

[51] *Id.*

require reporting of such assets owned by affiliates.[52]

30. EDF, NextEra, NRG, and Working Group ask the Commission to clarify how Sellers will be able to verify and/or make corrections to the relational database.[53]

31. Independent Generation prefers the Commission's alternative approach to the asset appendix in which Sellers would continue to provide information on all of their affiliates' assets, including affiliates with market-based rate authority, when submitting information into the relational database.[54] It expresses concern that the Commission's primary proposal takes control of data out of the hands of Sellers, which may lead to a significant number of incorrect or incomplete filings, especially with respect to jointly-owned Sellers.[55] It further argues that identifying precisely the same ultimate upstream affiliate is not a simple task given the complicated organizational structures of private equity funds, institutional investors, and other industry participants.[56] It expresses concern that each time a filing is submitted, a Seller would have to confirm that auto-generated information is accurate and re-file to correct any errors or omissions and that errors can continue to appear in subsequent filings due to discrepancies in the way affiliated Sellers report their ownership.[57] Independent Generation states that the alternative approach has the same inconsistent information concerns as the preferred proposal, but is more likely to produce current and accurate information, with considerably less burden.[58]

32. Working Group suggests that the Commission provide a Seller the option to report asset data on itself and: (1) Some or all of its affiliates, including those with market-based rate authority; (2) only affiliates without market-based rate authority and incorporate by reference the market-based rate data submissions of its Seller affiliates; or (3) a select list of affiliates that the Seller either controls or with which it has an agency relationship that permits the Seller to report on behalf of its affiliates without incorporating by reference the data of excluded affiliates.[59]

33. NRG states that there are significant pitfalls to both of the Commission's proposals regarding the reporting of affiliates' assets into the relational database.[60] With the Commission's preferred approach, NRG is concerned that the relational database could give false impressions of relationships between entities.[61] NRG states that it would need to spend considerable time and effort to review the relational database and even then may not be able to identify errors resulting from others' submissions. NRG is also concerned with the NOPR suggestion that if a Seller discovers an error in an affiliate's submission it should work with that affiliate to have the correct information submitted into the relational database.[62] NRG argues that this expectation ''ignores the reality that NRG will have no control over affiliates' submissions other than its subsidiaries so as to ensure that the Commission's relational database is up to date.'' [63] Under the alternative approach, NRG argues that it would be extremely burdensome and time consuming for NRG to reach out to all of its affiliates to obtain and verify their information. This would jeopardize NRG's ability to make timely filings and NRG would not have the ability to ensure its affiliates submit accurate and complete information.[64]

34. FMP opposes the use of the relational database as a tool for gathering market-based rate information. FMP states that the relational database would function as an adjudication machine.[65] FMP states that a Seller will submit to the Commission an electronic enumeration of the Seller's affiliates, then will learn after the fact whether the relational database, acting as the Commission's delegated adjudicator, has some disagreement with the Seller's disclosures.[66] FMP argues that in this fashion the Commission is proposing to delegate ''first-step market-based rate adjudication'' to the relational database, which it would do without prior notice or the opportunity to comment.[67] FMP argues that the Commission has established no right to delegate decisional functions to an adjudication machine whose processes are shielded from the public.[68] It states that the Commission should not invite the risk that market-based rate filings must be amended in order to respond to the unpredictable data entries of strangers to the affected filer, as overwritten by the Commission's new adjudication machine.[69] FMP argues that the NOPR establishes no basis to impose this regime. It states the relational database is intended as a data gathering and analysis tool and should not function as a substitute for the adjudication work of the Commission.[70]

35. EEI, FMP, Independent Generation, and NRG express concerns about the reporting of jointly-owned assets.[71] NRG states that jointly-owned assets could present a similar overwriting risk under either approach, as well as a double-counting problem.[72] EEI and FMP ask the Commission to clarify that for units in multiple markets or balancing authority areas and where the Seller is a partial owner, it needs to only report the market/balancing authority area that it considers its ownership share to be located in.

36. APPA and TAPS encourage the Commission to revise the proposed amendment to § 35.37(a)(2) to provide that Sellers must report information about the assets of their non-market-based rate affiliates.[73] They state that the regulations should expressly and unambiguously require the reporting of non-market-based rate affiliates' assets.

37. Some commenters request clarification of the proposed requirement that, to avoid the ''lost'' asset problem, Sellers report the assets of their non-market-based rate affiliates.[74] GE requests that the Commission clarify that this (1) does not include QFs exempt from FPA section 205 or behind-the-meter facilities; and (2) includes only jurisdictional generation facilities and not those located solely within the Electric Reliability Council of Texas (ERCOT) or outside of the contiguous United States.[75] ELCON and AFPA are

[52] *Id.* at DD Appendix 27.

[53] EDF at 9; NextEra at 11; NRG at 5; Working Group at 29–30.

[54] Independent Generation at 14.

[55] *Id.* at 13–14.

[56] *Id.* at 14.

[57] *Id.*

[58] *Id.*

[59] Working Group at 24.

[60] NRG at 5. For example, to the extent that a partial owner (''Entity A'') does not notify the Commission that it has divested its interests, other co-owners could still be deemed affiliated with Entity A, despite the fact that such affiliation terminated with the divestiture of Entity A's interests.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 5–6.

[65] FMP at 7–8.

[66] *Id.* at 8.

[67] *Id.* at 9 and n.24.

[68] *Id.* at 9.

[69] *Id.*

[70] *Id.*

[71] Independent Generation at 15; NRG at 6.

[72] NRG at 6. NRG provides the following example: If sellers A, B, and C, each own interest in an asset, a filing by A or B could overwrite C; even if C is the operator and best positioned to provide accurate and up-to-date information.

[73] APPA at 10–11; TAPS at 22.

[74] ELCON and AFPA at 11; GE at 23–24.

[75] *See* GE at 23–24 (''In Order Nos. 816 and 816–A, the Commission clarified that Sellers are not required to include qualifying facilities that are exempt from FPA section 205 and facilities that are behind-the-meter facilities in the asset appendix or indicative screens.'') (citing Order No. 816, 153 FERC ¶ 61,065 at P 255, *order on reh'g,* Order No.

similarly concerned that the requirement to submit ''any asset'' that an affiliate lacking market-based rate authority ''owns or controls'' could potentially include all QFs, which it argues would be in conflict with the Commission's determination in Order Nos. 816 and 816–A to exempt certain QFs from market-based rate screens and asset appendices.[76]

38. Moreover, ELCON and AFPA assert that, when conducting the indicative screens, many Sellers conservatively include output from QFs, consistent with Commission-approved simplifying assumptions for market power and pivotal supplier analyses; but it is now not clear how these QFs would be treated in the relational database or the ''populated'' Asset Appendix.[77] ELCON and AFPA request that, given the apparent incongruity between requiring ''all assets'' in the relational database with exempting QFs from the indicative screen and asset appendix under Order Nos. 816 and 816–A, the Commission explicitly exclude QFs from the reporting obligations, or at a minimum provide guidance and clarification.

c. Commission Determination

39. We adopt the proposals in the NOPR to require Sellers to submit asset appendix information in XML format and that each Seller would no longer report assets owned by its affiliates with market-based rate authority. We also adopt the proposal to require that a Seller include in its relational database submission any assets that are owned or controlled by an affiliate that does not have market-based rate authority.[78]

40. As described in the NOPR, once a Seller identifies its own assets, the assets of its affiliates without market-based rate authority, and its ultimate upstream affiliate(s), the relational database will contain sufficient information to allow the Commission to identify all of that relevant Seller's affiliates (*i.e.,* those with a common ultimate upstream affiliate) to create a complete asset appendix for the Seller, which includes all of its affiliates' assets. Additional information concerning the mechanics of this process will be made available on the Commission's website.

41. The majority of commenters agree that the automation of the asset appendix is preferable to the alternative approach presented in the NOPR, which would have required Sellers to continue to provide information on all of their affiliates' assets when submitting asset appendix information to the relational database.[79] As EEI observes, the preferred alternative avoids repetitious filings and system overwrites if information is added or changed.[80]

42. We are adopting the requirement that a Seller include, in its relational database submission, any assets that are owned or controlled by an affiliate that does not have market-based rate authority because without this requirement, information about these assets—which is relevant to the Seller's market power analysis—would be missing from the asset appendix, rendering the Seller's filing incomplete. We appreciate commenter concerns that the term ''any assets'' is broad. Therefore, we clarify that in this final rule ''any assets'' refers to assets that are reportable in the asset appendix: Generation assets, long-term PPAs, and vertical assets.[81] We disagree with EEI's contention that the proposal is too burdensome because this same information is currently required in the asset appendix. While it is true that in some circumstances Sellers in a corporate family can make a joint filing with one asset appendix that contains all affiliates and eliminates the need for each Seller to report the same non-MBR assets separately, this is not always the case. In many instances, corporate families file separately and thus submit separate asset appendices. In such cases, duplication already exists. An advantage to the new approach is that the data on the non-market-based rate affiliates will be stored in the database such that no further duplicate reporting will occur unless there is a change. We view EEI's alternative proposal of creating a new table focusing on non-market-based rate assets as presenting a greater burden on Sellers. As discussed below, we are creating a table structure that will allow a one-to-many relationship to exist between the gen_assets table, where all generators in the database will be uniquely identified, and the entities_to_genassets table,[82] where Sellers will report relationships between themselves (or their non-market-based rate affiliates) and the generators on the gen_assets table. Creating an additional table specifically to focus on the assets of non-market-based rate affiliates would create an unnecessary step and table.

43. We appreciate EEI's contention that the software would have to be programmed to eliminate duplication if each Seller in a single corporate family includes the same non-market-based rate assets. The table structure is built to allow a one-to-many relationship to exist between the gen_assets table and the entities_to_genassets table.[83] When creating an asset appendix for a specific Seller, the software will be designed such that the asset appendix will only include the non-market-based rate affiliate asset information submitted by that Seller. It is important to note that the system will pull information from the relational database to create asset appendices unique to each Seller, rather than asset appendices that represent entire corporate families.[84]

44. We will not adopt EEI's suggestion to rename the vertical assets table ''Vertical Assets Owned by Filer.'' [85] This would be misleading because Sellers are required to report not only their own vertical assets but also the vertical assets owned or controlled by their non-market-based rate affiliates. Contrary to EEI's statement, the NOPR proposal that a Seller include in its relational database submission any assets that are owned or controlled by an affiliate that does not have market-based rate authority, was not limited to generation assets or long-term PPAs, but also included vertical assets. The

816–A, 155 FERC ¶ 61,188 at PP 23, 44); *see also* Energy Ottawa at 5 (noting that P 66 n.67 of the NOPR clarifies that, consistent with Commission Order No. 816, certain QFs are not reportable assets).

[76] ELCON and AFPA at 10.

[77] *Id.* at 11 (''An additional complication may arise in a situation that requires relying on the accuracy of relational database submissions from other third-party 'affiliates' being used to populate that [Sellers]' specific asset appendix.'').

[78] See revisions to §§ 35.37(a)(1) and (a)(2).

[79] *See, e.g.,* APPA at 10–11; GE at 15–16; NextEra at 11.

[80] *See* EEI at 19.

[81] This includes information on long term firm sales power purchase agreements, as discussed below.

[82] We have renamed the ''Entities to Generation'' table as ''entities_to_genassets.''

[83] Stated another way, the table structure will allow for each generation asset to have many reported relationships.

[84] As an example, Seller A and Seller B are both wholly owned subsidiaries of the same ultimate upstream affiliate, and are affiliated with Entity C, which does not have market-based rate authority. Seller A and Seller B will both submit information on their respective assets. In addition, Seller A and Seller B will both separately report information on Entity C's reportable assets. When an asset appendix is created for Seller A, it will contain the following asset information: For Seller A, the asset information that Seller A submitted for itself; for Seller B, the asset information that Seller B submitted for itself; and, for Entity C, only the asset information that Seller A submitted for Entity C. Similarly, when an asset appendix is created for Seller B, it will contain the following asset information: For Seller A, the asset information that Seller A submitted for itself; for Seller B, the asset information that Seller B submitted for itself; and, for Entity C, only the asset information that Seller B submitted for Entity C.

[85] However, as discussed in the Data Dictionary Section, we have renamed the vertical assets table the ''entities_to_vertical_assets'' table to reflect that Sellers will provide information on their relationships to their vertical assets.

identification of a Seller's non-market based rate affiliates' vertical assets is necessary to have a complete asset appendix and to allow the Commission to fully analyze a Seller's potential vertical market power.

45. Sellers will be able to report the assets of their non-market-based rate affiliates in the same XML submission that they use to report their own assets. However, Sellers will need to identify which affiliate owns/controls each reported asset using that affiliate's CID, LEI, or FERC generated ID. This will help to reduce duplication in the relational database and will allow the relational database to produce more accurate and complete asset appendices.

46. We agree with APPA and TAPS that the requirement for Sellers to report assets of their non-market-based rate affiliates should be explicit in the regulatory text and therefore revise the proposed amended § of 35.37(a)(2) to provide that Sellers must report information about the reportable assets of their non-market-based rate affiliates.[86]

47. We are not changing existing Commission policy regarding exempt QFs and behind-the-meter generation. As the Commission held in Order No. 816, Sellers do not need to include such entities in their asset appendix or indicative screens.[87] To avoid discrepancies in the auto-generation of the asset appendix, Sellers should not include these assets as part of the relational database submission for market-based rate purposes.

48. We disagree with Independent Generation's statement that this approach takes control of the data out of the hands of Sellers. Although we are relieving Sellers of the burden of compiling complete asset appendices for their filings, Sellers remain in control of, and in fact have the responsibility to maintain, their data in the relational database. It is true that Sellers will not have control of their affiliates' data; however, as discussed below, we are putting in place measures for Sellers to report to the Commission any errors in their affiliates' submissions that affect the Sellers' asset appendices.

49. We do not find persuasive Independent Generation's and NRG's arguments that the time necessary to review and confirm the accuracy of the relational database constitutes a new burden. We appreciate that Sellers will have to spend time reviewing the accuracy of their information based on what their affiliates submitted. However, this additional burden is counterbalanced by the time savings attributable to the fact that Sellers no longer need to compile and submit information about the assets of their market-based rate affiliates. Further, the only place an affiliate's submission would affect a Seller is the asset appendix. As discussed below, when a submission is made to the database that causes a change in a Seller's asset appendix, a new asset appendix will be generated incorporating the change.[88] A Seller will have the ability, at any time, to access its latest asset appendix to verify its contents to stay abreast of any changes that have occurred.

50. Independent Generation also raises a concern that Sellers would have to make additional submissions to correct any errors or omissions and that errors can continue to appear in subsequent filings. This is not necessarily the case. A Seller's asset information in the relational database will reflect the information the Seller submitted. To the extent that Sellers make errors or omissions when submitting data, they will be expected to make a subsequent submission to correct that error. When such corrections are made, future asset appendices will only contain the updated information. However, to the extent that Independent Generation shares NRG's concern that Sellers will not have any control over submissions by affiliates that may contain errors or may not be up to date, we note that Sellers will not be expected to correct their affiliates' data. If a Seller disagrees with information submitted by an affiliate that affects the Seller's asset appendix, the Seller should inform the Commission of that disagreement. Sellers will be able to inform the Commission in two ways. First, they can make note of any perceived errors in their transmittal letters. Second, the submittal process will include a commenting feature that will allow Sellers in their XML submissions to comment on the asset data of other Sellers.[89]

51. We understand Independent Generation's concern that it may not be a simple task for multiple affiliated entities to identify the same ultimate upstream affiliate(s) given complicated ownership structures. However, we believe the requirement to identify the ultimate upstream affiliate(s) represents an overall reduction in burden as Sellers are currently required to identify all affiliates, including their ultimate upstream affiliates and any intermediate upstream affiliates.[90] Further, each ultimate upstream affiliate in the relational database will have a CID, LEI, and/or FERC generated ID, which will be the means for Sellers to report the connection. The system will allow a Seller to search the database to see if its ultimate upstream affiliates have already been reported to the Commission, and if so, to retrieve each of those entities' CID, LEI, and/or FERC generated ID. This will reduce the likelihood that Sellers attempting to report the same ultimate upstream affiliate(s) inadvertently report different entities, preventing the relational database from making the appropriate connections. This should also lessen NRG's concern that the relational database could give the false impression of relationships between entities.

52. In response to concerns raised by NRG, Independent Generation, EEI, and FMP regarding the reporting of jointly owned assets, double-counting, and overwriting, we have revised the information to be set forth in the MBR Data Dictionary. Multiple Sellers will be able to report a relationship with a generation asset, and each Seller will also provide information specific to its relationship with that generation asset. As discussed below in the Reporting of Generation Assets section, only the information reported by a given Seller will be associated with that Seller in any asset appendix created from the relational database.[91]

53. We disagree with FMP's statement that the relational database would function as an adjudication machine. The relational database is not ''deciding'' which entities have a relationship, but rather is aggregating the relationship information provided to it by Sellers to depict the relationships between them. When the information in the relational database indicates that two entities are affiliated, it is due to affiliate information being submitted to the relational database. We reiterate that

[86] APPA at 10–11 n.26; TAPS at 22.

[87] Order No. 816, 153 FERC ¶ 61,065 at P 255.

[88] The change could be the Seller or an affiliate submitting new, or updating, information that appears in the asset appendices such as its name, generation assets, PPAs, or vertical assets.

[89] This commenting feature will allow Sellers to submit a narrative explaining why they disagree with any of the information contained within the relational database regarding their affiliates' assets. Comments submitted in this manner will only appear on the submitting Seller's Asset Appendix and will not alter the information provided by that Seller's affiliate. This feature can be utilized when an affiliate's information is factually incorrect or is being reported in a manner inconsistent with a Seller's market power analysis and should detail the specific fields that are being disputed and reason for the dispute.

[90] *See* Order No. 697–A, 123 FERC ¶ 61,055 at n.258.

[91] In cases where the joint-owners of a generation assets are affiliates, that generation asset may appear multiple times in an asset appendix.

to the extent that a Seller does not believe it has a relationship with an entity, the Seller will have the ability to correct the data. If the mistaken relationship is the product of an error not made by the Seller, the Seller will be able to explain its disagreement with the output of the relational database in its market-based rate filing.

54. Further, we are not delegating ''first-step market-based rate adjudication'' to the relational database. Applications for market-based rate authority, change in status filings, and triennial market power updates will continue to be evaluated according to the existing market-based rate regulations in public, docketed market-based rate proceedings. While Sellers will be submitting information to the relational database that may be used in market-based rate proceedings, the relational database does not adjudicate anything. Rather, as explained below, when Sellers are initiating a market-based rate proceeding, they will extract information from the relational database, verify it, and include it as part of their docketed, market-based rate filings.

55. We do not accept Working Group's suggestion that Sellers be able to choose how they wish to submit information into the asset appendix. That approach would disrupt the ability to use the information in the relational database to auto-generate accurate asset appendices and would result in the types of system overwrites and repetitious filings that we are seeking to avoid.

56. We appreciate comments requesting the opportunity to review the information input to the asset appendix before making the filing and have developed a submission and filing mechanism that will accommodate such review. As will be explained in more depth on the Commission's website, each Seller will first submit the required information into the relational database and an asset appendix will be generated for the Seller with a serial number that the Seller can reference in its market-based rate filing. The Seller will have the opportunity to review the asset appendix and, if necessary, make a submission to the relational database to address any errors. Next, when the Seller is comfortable with the asset appendix, it will reference in its transmittal letter the serial number of the asset appendix it wants included as part of its filing. However, the Seller must reference either its most recently created asset appendix or an asset appendix created fewer than 15 days before it makes its filing.[92] This approach will minimize the need to correct errors through amendments and should mitigate commenters' concerns in that regard.

2. Reporting of Generation Assets

a. Commission Proposal

57. In the NOPR, the Commission proposed two changes to the information required to be reported regarding generation assets. First, the Commission proposed to require that each generator be reported separately for purposes of the relational database and that Sellers report the Plant Name, Plant Code, Generator ID and Unit Code (if applicable) information from the Energy Information Agency (EIA) Form EIA–860 database. Second, the Commission proposed that Sellers be required to report in the relational database the ''Telemetered Location: Market/Balancing Authority Area'' and ''Telemetered Location: Geographic Region'' in which the generator should be considered for market power purposes when that location differs from the reported physical location.

b. Comments

58. GE and NextEra seek clarifications regarding the use of EIA–860 data. GE asks that to the extent a Seller is aware that the EIA data for its assets is inaccurate, that the Commission clarify whether the Seller should use the published EIA–860 data or whether it should submit to the Commission more up-to-date information known to it.[93] GE notes that EIA, at times, has two versions of their data available, ''Final Data'' which may be over a year old, and ''Early Release'' data which may not be fully edited. GE requests clarification as to which version of the data Sellers should use. NextEra requests that the Commission clarify that EIA–860 data need only be reported if available.[94] NextEra states that it is possible that a Seller may submit its initial application in advance of this information being entered into the EIA–860 database. Therefore, the Commission should clarify that such information, if unavailable at the time of filing, may be entered in the quarterly relational database update filing.[95] NextEra notes that, ''[i]n addition to a delay in filing resulting from [the] burden in finding the employee responsible for submitting EIA–860 data,'' the information has never before been needed by the Commission in accepting market-based rate filings. NextEra contends that the Commission did not provide rationale as to why including this information should be a condition precedent to acceptance of an application.[96]

59. EEI, EPSA, and FMP note that the EIA–860 database only includes generators with a nameplate rating of one MW or greater,[97] and EEI argues that Sellers should only be required to provide information on facilities with a nameplate rating of one MW or larger, as the EIA–860 database does not include information on any facilities smaller than one MW.[98]

60. EPSA argues that the requirement to provide unit-specific generation information constitutes a change in the rules governing market power analysis and is beyond the scope of this rulemaking.[99]

61. EPSA and Brookfield note certain concerns regarding the use of EIA codes. EPSA states that EIA nomenclature is impractical to collect for purposes of achieving a consistent, granular view into the asset mix in each Seller's filing and notes that some wind farms are identified under a single ID without distinction of individual turbines with their own plant names and plant codes, while other wind farms have IDs for each of their turbines.[100] Brookfield notes that it has at least one plant with multiple EIA plant codes and requests that the Commission allow multiple entries.[101]

62. Independent Generation seeks clarification on whether Sellers should pro-rate assets on a proportional basis or whether each Seller will be required to account for the full capacity of the unit in its market power analysis.[102] EEI and FMP recommend that the Commission add an option for ''nameplate'' in the adjusted capacity rating field of the data dictionary.[103] EEI and FMP note that

[92] This ensures that Sellers will submit accurate asset appendices as part of their filings. A new asset appendix will be created after the close of business for any Seller whose asset appendix is affected by a relational database submission made during business hours by it or one of its affiliates. Sellers will also have the ability to request the creation of a new asset appendix ''on demand.'' While we prefer that Sellers always reference their most recent asset appendix, we realize that Sellers may not know when their affiliates are going to make submissions that affect their asset appendices and that Sellers need an opportunity to review their asset appendix before making a filing.

[93] GE at 24–25.

[94] NextEra at 12.

[95] *Id.*

[96] *Id.* at 12–13.

[97] EEI at 21; EPSA at 29; FMP at DD Appendix 6–8.

[98] EEI at 21.

[99] EPSA at 29–30.

[100] *Id.* at 30.

[101] Brookfield at 9.

[102] Independent Generation at 15.

[103] EEI at DD Appendix 6–10; FMP at DD Appendix 6–8.

Order No. 816 stated that to the extent a Seller is attributing to itself less than a facility's full capacity rating, the Seller can explain this fact in the end notes column. In light of the ''entities_ genassets'' table having an ownership percentage field, they ask the Commission to reconcile whether there is a need to explain the amount attributed in the ownership percentage field.[104] Designated Companies ask the Commission to clarify whether a Seller only reports one rating and how best to identify which season corresponds to which rating and which rating corresponds to the associated de-rating of a facility.[105]

63. Others recommend that in-service date be changed to ''in-service date if after final rule'' because it is burdensome to locate the actual date in many cases (or a year or default date should be set).[106]

c. Commission Determination

64. We adopt the NOPR proposal to require each generator to be reported separately for purposes of the relational database and that Sellers report the Plant Code, Generator ID, and Unit Code (if applicable) (collectively, EIA Code) information from the EIA–860 database. However, the Commission will capture the Plant Name from the EIA–860 database and therefore we will not require Sellers to report it to the Commission's relational database as had originally been proposed in the NOPR.[107] In response to comments that certain generators may not appear in the EIA–860 database, the Commission is creating a Commission Issued ''Asset Identification'' (Asset ID) number. Sellers will obtain Asset ID numbers for their generators that are not included in the EIA–860 database prior to making their relational database submission to the Commission.[108] Commission staff will maintain a look-up table containing EIA Codes and Asset ID numbers to help Sellers to find the appropriate Code or ID for their assets.

65. We disagree with EPSA's comments that requiring Sellers to report generation units separately is a rule change impacting market power analysis. The requirement to report generators individually is a modification to the way assets should be reported to the Commission and not a change in how the generation assets are analyzed. The Commission's current rules allow Sellers to report their generation assets at either the plant or individual generator level. Requiring Sellers to report generators at the more granular generator level will reduce redundancy, reduce the need for explanatory notes in the relational database, and make the asset appendices more accurate. Further, the use of EIA–860 data and Asset IDs will make accessing and reporting generation data less burdensome for Sellers in some respects, as some of the current requirements are being eliminated (*e.g.,* nameplate capacity and in-service date) given that the Commission can obtain comparable information from the EIA–860 database using the Plant Code as well as the Generator ID, and Unit Code provided by the Seller.

66. We do not share EPSA and Brookfield's concerns regarding the use of EIA codes. The EIA–860 data is the most complete public database of generators available and can be relied upon to have accurate, detailed information on generation assets. We understand that there may be some instances where data is reported to EIA in an inconsistent manner.[109] In those instances, Sellers should use the most granular information possible and, if necessary, make use of the ''end notes'' field in the entities_to_genassets table to provide explanations where necessary. For example, if a Seller owns one turbine in a wind farm that reports to EIA all of the turbines under one Gen ID; the Seller should report the EIA Code with the single Gen ID, and explain in the end notes field that the Gen ID covers multiple turbines, but that the Seller only owns one turbine.[110] In the case of Brookfield's plant with multiple EIA codes, Brookfield will be able to report all of the relevant EIA codes.[111]

67. We also adopt the NOPR proposal that Sellers be required to report the telemetered market/balancing authority area of their generation, but not the proposal to require Sellers to report the telemetered region of their generation.[112] As explained in the NOPR, providing the telemetered location will ensure that the Commission is able to properly match identified generators with the markets/balancing authority areas in which they are studied in a Seller's market power analysis. Providing the market/balancing authority area will be sufficient for the Commission to identify the region in which the generation is located.[113]

68. The MBR Data Dictionary will have multiple generation-related tables. The gen_assets table will store the basic information about all of the generators in the database, such as the generator's name, nameplate capacity, and in-service date. This information will be populated by the information from EIA–860 or the information provided by Sellers' when they request an Asset ID. Sellers will not submit information directly to the gen_assets table when updating the database. Instead, Sellers will update the entities_to_genassets table with the information pertinent to their (or their non-MBR affiliate's) relationship to the generation asset. This includes information on the type of relationship (ownership or control), the generator's location (physical and telemetered), de-rated capacity of the facility and de-rating methodology used, the actual amount of capacity controlled, and any explanatory notes.

69. We have restructured the tables in response to concerns about joint-ownership and overwriting of data. This structure will allow for more than one Seller to report a relationship with a specific asset. However, only the details that the Seller assigns to the generation asset via its submissions will appear on that Seller's entry in the asset appendix.[114] As an example, Seller A

[104] EEI at DD Appendix 6–10; FMP at DD Appendix 6–8.

[105] Designated Companies at 18–19.

[106] Brookfield at 10; EEI at DD Appendix 6–10; FMP at DD Appendix 6–8.

[107] The Commission will also capture the nameplate capacity and operating year from the EIA–860 database.

[108] When creating the Asset ID, Sellers will be required to provide basic information about the generator such as its plant name, nameplate capacity, and month and year it began commercial operation (if known).

[109] This includes EPSA's wind farm example where some wind farms report the individual turbines as unique generators with their own Gen IDs, and others report the entire wind farm under one Gen ID.

[110] As discussed below, the Commission will only retrieve from the EIA–860 certain basic information about the generator, such as nameplate capacity and operating year. Sellers will still provide information such as the adjusted capacity rating when they make their submissions. In that way, Sellers will be able to show if the actual amount of capacity they own is different than the EIA figure.

[111] We are not sure if Brookfield is indicating that its EIA codes are redundant. However, to the extent that they are redundant and will result in inaccurate or duplicative entries in the asset appendix, Brookfield should explain in its narrative or end notes column.

[112] We also clarify that Sellers are required to report the telemetered market/balancing authority area, even when it is the same as the physical market/balancing authority area. The NOPR contains an unclear statement, which could be read to suggest that Sellers only need to report the telemetered location when it differs from physical location. *See* NOPR, 156 FERC ¶ 61,045 at P 36.

[113] This is true for other tables in the MBR Data Dictionary where the NOPR proposed to require both the market/balancing authority and region. We have accordingly revised those tables to only require the market/balancing authority area. The Commission will also be able to determine if a generator is in Canada, Mexico, or ERCOT by using the reported market/balancing authority area.

[114] However, the Plant Name, Nameplate Capacity, and Operation Date information will be

and Seller B can both report a relationship with Generator X. Seller A can report via the entities_to_genassets table that the capacity rating of Generator X is 20 MW; and Seller B can report via the entities_to_genassets table that the capacity rating of Generator X is 25 MW. When an asset appendix is created for Seller A (or an affiliate of Seller A), there will be a row containing Seller A's relationship with Generator X that will reflect Seller A's capacity rating of 20 MW. Similarly, for a Seller that is an affiliate of both Seller A and Seller B, its asset appendix will have two separate rows for Generator X: One to report its relationship to Seller A (with the 20 MW capacity rating) and a second to report its relationship to Seller B (with the 25 MW capacity rating).

70. This solution should resolve many of the concerns about the accuracy of the EIA data. The Commission will only rely on EIA data (or information input when creating an Asset ID) for basic information about generation assets such as Plant Name, Nameplate Capacity, and In-service Date.[115] The rest of the information in the asset appendix will be provided by Sellers. If a Seller believes the Plant Name, Nameplate Capacity, or In-service Date for one of its generation assets is incorrect, the Seller will be able to note the error in its transmittal letter or use the commenting feature discussed above.

71. In response to NextEra, we clarify that EIA–860 data need only be reported if available. However, if EIA–860 data is unavailable for a generation asset, the Seller should check to see if another Seller has obtained an Asset ID for that generation asset, and, if not, obtain an Asset ID for that generation asset. If, at a later date, EIA–860 data becomes available for that asset, the Seller should update its relationship to that generation asset to provide the EIA information in its next monthly database submission.[116] We disagree with NextEra's contention that the burden associated with finding the employee responsible for submitting the EIA–860 data will cause a delay. First, the only EIA–860 data that Sellers will be responsible for submitting into the relational database is the Plant Code, Generator ID, and Unit Code, which is necessary to identify which generation assets the Seller is referencing when submitted the entities_to_genassets table. Sellers will not have to resubmit this information in advance of every market-based rate filing. Instead, Sellers will report all of their generation assets (as well as the assets of any affiliates without market-based rate authority) when making their baseline or initial submissions. We anticipate that most Sellers will not have to provide additional asset information after submitting their baseline or initial submissions. However, in cases where a Seller does need to add, remove, or update information on a generation asset, it will be able to do so without having to resubmit information for all of its generation assets. Rather, it will only have to resubmit/update the information for that specific generation asset.

72. In response to GE, we clarify that Sellers should use the latest available ''Final Data'' from EIA. When the Final Data is released, the Commission will update the relevant information in the reference tables because, as GE notes, the ''Early Release'' data may be incomplete.

73. In response to comments regarding the need for clarity in reporting generation asset capacity, we have added an option for ''Nameplate'' under the adj_rating_options field in the entities_to_genassets table.

74. We clarify that Sellers should not pro-rate assets on a proportional basis when submitting the de-rated capacity of an asset in the cap_rating_adjusted field.[117] In response to EEI and FMP, we further clarify that there is no longer a need for a Seller to explain in the end notes fields that it is attributing to itself less than the full amount of a facility. However, a Seller will not provide its attributable capacity in the ownership_percentage field, as we have removed that field. Instead, we have added an ''amount'' field to the new entities_to_genassets table in the MBR Data Dictionary. In the amount field, Sellers will provide the megawatts controlled by the entity that it is reporting as controlling the asset.[118] Further, in response to Independent Generation, we clarify that Sellers will not be required to account for the full capacity of the unit in their market power analysis. While Sellers may conservatively assume in their market power analyses that they own or control the full output of a facility, they are only required to attribute to themselves the actual energy and/or capacity that they and their affiliates own or control.

75. In response to Designated Companies, we clarify that Sellers will only report one rating in the cap_rating_adjusted and amount fields. The cap_rating_adjusted and adj_rating_options fields are analogous to the ''Capacity Rating Used in Filing (MW)'' and ''Capacity Rating: Methodology Used'' columns created in Order No. 816, and modified in Order No. 816–A, and should be populated in the same manner.

76. We deny requests to change ''in-service date'' to ''in-service date if after final rule.'' First, in-service date information is currently required in Sellers' asset appendices and is not a new requirement. Also, as noted above, for entities with EIA codes, the Commission will obtain the operational month and operational year information from the EIA database. Therefore, Sellers will only have to provide the in-service date for assets for which they are requesting an Asset ID. To the extent that Sellers do not know the precise in-service date for an asset for which they are requesting an Asset ID, they may use a default date of January 1, 2020 or, if they know the year, but not the month and date, they may use the appropriate year and assume January 1 as the month and day.[119]

3. Power Purchase Agreements

a. Commission Proposal

77. In addition to long-term firm purchase agreements, the Commission proposed to require Sellers to submit into the relational database information on long-term firm sales (*i.e.,* those one year or longer) agreements. The Commission stated that to the extent that a Seller believes there are any unique qualities of the contract that would not otherwise be captured by the relational database, the Seller is free to explain this as part of its horizontal market power discussion.

b. Comments

78. EEI and Independent Generation oppose the proposal to require Sellers to include information on long-term firm sales in the PPAs table.[120] They argue that the proposal is duplicative of sales information already reported through

pulled from EIA–860 or provided when Sellers seek an Asset ID.

[115] The EIA data contains ''operational month'' and ''operational year'' fields, which the Commission will use for In-Service Date information.

[116] The monthly relational database submissions are discussed in the Ongoing Reporting Requirements section of this final rule.

[117] As noted above, the nameplate capacity for assets in the EIA–860 will be populated from the EIA–860 database and the nameplate capacity for assets with Asset IDs will be inserted when the Asset ID is created.

[118] The total in the amount field should be calculated using the same capacity rating methodology used to find the total de-rated capacity of that generator. If the reported entity does not control the generation asset, the Seller should input ''0'' as the amount.

[119] Similarly, if they know the month, but not the actual date, they can use the first day of the month.

[120] EEI at 19; Independent Generation at 15.

EQR.[121] EEI disagrees that the requirement will improve consistency in reporting between purchasers and Sellers. According to EEI, Sellers often sell to, and purchase power from, non-jurisdictional assets such that the purchases and sales will not match up.[122] EEI states that the requirement to report long-term firm sales would violate the Paperwork Reduction Act and the Office of Management and Budget (OMB) prohibitions against duplicative collections of data.[123]

79. If the Commission retains the requirement to report long-term sales agreements, EEI and GE state that additional clarity is needed as to: (1) Whether the sales reporting obligation is parallel to purchases in that purchases must have associated firm transmission; [124] (2) how to complete the amount field for full and partial requirements contracts; [125] (3) whether a heat rate call option should be reported; and (4) whether system contracts or just unit-specific contracts are intended to be captured.[126] EEI states that, as with PPA data, there is considerable confusion as to the requirement in Order No. 816 that asset appendices be both current and reflect triennial data from the study period.[127]

80. AVANGRID, and ELCON and AFPA request clarification on the NOPR proposal that if a Seller believes there are any unique qualities of the contract that would not otherwise be captured by the relational database, the Seller is free to explain this as part of its horizontal market power discussion.[128] They state that the NOPR provides little guidance on the characteristics of a contract that would be sufficiently unique to report,[129] and that the Commission should clarify that this obligation applies only to market-based rate-related filings and should identify the need for, and define, the sort of unique qualities to which the NOPR refers.[130]

81. AVANGRID also states that it is unclear when the ''multi-lateral contract identifier'' row would apply and what information needs to be listed and that the table requests filing entities identify the date of last change of a contract, but it is unclear if a filing entity is required to track and report all changes, even minor, non-substantive revisions and corrections.[131]

82. EEI strongly objects to the reporting of the source of supply for long-term PPAs.[132] EEI argues that it is unclear as to what data is being sought, and requires analysts to review contracts on an individual basis to gather the data, which are not collected elsewhere. EEI states that this is the type of requirement that cannot and should not be imposed without reissuing the NOPR to explain what is being required and its purpose.[133]

83. EEI explains that the Commission should recognize that there are data elements specific to PPA sellers that purchasers may not have contractual rights to receive, which are necessary in order to meet the new reporting requirements and that, therefore, the Commission should apply a ''reasonable efforts'' standard.'' [134]

84. Several commenters requested clarifications regarding the definition of, and reporting requirements related to, power purchase agreements.[135]

c. Commission Determination

85. We adopt the NOPR proposal to require Sellers to include information on long-term firm sales. Collecting information on long-term firm sales will help the Commission ensure that purchasers and sellers report and treat transactions in a consistent and accurate manner. It will also allow for corroboration of the long-term sale information in the indicative screens and delivered price tests, in a manner similar to installed capacity and long-term purchases.

86. We will maintain the definition of long-term firm sales established in Order No. 816.[136] Sellers will be required to report sales that are both long-term and firm. Long-term is defined as sales for one year or longer. Firm means a ''service or product that is not interruptible for economic reasons.'' [137] As discussed more below, long-term firm sales will be reportable even if they do not have associated firm transmission.

87. In regard to long-term firm sales, Sellers will be required to provide to the relational database the identity of the counter-party (using a CID, LEI, or FERC generated ID), the type of sale,[138] relevant dates, the amount, relevant de-rating information, and the source market/balancing authority area.[139] We note that the source market/balancing authority area will be required for all long-term firm sales.

88. We disagree with EEI's statement that the collection of this information here and in the EQR is a violation of the requirements of the Paperwork Reduction Act and OMB prohibitions against duplicate collection of data. While Sellers may report to the relational database some of the same contracts that they will report in their EQRs, the information is not unnecessarily duplicative. First, this data collection captures information on long-term firm purchases and sales, while the EQR only collects sales information. Further, where the EQR and this data collection have overlapping information *i.e.,* agreement identifier, identities of parties, source and sink information, and contract start and end dates, this information is necessary for several reasons.

89. The power purchase agreement identifier, although similar to the EQR contract service agreement identifier, is different in that this unique identifier will remain assigned to a particular agreement in perpetuity whereas the EQR contract service agreement ID field does not necessarily retain the same identifier over different quarters.[140] Regarding fields that serve to identify the parties to an agreement, this is not a direct overlap as the EQR relies on counterparty/purchaser names while the relational database relies on unique identifiers, such as CID, LEI, and FERC

[121] EEI at 19, 20; Independent Generation at 15.

[122] EEI at 20.

[123] *Id.* (citing Paperwork Reduction Act of 1980, Pub. L. 96–511, 94 Stat. 2812, 44 U.S.C. 3501–352; Paperwork Reduction Act of 1995, Pub. L. 104–13, 109 Stat 163).

[124] *Id.* at 20 & n.45 (''If the obligation is parallel, the Commission must address how the Seller would be expected to know this information. And if the obligation is not parallel, it raises the question of the need for the information as it could not be used for matching purposes.'').

[125] *Id.* at 20; GE at 30.

[126] GE at 30.

[127] EEI at 20–21.

[128] AVANGRID at 13; ELCON and AFPA at 13 (citing NOPR, 156 FERC ¶ 61,045 at P 37).

[129] AVANGRID at 13.

[130] ELCON and AFPA at 13.

[131] AVANGRID at 13.

[132] EEI at 21. EEI notes that Commission staff explained at the Workshop that it wanted to expand Source reporting beyond a unit-specific power purchase agreement to system sales.

[133] *Id.* at 21–22.

[134] *Id.* at 22.

[135] *See e.g.,* Duke at 2 n.4; GE at 30.

[136] Order No. 816, 153 FERC ¶ 61,065 at PP 39–44.

[137] This is consistent with the definition of firm used in the EQR Data Dictionary and for long-term firm purchases. *See* Order No. 816, 153 FERC ¶ 61,065 at P 43.

[138] Type of Sale can be Unit Specific, Slice of System, or Portfolio.

[139] For unit-specific sales, Sellers will know the location of their generators. The source for slice of system sales will be the market/balancing authority area where the Seller's system is located. Sellers will identify all markets/balancing authority areas if generation is sourced from more than one area. If the source for a portfolio sale is generation purchased at a hub, and the location of the generation supplying the energy/capacity is unknown, sellers will provide the hub name.

[140] There is currently no requirement for the contract service agreement ID field in the EQR database to remain constant across every quarterly submission, making it difficult in some cases to consistently map a PPA with a contract reported through EQR. The Commission will continue to be mindful of opportunities to minimize overlap in the future.

generated ID, which are more precise and will help prevent a single entity from being reported with multiple names.

90. In addition, Sellers currently are required to provide information regarding their counterparties to long-term firm purchases as part of their asset appendix. This final rule extends the PPA reporting to long-term firm sales. Similarly, information concerning the source and sink information of long-term firm purchases is already required to be reported in a Seller's asset appendix; we are merely altering the format in which the information is submitted and extending the requirements to long-term firm sales.[141] This information will allow the Commission to ensure that Sellers attribute the capacity associated with these PPAs to the appropriate markets/balancing authority areas when performing market power analyses.[142] Similarly, the end date is necessary to remove a PPA from a Seller's asset appendix upon its actual expiration.

91. There is also a time differential between the EQR reporting requirement and the long-term firm sales information required in a Seller's asset appendix. EQRs are submitted quarterly and the EQR submission obligation begins after a Seller receives market-based rate authority. In contrast, a Seller will have to provide information to this database prior to obtaining market-based rate authority, because it is necessary to create the asset appendix and to analyze the Seller's indicative screens.

92. Furthermore, the relational database submission requires certain information that is not contained in the EQR submission, *e.g.,* supply type and supply identifier, and Sellers will be able to include in their relational database submissions the de-rated capacity of their unit-specific contracts, information that is not reported in EQRs. This will allow the Commission to more accurately review Sellers' indicative screens, which often reflect de-rated capacity numbers. Moreover, information on long-term firm sales made by certain non-jurisdictional public utilities is not reflected in EQRs [143] but must be reported in the relational database as a long-term firm purchase in the Seller's asset appendix. Further, where similar data are required in both the EQR and the instant proceeding, we have deliberately harmonized the definitions of that data to simplify the data gathering aspect of the requirement.

93. In response to EEI, we clarify that the long-term sales reporting obligation is not parallel to purchases in that purchases must have associated firm transmission. We understand that the Seller may not always know if the buyer has procured firm transmission. To EEI's question about the need for this information, as stated above, this information will allow the Commission to corroborate the long-term sales information in the indicative screens and delivered price tests.

94. In response to EEI and GE, we clarify that Sellers should complete the amount field for full and partial requirements contracts. For a full requirements contract, the amount should equal the buyer's most recent historical annual peak load. For a partial requirements contract, the amount should equal the portion of the buyer's requirements served by the seller multiplied by the buyer's annual peak load. For example, if the Seller supplies 50 percent of the buyer's requirements, it should multiply the buyer's annual peak load by 0.5 and place this value in the amount field.

95. We also clarify that Sellers' asset information, including long-term firm sales and purchase data, should be current in the relational database. The Commission's expectation has always been that the information in a Seller's asset appendix should be current. We recognize that at times this may create a data disconnect with the study period of a market power analysis. However, the Commission provided guidance on this issue in Order No. 816.[144]

96. In regard to long-term firm purchases, Sellers will be required to report to the relational database information on the counter-party (by providing a CID, LEI, or FERC generated ID), the type of purchase,[145] relevant dates, the amount, relevant de-rating information, and the sink market/balancing authority area.[146] In response to comments, we are not requiring Sellers to report the source market/balancing authority area for their long-term firm purchases. Source information for long-term firm purchases may provide useful information, but it is not critical to the Commission's examination of a specific Seller's market power. For that purpose the sink market/balancing authority area is more relevant, because that is where the Seller should study that energy/capacity.

97. We decline to adopt a ''reasonable efforts'' standard for data elements specific to PPAs as EEI suggests. Sellers are already reporting substantially all of this information in their asset appendices pursuant to Order No. 816–A.[147] The only additional information that Sellers will need to provide regarding their long-term firm purchases is the counterparty's CID, LEI, or FERC generated ID, de-rated capacity rating and details on their de-rating methodology (if they use a de-rating methodology), and two additional dates. This is information that should be available to Sellers with long-term firm purchases. As discussed in the Due Diligence section of this final rule, Sellers are subject to § 35.41(b) of the Commission's regulations when providing information to the Commission and are expected to exercise due diligence to ensure the accuracy of their submissions, including reporting the data elements specific to PPAs.

98. In response to AVANGRID, and ELCON and APPA's requests for guidance on how to populate the ''contractual details'' row in the PPA table of the MBR Data Dictionary, we have replaced the ''contractual details'' row with an ''explanatory notes'' field. The ''explanatory notes'' field will work the same as the ''End Notes'' sheet in the current asset appendix, allowing Sellers to provide additional information or clarifications regarding the reported PPA if they desire to do so.[148]

99. In response to AVANGRID's comment, we have removed from the MBR Data Dictionary the ''multi-lateral contract'' row. Given our decision to not pursue the Connected Entities requirements and associated required contract information, and our revisions to the MBR Data Dictionary in regard to the reporting of long-term firm purchases and sales, this row is no longer necessary.

[141] *See* Order No. 816–A, 155 FERC ¶ 61,188 at P 61; 18 CFR 35, Subpt. H, App. A. The reporting requirements in Order Nos. 816 and 816–A were approved by OMB on December 22, 2015 and July 21, 2016 (OMB Control No. 1902–0234).

[142] We also note that the analogous EQR point of receipt and point of delivery balancing authority area fields are only required to be reported in EQR if specified in a contract.

[143] Only non-public utilities above the *de minimis* market presence threshold are required to report their wholesale sales in the EQR, subject to certain reporting exclusions.

[144] Order No. 816, 153 FERC ¶ 61,065 at PP 289–294.

[145] Type of purchase can be Unit Specific, Slice of System, or Portfolio.

[146] If the sink is a hub, Sellers will identify the hub.

[147] As revised in Order No. 816–A, the LT Firm Power Purchase Agreement sheet of the Asset Appendix requires Sellers to provide the following information for each reported purchase agreement: Seller (counterparty) Name, Amount of PPA, Source Market/balancing authority area, Sink Market/balancing authority area, Sink Geographic Region, Start Date, End Date, Type of PPA (Unit or System), and any relevant end notes.

[148] *See* Order No. 816, 153 FERC ¶ 61,065 at P 267.

100. We need not provide in this final rule additional clarifications regarding the definition and reporting thresholds for long-term power purchase agreements. The definitions and thresholds established in Order No. 816 continue to apply.[149]

4. Providing EIA Codes for Unit-Specific Power Purchase Agreements

a. Commission Proposal

101. The Commission proposed that for unit-specific power purchase agreements, Sellers must provide the associated Plant Code and Generator ID from the Form EIA–860 database, which will provide the unique identifier for that unit.

b. Comments

102. EEI and EPSA oppose this proposal, arguing that it is burdensome when the filing entity is the purchaser.[150] EEI argues that a purchaser has no basis for knowing such information and should not be tasked with searching for it.[151] EPSA states that this proposal would not provide the Commission with useful information and that the EIA data is not granular enough to tie all specific units within a facility to specific PPAs.[152]

103. EPSA expresses concerns that EIA data does not provide useful tracking information regarding which entities control specific units within a facility, making it difficult to identify which PPAs and off-takers are tied to specific units within a facility.[153] EPSA comments that some units may have more than one PPA and more than one off-taker, and all potential off-takers share the energy produced by the entire facility; and that in other instances a sales contract may tie a specific off-taker to a specific turbine. EPSA states that there is confusion about the reporting of geographic region for generation units that serve multiple regions.[154] EPSA notes that some units in a plant may be pseudo-tied to another region, while others may not. According to EPSA, if EIA does not have separate generator IDs for each unit, it will be impossible to break down these unit commitments using EIA nomenclature.[155]

c. Commission Determination

104. We adopt the proposal that, for unit-specific power purchase agreements, Sellers must provide the associated EIA Codes or FERC Asset IDs, which will provide the unique identifier for that unit. This requirement will apply to both unit-specific sales and unit-specific purchases. Providing this information will allow the Commission to match reported long-term purchases and sales to ensure that generators are ascribed to the appropriate Sellers in market-power analyses. While we understand that the Commission and Sellers will not be able to match all reported purchases to a reported sale,[156] there is value in maximizing the instances that it can be done and in having corroborating data wherever possible.

105. We disagree with EPSA and EEI's comments that providing this information on purchases is burdensome for Sellers; and we also disagree with EEI's argument that Sellers have no basis to know this information regarding their purchases and should not be tasked with searching for it. First, the Commission already requires Sellers to track and report information about their purchases under unit-specific long-term PPAs pursuant to Order No. 816–A.[157] We reiterate that this requirement is only for unit-specific purchases. If the PPA is not tied to a specific generator, then Sellers will not have to provide this information. If a Seller is entering into a PPA to purchase power from a specific generator, the Seller should know from which generator it is purchasing, and we do not believe it is burdensome for the Seller to report this information.

106. EPSA's concern regarding the use of EIA data to track information regarding the PPAs is misplaced. The Commission does not plan to use the EIA data (or FERC Asset IDs) to track information about the off-takers under a particular PPA. Rather, Sellers will provide the details of their long-term PPAs, including the identity of the relevant counter-parties and off-takers. The EIA data, or relevant Asset IDs, will merely serve as identifiers for generators in unit-specific purchases or sales.

107. In regard to EPSA's concern that certain units may have more than one PPA and more than one off-taker, we clarify that it is acceptable for a specific generator to have multiple purchase agreements with multiple counter-parties and we have designed the database to allow generators to be associated with multiple reported PPAs. If EPSA's concern is that a Seller may be attributed an incorrect amount of generation in its asset appendix, we note that the Seller itself will input into the relational database the amount of generation or capacity that should be attributed to it.[158] Further, to the extent that Sellers want to provide further explanation, there will be a place for explanatory notes, similar to current Asset Appendices.

5. Vertical Assets

a. Commission Proposal

108. The Commission proposed to eliminate the requirement that Sellers provide specific details about their transmission facilities in their asset appendices. Instead, the Commission proposed that Sellers only report in the relational database whether they have transmission facilities covered by a tariff in a particular balancing authority area and region. With respect to the natural gas pipeline information, the Commission proposed to revise the requirements so that a Seller will only be required to indicate for purposes of the relational database whether it owns natural gas pipeline and storage facilities, and if so, to identify in which balancing authority area and region those assets are located.

b. Comments

109. We did not receive any comments opposing this requirement. However, EEI argues that the Commission should determine that the reporting of affiliates, ownership, and Vertical Assets by XML eliminates the need for narratives on these subjects in market-based rate filings.[159] EEI argues that textual descriptions and lists of assets and affiliates should no longer be required and, if the final rule requires the same information in narrative and in XML, it violates OMB prohibitions and the Paper Reduction Act.[160] Conversely, TAPS argues that the Commission should maintain an ongoing narrative reporting of sufficient information concerning certain aspects of the market-based rate corporate family to monitor and ensure that the relational database is working and that the Commission possesses the necessary

[149] *See id.* PP 130–45, *order on reh'g,* Order No. 816–A 155 FERC ¶ 61,188 at PP 26–28.

[150] EEI at 21; EPSA at 31.

[151] EEI at 21.

[152] EPSA at 31.

[153] *Id.* at 30.

[154] *Id.*

[155] *Id.*

[156] For example, this could occur where a Seller makes a purchase from an entity that is not a Seller and thus is not required to submit any information to the relational database.

[157] Order No. 816–A, 155 FERC ¶ 61,188 at P 25 (''We also clarify that the generation capacity associated with a unit-specific long-term contract should be reported in the 'Notes' portion of the asset appendix.'').

[158] In addition, the Seller will be providing its own indicative screen information and horizontal market power analysis, which will reflect the amount of capacity that the Seller is attributing to itself and its affiliates.

[159] EEI at 22.

[160] *Id.*

information to perform its required market-based rate oversight.[161]

c. Commission Determination

110. We adopt the proposal to eliminate the requirement that Sellers provide specific details about their transmission facilities and only require Sellers to submit into the relational database information as to whether they have transmission facilities covered by a tariff in a particular balancing authority area.[162] Additionally, we adopt the proposal that for purposes of the database, a Seller only needs to indicate, if applicable, that it owns natural gas pipeline and/or storage facilities and identify in which balancing authority area those assets are located.

111. Further, we will maintain the requirement that Sellers provide a narrative on their vertical assets, affiliates, and ownership in their market-based rate filings.[163] Thus, we are not proposing to revise the vertical market power requirements in §§ 35.37(d) and (e). As TAPS notes, requiring a description of ultimate upstream affiliates and affiliates relevant to the horizontal and vertical market power analyses as a supplement to the information in the relational database will ensure that the database includes the information necessary for market-based rate authorization purposes and for ensuring that the new relational database functions properly.[164]

B. Ownership Information

1. Commission Proposal

112. In Order No. 697–A, the Commission stated that Sellers seeking to obtain or retain market-based rate authority must identify all upstream owners and describe the business activity of its owners and whether they are involved in the energy industry.[165] In carrying forward and superseding the proposals in the Ownership NOPR,[166] the Commission proposed in this NOPR proceeding to reduce and clarify the scope of this requirement such that Sellers would only need to provide for market-based rate purposes information on a subset of upstream affiliates (*i.e.,* entities that fall within the definition of affiliate found in 18 CFR 35.36(a)(9)(i)).[167] This subset would include upstream affiliates that either: (1) Are an ''ultimate upstream affiliate,'' defined as the furthest upstream affiliate in the ownership/control chain; or (2) have a franchised service area or market-based rate authority, or directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.[168]

113. The Commission proposed that the first time an entity is identified as an ultimate upstream affiliate by a Seller in an XML submission, the relational database would create a unique identifier for that entity, assuming that the entity did not already have an LEI. A list of all of these entities and their associated unique identifiers, along with limited identifying information (*e.g.,* business address) would be published on the Commission's website. Once a unique identifier is assigned to an entity, all Sellers would be responsible for using this unique identifier when identifying their upstream affiliates in future XML submissions.

114. The Commission explained that the upstream affiliate information in the relational database could be used to generate an organizational chart for use by the Commission.[169] Thus, the Commission also proposed to amend § 35.37(a)(2) to remove the requirement for Sellers to submit corporate organizational charts adopted in Order No. 816.[170]

2. Comments

115. Independent Generation, and ELCON and AFPA support the Commission's proposal to limit the scope of ownership information required for market-based rate purposes. Independent Generation notes that it is burdensome for the industry to provide information on intermediate holding companies and unaffiliated owners when such information does not affect the Commission's determination of whether a Seller qualifies for market-based rate authority.[171] ELCON and AFPA agree that there is no realistic way to strictly implement Order No. 697–A, which on its face would require disclosure of individual shareholders.[172]

116. NextEra requests clarification of the proposed requirement that Sellers identify all upstream affiliates with market-based rate authority and other upstream affiliates that directly own or control generation. NextEra suggests that the Commission require Sellers to identify all affiliates relevant to the specific market power analysis but allow Sellers to identify other upstream affiliates by reference to the relational database.[173]

117. In light of the Commission's proposal to require the reporting of affiliates and ownership information through the relational database, EEI and SoCal Edison request that the Commission eliminate the need for narratives on these subjects in new market-based rate applications, triennial filings, and change-in-status filings.[174] EEI adds that if the same narratives are required in addition to the information submitted in XML format into the relational database, the proposal would violate the requirements of the Paperwork Reduction Act and OMB's prohibitions against duplicative collection of data.[175]

118. TAPS requests that the Commission require that Sellers provide information identifying and describing all upstream affiliates, including intermediate upstream affiliates, which it describes as the ''trunk'' of the corporate family tree. TAPS is concerned that if the relational database does not work as planned, ''the Commission will be left with pieces of trees and no backup information as to

[161] TAPS at 9–11.

[162] In line with our determination on the reporting of generation assets, Sellers will not need to report the region their transmission, or other vertical assets are located. Providing the market/balancing authority area will be sufficient for the Commission to identify the region in which the assets are located.

[163] The need for narratives in regard to ownership is addressed below in the Ownership Information section.

[164] TAPS at 11.

[165] Order No. 697–A provides: ''A seller seeking market-based rate authority must provide information regarding its affiliates and its corporate structure or upstream ownership. To the extent that a seller's owners are themselves owned by others, the seller seeking to obtain or retain market-based rate authority must identify those upstream owners. Sellers must trace upstream ownership until all upstream owners are identified. Sellers must also identify all affiliates. Finally, an entity seeking market-based rate authority must describe the business activities of its owners, stating whether they are in any way involved in the energy industry.'' Order No. 697–A, 123 FERC ¶ 61,055 at n.258.

[166] Ownership NOPR, 153 FERC ¶ 61,309. *See also* n.1.

[167] As noted above, we use the term ''upstream affiliate'' and ''ultimate upstream affiliate'' in place of ''affiliate owner'' and ''ultimate affiliate owner'' when referencing the NOPR proposal and comments.

[168] *See* NOPR, 156 FERC ¶ 61,045 at P 25.

[169] The ultimate upstream affiliate information is also used to auto-generate a Seller's asset appendix, as discussed in the Asset Appendix section above.

[170] The organizational chart requirement was suspended in Order No. 816–A ''until the Commission issues an order at a later date addressing this requirement.'' Order No. 816–A, 155 FERC ¶ 61,188 at P 47.

[171] Independent Generation at 12; *see also* ELCON and AFPA at 9.

[172] ELCON and AFPA at 9.

[173] NextEra at 13–14.

[174] EEI at 22; SoCal Edison at 1.

[175] EEI at 22.

whether and how they fit together.'' [176] TAPS is also concerned that the relational database is vulnerable to the reporting errors of a few entities causing ripple effects that undermine its accuracy.[177] For example, TAPS describes a hypothetical where an ultimate upstream affiliate of several Sellers is a hedge fund that owns 10.1 percent of their common parent holding company. If the hedge fund sells off 0.2 percent of the parent holding company, it would fall below the 10 percent threshold under the definition of ''affiliate'' and would no longer be the ultimate upstream affiliate of the commonly owned Sellers. TAPS submits that not all of the affiliates Sellers may notice and report this subtle change in ownership, and, as a result, the relational database would no longer recognize the relationship between the affiliated Sellers who properly updated their ultimate upstream owner status and those that did not.[178]

119. Most commenters support the Commission's proposal to eliminate the organizational chart requirement, claiming that the proposal will reduce burden on Sellers.[179] However, TAPS requests that Sellers be required to submit an organizational chart but propose that the chart ''would include only upstream affiliate owners and those affiliates required to be included in [sic] market power analysis—not all of the entities required in the organizational chart the Commission adopted in Order No. 816.'' [180]

120. Regarding the proposal to assign unique identifiers to a Seller's upstream affiliates and publish this information on the Commission's website, Designated Companies state that if the relationship of a Seller with an upstream affiliate is privileged, it is appropriate that the identity of the upstream affiliate also remain non-public.[181]

3. Commission Determination

121. We will adopt the NOPR proposal to require that, as part of its market-based rate application or baseline submission, a Seller must identify through the relational database its ultimate upstream affiliate(s).[182] Because this is a characteristic the Commission will rely upon in granting market-based rate authority, Sellers must also inform the Commission when they have a new ultimate upstream affiliate as part of their change in status reporting obligations, consistent with the NOPR proposal, which we adopt and codify in § 35.42(a)(1)(v). Any new ultimate upstream affiliate information must also be submitted into the relational database on a monthly basis, as discussed further in the Ongoing Reporting Requirements section of this final rule.

122. Beyond a Seller's ultimate upstream affiliate(s), the Commission proposed to require Sellers to report a second category of upstream affiliates, specifically, those upstream affiliates that: (a) Have a franchised service area or market-based rate authority; or (b) directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.[183] We will not require submission of this second proposed category of ownership information because, as noted by commenters, any such assets, and thus their respective owners/controllers, are already captured in the Seller's narrative and asset appendix as part of the demonstrations that a Seller must make to show a lack of horizontal and vertical market power.

123. We have considered TAPS's request to require additional upstream affiliate information, but find that this would impose an unjustified burden on Sellers in light of the ability to use information in the relational database to discover affiliates through Sellers' reporting of a common ultimate upstream affiliate. We recognize that this may present some risk of reporting errors in the case described by TAPS of a subtle change in ownership percentage resulting in new ultimate upstream affiliates that may not be universally noticed and reported by all affiliated Sellers. However, we believe that these errors can be identified and addressed when a Seller views its auto-generated asset appendix.

124. Additionally, we adopt the proposal to remove the requirement for Sellers to submit corporate organizational charts adopted in Order No. 816. Because each Seller is required to identify in the database their ultimate upstream affiliate(s), the Commission will be able to create an organizational chart for each Seller that identifies both its ultimate upstream affiliates and its affiliates with market-based rate authority. Therefore, we reject TAPS's request that the Commission maintain a requirement that Sellers provide a chart of all upstream affiliate owners in their narrative. The organizational chart that the Commission will be able to create using information in the database is sufficient to allow the Commission to understand the connection between affiliates, as well as the relevant assets for a Seller's market power analysis. The regulatory changes proposed in the NOPR and adopted herein remove references to the organizational chart requirement in 18 CFR 35.37(a)(2) and 35.42(c).

125. We disagree with EEI and SoCal Edison that the submission of ownership information in the relational database obviates the need for such information in a Seller's market-based rate narrative and that continuing to require it violates the Paperwork Reduction Act and OMB's prohibitions against duplicative collection of data. The NOPR proposals contained minimal overlap of the information submitted in the narrative and into the database, and our determinations in this final rule further reduce this overlap by requiring less ownership information in the database.

126. However, as revised in this final rule, the only ownership information that Sellers will provide to the relational database is the Seller's ultimate upstream affiliate(s), information that is necessary to generate the asset appendix, which, together with the indicative screens, constitutes a portion of the Seller's horizontal market power analysis.[184] A complete horizontal market power demonstration should also identify the Seller's ultimate upstream affiliate(s), which will not be evident from the asset appendix that is produced as part of the record in the market-based rate proceeding. Accordingly, we will continue to require a narrative description of a Seller's ownership structure, which identifies all ultimate upstream affiliates whenever the Seller submits a market power analysis, as set forth in revisions to § 35.37(a)(2). This information will be readily evident to the Seller and will not present an increase in burden.

127. Further, although some ownership and affiliate information will be discoverable from the relational database and placed into the Seller's asset appendix, which will become part of the record in the market-based rate proceeding, it does not specifically identify all affiliates relevant to the

[176] TAPS at 9.

[177] *Id.* at 19.

[178] *Id.* at 20.

[179] AVANGRID at 7; Independent Generation at 15.

[180] TAPS at 10.

[181] Designated Companies at 5.

[182] See revisions to §§ 35.37(a)(1) and (a)(2) of the Commission's regulations. Existing Sellers must submit their ultimate upstream affiliate information into the relational database as part of their baseline filings, as discussed in Initial Submissions section.

[183] NOPR, 156 FERC ¶ 61,045 at P 25.

[184] Portions of the asset appendix are also part of the Seller's vertical market power analysis.

market power analysis.[185] Therefore, any ownership or affiliate relationship information that has a bearing on a Seller's horizontal and vertical market power analyses—and that is not otherwise captured in the asset appendix—must be identified and described separately in the Seller's narrative. In addition, we remind Sellers of their obligation under § 35.37(e) to describe certain affiliates as part of their vertical market power demonstration.

128. We do not adopt the proposal that the first time that an entity is identified as an ultimate upstream affiliate by a Seller in an XML submission, the relational database would create a unique identifier for that entity. Sellers will identify their ultimate upstream affiliates by reporting their CIDs, LEIs, or FERC generated IDs, which must be discovered and/or obtained prior to making an XML submission. Reporting the identifiers in this manner will simplify the management of these identifiers and reduce duplication. Finally, we adopt the proposal to make available a list of unique identifiers for Sellers' ultimate upstream affiliate(s). As to TAPS's concern regarding a situation where one affiliate's failure to update ownership information could cause affiliate relationships to be lost, as discussed in the Asset Appendix section, Sellers will have the ability to note errors in their narratives and XML submissions. In addition, we encourage Sellers to contact their affiliates if they believe that an affiliate has not provided accurate, up-to-date information in its own submissions to the relational database.

129. We disagree with Designated Companies that the relationship between the Seller and its ultimate upstream affiliate qualifies for privileged treatment. As the Commission noted in *Ambit,* ''the Commission must know the identity of a [S]eller's upstream owners in order to examine the [S]eller's ability to exercise market power in coordinated interaction with other [S]ellers'' [186] and the ''public interest in transparent decision making and encouraging public participation exceeds [a Seller's] request to shield the identity of its owners.[187]

C. Passive Owners

1. Commission Proposal

130. With respect to any owners that a Seller represents to be passive, the Commission proposed that the Seller affirm in its market-based rate ownership narrative that its passive owner(s) own a separate class of non-voting securities, have limited consent rights, do not exercise day-to-day control over the company, and cannot remove the manager without cause.[188]

2. Comments

131. APPA and TAPS object to the passive ownership proposal to the extent it eliminates the requirement that Sellers make a demonstration of passivity.[189] APPA and TAPS argue that Commission precedent requires a Seller to provide evidence of passivity beyond an affirmation or representation and that the Commission has not provided any reason for departing from this prior precedent.[190] In contrast, Independent Generation interprets and supports this part of the NOPR as proposing a more streamlined approach to reporting passive investors that avoids the need to file extensive documentation of passive investors' limited voting rights.[191] However, Independent Generation seeks confirmation that a Seller may rely on an affirmation made in good faith after due inquiry as long as the representations remain true to the best of the Seller's knowledge.[192]

132. Starwood objects to the requirement that a Seller must identify its passive owners and affirm, among other things, that the passive owners cannot remove the manager without cause.[193] Starwood argues that the Commission has recognized that passive investors are not ''affiliates'' of a Seller for Commission-jurisdictional purposes because passive interests with limited investor consent or veto rights to protect an investment are not considered voting securities within the definition of ''affiliate'' under the Commission's regulations. Further, Starwood points out that the Commission confirmed in a declaratory order that certain of Starwood's investors that the Commission deemed to be passive would not need to be identified in any future section 205 market-based rate application, updated market power analysis, or notice of change in status.[194] Thus, Starwood argues that the requirement to identify passive owners in market-based rate data is directly at odds with the Starwood Declaratory Order.

133. Starwood adds that the requirement that a Seller confirm that its passive owners cannot remove the manager without cause is also contrary to the Starwood Declaratory Order. Starwood argues that the Commission expressly confirmed in that order that certain of its investors' interests remained passive despite their ability to remove the manager with or without cause and would thus not have to be reported in filings under sections 203 and 205 of the FPA.[195] Starwood acknowledges that the Commission also determined that these investors would lose their passive status if they exercised their right to remove the manager, in which case they would have to be reported under sections 203 and 205 of the FPA. Starwood states that its investment decisions were informed by the Starwood Declaratory Order and that any requirement that contradicts the findings in that order would be inequitable.[196] Working Group also questions the NOPR proposal that Sellers must confirm that an owner that the Sellers represent to be passive cannot remove key management without cause, stating that the Commission has failed to provide any explanation or rationale supporting this requirement.[197]

134. Other commenters request clarification of the Commission's existing policy on what constitutes a passive owner and when changes in passive ownership trigger a change in status update.[198] For example, Independent Generation asks whether owners that do not own a separate class of securities but meet all the other criteria (*i.e.,* they have limited consent rights, do not exercise day to day control over the company, and cannot remove the manager without cause) satisfy the Commission's criteria for passive owners and qualify for the proposed streamlined reporting

[185] For example, many times a Seller's ultimate upstream affiliate may not itself own any assets and therefore will not appear in the asset appendix. Nevertheless, the identity of the ultimate upstream affiliate is relevant to the seller's horizontal market power analysis. In addition, a Seller's description of its ownership or control of inputs to electric power production, as required to demonstrate a lack of vertical market power under 18 CFR 35.37(e), is not captured in the asset appendix.

[186] *Ambit Northeast, LLC,* 167 FERC ¶ 61,237, at P 28 (2019).

[187] *Id.* at P 30.

[188] NOPR, 156 FERC ¶ 61,045 at P 26.

[189] APPA at 11–12; TAPS at 23–25.

[190] APPA at 11–12; TAPS at 23–25.

[191] Independent Generation at 13.

[192] *Id.*

[193] Starwood at 7–8. *See also* PTI at 4 (claiming that the NOPR breaks with Commission practice to not require entities to disclose details of all passive investments and contradicts the NOPR objective to avoid collecting unnecessary information on unaffiliated owners).

[194] Starwood at 7 (citing *Starwood Energy Group Global, L.L.C.,* 153 FERC ¶ 61,332, at P 21 (2015) (Starwood Declaratory Order)).

[195] *Id.* at 8–9 (citing Starwood Declaratory Order, 153 FERC ¶ 61,332 at P 19).

[196] *Id.* at 10.

[197] Working Group at 20–21.

[198] *See, e.g.,* EDF at 5–8; Independent Generation at 13.

approach.[199] EDF seeks a similar clarification with respect to joint venture arrangements, which can include only one class of securities.[200] EDF also requests that the Commission confirm that a notice of change in status need not be submitted when passive interests arise in the Seller.[201]

135. Financial Marketers Coalition seeks clarification on how passive information will be treated and to what extent the information will be publicly available, whether it will be through the relational database or the Commission's proposed website interface.[202]

136. EDF observes that some enterprises have subsidiary companies that hold tax equity, passive ownership interests in unaffiliated Sellers. EDF also states that these same enterprises may also have subsidiaries that have market-based rate authority. EDF seeks confirmation that there will be no ''bleed over'' or connection of such interests established in the relational database.[203]

3. Commission Determination

137. We will adopt the proposal to require Sellers to make an affirmation, in lieu of a demonstration, in their market-based rate narratives concerning their passive ownership interests. Such a demonstration is unnecessary given that the Commission does not make a finding of passivity in its orders granting market-based rate authority,[204] and doing so will ease the burden on filers. We remind Sellers of their obligation under § 35.41(b) [205] to provide accurate and factual information such that the Commission can rely upon an affirmation in lieu of a demonstration.

138. In light of the comments received, we clarify the nature of the proposed affirmation regarding passive owners. With respect to any owners that a Seller represents to be passive, the Seller must identify such owner(s), and affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners' investments and do not confer control.[206]

139. While some Sellers will be able to make this affirmation when they apply for market-based rate authority, other Sellers will acquire new passive owners after they have received market-based rate authority. Thus, in response to EDF's request, we clarify that we will continue to require change in status filings when passive interests arise in a Seller, so that the Seller can make the necessary affirmations. However, we clarify that, in this context, a Seller only needs to make a change in status to report and affirm the status of new passive owners as passive; it need not submit any additional information into the relational database.

140. Further, we clarify that we are not changing the Commission's existing policy regarding the definition of a passive investor, and specific clarifications on that policy are beyond the scope of this proceeding. In most circumstances, a determination as to passivity is fact-specific. If a Seller is uncertain as to whether an investment is passive, it may file a petition for declaratory order.[207] Nothing in this final rule is intended to overturn the Commission's case-specific determinations as to passivity and an entity's reporting obligations under previously issued declaratory orders. In response to Working Group, we note that considering whether an owner can remove the manager without cause has been the Commission's standard practice when evaluating a Seller's claim of passivity.[208] Therefore, absent a Commission order to the contrary, an owner who can remove the manager without cause is not considered passive. This is because an owner that can remove the manager without cause may have the ability to influence the actions taken by the manager.

141. Passive owners need not be reported in the database as ultimate upstream affiliates.[209] The Commission will not require that a Seller disclose the identity of its passive owners in the database, which should alleviate any concerns or confusion regarding confidentiality or collecting of unnecessary information. Further, if a Seller is able to make the requisite affirmation regarding passive ownership, it would not need to list the assets associated with any such passive owner in its asset appendix.

D. Foreign Governments

1. Commission Proposal

142. The Commission proposed that, where a Seller is directly or indirectly owned or controlled by a foreign government or any political subdivision of a foreign government or any corporation which is owned in whole or in part by such entity, the Seller identify such foreign government, political subdivision, or corporation as part of its ownership narrative.[210] The Commission explained that this information is useful in protecting public utility customers against inappropriate cross-subsidization and affiliate abuse concerns that are possible when controlling interests in a public utility are held by a foreign government, any political subdivision of a foreign government, or any corporation which is owned in whole or in part by such entity.

2. Comments

143. GE objects to the proposed collection of data on foreign entities, arguing that the Commission's jurisdiction does not extend to foreign companies operating outside of the United States borders.[211] GE also questions how this information would help the Commission to identify wrongdoing given that foreign entities are not market participants.[212] GE adds that advance review of foreign investments is already conducted by the Committee on Foreign Investment in the United States and that reporting on relevant investments is mandated to be delivered to the Commerce Department's Bureau of Economic Analysis.[213]

144. Some commenters assert that the Commission has not justified the claim in the NOPR that foreign government investment information is useful in protecting public utility customers against inappropriate cross-subsidization and affiliate abuse.[214] GE contends that it is not clear why such cross subsidization would be an issue since that concept is most commonly related to a regulated transmission providing utility and its unregulated affiliates.[215] Working Group contends

[199] Independent Generation at 13.

[200] EDF at 8.

[201] *Id.* at 6–7.

[202] Financial Marketers Coalition at 16.

[203] EDF at 7.

[204] As discussed below, if a Seller seeks a Commission finding as to passivity, it may file a petition for declaratory order.

[205] 18 CFR 35.41(b).

[206] *See AES Creative Resources, L.P.,* 129 FERC ¶ 61,239 (2009) (AES Creative). The Commission expects that this affirmation will be included in the narrative of initial market-based rate applications and in any other market-based rate filing (*e.g.,* triennial update or change in status notification) where the Seller is making a passive ownership representation.

[207] We decline to extend any safe harbor to affirmations made in good faith. As discussed in the Due Diligence section, we do not intend to impose sanctions for inadvertent errors, but we expect that Sellers will exercise due diligence to ensure accurate reporting.

[208] *See AES Creative,* 129 FERC ¶ 61,239 at P 8 n.5.

[209] We clarify that Sellers should provide the identity of the new passive owner(s) in their narratives when making their passive affirmation.

[210] NOPR, 156 FERC ¶ 61,045 at P 26.

[211] GE at 17.

[212] *Id.* at 17–18.

[213] *Id.* at 17.

[214] *See, e.g.,* ELCON and AFPA at 13; GE at 17–18; Working Group at 23.

[215] GE at 17–18.

that the Commission has not explained why foreign government ownership requires additional scrutiny beyond the Commission's affiliate abuse rules and that any proposed changes to those rules should have been proposed through a rulemaking on affiliate abuse.[216]

145. ELCON, and AFPA and Working Group also argue that Sellers should have no obligation to report foreign government ownership because the Commission has not shown why such information is necessary to assess vertical and horizontal market power and to ensure just and reasonable rates under the FPA.[217]

3. Commission Determination

146. In light of the comments received on this aspect of the NOPR, we will not adopt the proposal to require a Seller to identify its relationship with a specific foreign government. However, Sellers will still be required to identify all ultimate upstream affiliates (and file a notice of change in status for any new ultimate upstream affiliate(s)) even if such affiliates are owned or controlled by a foreign government.

E. Indicative Screens

1. Commission Proposal

147. In the NOPR, the Commission proposed that Sellers submit indicative screen information in XML format, which will enable the information to be included in the relational database. The Commission explained that once the Seller submitted the required screen information to the relational database through the XML submission, the database will format the indicative screens for the inclusion in the public record in eLibrary. Therefore, the generated indicative screens will be available for public comment, as part of the Seller's filing, and data will be available to the Commission in the relational database for ease of access and analysis. Lastly, the Commission indicated that Sellers would still be required to submit all work papers underlying their indicative screens.

2. Comments

148. GE requests that the Commission continue to accept indicative screen data in Excel format.[218] GE states that these data are currently submitted in Excel format with market-based rate applications, triennial market power updates, and certain notices of change in status. GE contends that the benefits of an XML submission are unclear.[219] GE further contends that the process of converting Excel data to XML introduces the possibility for error, and that Excel is the desired format for final use of this information.[220]

149. Independent Generation states that the Commission's proposal would replace seller-generated indicative market power screens with auto-generated information based on information submitted in the relational database. Independent Generation has concerns that this would lead to a significant number of incorrect or incomplete filings.[221]

3. Commission Determination

150. We adopt the proposal to require Sellers to submit indicative screen information in XML format, which will enable indicative screens to be incorporated into the relational database.[222] Furthermore, we adopt the proposal to require Sellers to continue to submit to the Commission all of their work papers underlying their indicative screens.

151. However, we have determined that the relational database will not have the capability to automatically populate indicative screens into the eLibrary record as originally proposed. Therefore, a Seller will submit its XML schema into the relational database for its indicative screens and will receive a serial number for each of its indicative screens. The Seller is then required to include these serial numbers in its associated market-based rate filing. Reporting these serial numbers will incorporate the associated indicative screens as part of the market-based rate filing and allow the Commission and the public to view the indicative screens using the systems that will support the relational database.

152. We deny GE's request to allow the use of workable electronic spreadsheets, such as Excel, as a means of submitting indicative screen data. The relational database will only accept data submitted in XML format. The Commission is requiring the use of XML instead of workable electronic spreadsheets because XML is an open source platform that allows the Commission to build a database that will meet its information collection purposes and that helps facilitate public access to the data.

153. Further, XML is more adaptable than workable electronic spreadsheets and allows for greater flexibility in the use of data, which will allow the Commission to conduct more robust analyses. Some of this flexibility will also extend to submitters who will have better access to their own information as well as limited access to other information in the relational database. Filers will also have the advantage of being able to continually update information in the relational database, while keeping track of historical data, making it easier for them to prepare their filings for submission at the Commission.

154. We disagree with GE's comment that converting workable electronic spreadsheets to XML produces the potential for error. Spreadsheet programs typically now have the capability to convert data entered into a given spreadsheet into an XML schema automatically. Moreover, XML submissions make the compilation and gathering of data into the relational database easier and provide the submitter with different layers of automated error checking, thus reducing the burden on the submitter. Finally, XML submissions provide a stable, long-term business-to-business solution that will enable the Commission to make improvements to the relational database without affecting submitters.

155. In response to Independent Generation's comments, we clarify that the relational database will not auto-generate the indicative screens based on affiliate connections made by the relational database. Rather, the relational database's services will simply format the data the Seller submits.[223]

F. Other Market-Based Rate Information

1. Commission Proposal

156. In the NOPR, the Commission proposed that a Seller provide other market-based rate information as set forth in the NOPR data dictionary, including: (a) Its category status for each region in which it has market-based rate authority, (b) markets in which the Seller is authorized to sell ancillary services, (c) mitigation, if any, and (d)

[216] Working Group at 23.

[217] ELCON and AFPA at 13; Working Group at 23.

[218] GE at 30–31.

[219] *Id.*

[220] *Id.*

[221] Independent Generation at 13–14.

[222] Concurrent with the issuance of this final rule, the Commission is issuing a final rule in Docket No. RM19–2–000 that relieves Sellers in certain RTOs/ISOs from the requirement to submit indicative screens. *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets,* Order No. 861, 168 FERC ¶ 61,040 (2019). That relief is unchanged with the issuance of this final rule in Docket No. RM16–17–000 and will take effect prior to the October 1, 2020 effective date of this final rule. Accordingly, the regulatory text changes to § 35.37 that we adopt herein are based on the regulatory text as amended in the Docket No. RM19–2–000 proceeding.

[223] In contrast, the asset appendix will be generated based on data submitted by a Seller and its affiliates.

the area(s) where the Seller has limited its market-based rate authority.[224]

2. Comments

157. FMP notes in its comments on the NOPR data dictionary that information on category status, ancillary services, mitigation, and limitations is duplicative of what is already provided in a Seller's market-based rate tariff and therefore asks that the Commission delete this requirement.[225] GE suggests that the operating reserves authorization should only be required to be provided where relevant.[226] No other commenters specifically address this proposal, although several commenters note that the NOPR preamble and proposed regulatory text do not always reflect or discuss requirements set forth in the NOPR data dictionary.[227] Specific comments on the NOPR data dictionary are discussed in the NOPR data dictionary section.

3. Commission Determination

158. We adopt the NOPR proposal to require that Sellers submit additional information into the relational database as set forth in the MBR Data Dictionary, with some modification. For example, we have not adopted a requirement for Sellers to provide information regarding ancillary services, but we have adopted the requirement, as set forth in revised § 35.37(a)(1), that Sellers provide information about their operating reserves, which are a subset of ancillary services. Revised § 35.37(a)(1) also specifies that a Seller must submit information about its category status, mitigation, and other limitations. Such information is readily known to the Seller because, as FMP observes, this information is also included in the Seller's market-based rate tariff.[228] The incremental burden of providing this information to the relational database is outweighed by the benefit of having a searchable repository of information that is easily accessible by the Commission and the public through the relational database's services function.

159. We disagree that the MBR Data Dictionary must use the exact language from the preamble and regulatory text of the rule. We do not view this as any different from the eTariff filing or EQR submission requirements, which similarly are not detailed in the Commission's regulations.[229]

V. Ongoing Reporting Requirements

A. Commission Proposal

160. The Commission proposed an ongoing quarterly reporting requirement under the regulation for the change in status reporting requirement in § 35.42. However, unlike the existing change in status reporting requirement, the Commission proposed that the quarterly reporting requirement be treated as informational.[230] Specifically, the Commission proposed a new § 35.42(d), which would require a Seller to make a submission updating the relational database on a quarterly basis to reflect any changes not already captured in the required change in connection submissions, change in status filings or any other market-based rate filing such as a notice of cancellation of or revision to a market-based rate tariff. The Commission provided the following list of examples of occurrences that would be reported in the quarterly updates: (1) Retirement of a generation asset; (2) capacity rating changes to an existing generation asset; [231] (3) acquisition of a generation asset that is a reportable asset but not required to be reported in a change in status filing; and (4) loss of affiliation with an affiliate owner that has a franchised service area or market-based rate authority, or directly owns or controls generation, transmission, interstate natural gas transportation, storage or distribution facilities, physical coal supply sources, or ownership of or control over who may access transportation of coal supplies that does not trigger a change in connection submission.[232] The Commission explained that this requirement would help to ensure that the relational database generates an accurate asset appendix, based on current information, for inclusion in a Seller's market-based rate filings and organizational charts for use by the Commission.[233]

161. The Commission proposed to retain the requirement for Sellers to file notices of change in status, which are due no later than 30 days after a change in status occurs.[234] However, the Commission did propose a change to § 35.42(a)(2) to include new ultimate upstream affiliates as an example of a change that would trigger a change in status obligation. In addition, the Commission proposed to require Sellers to update the relational database when filing a notice of change in status.

B. Comments

162. Numerous commenters request that any updates to the relational database be made on a quarterly basis instead of the rolling 30-day time window that was proposed for change in connection submissions in the NOPR and that exists for change in status filings pursuant to § 35.42(b).[235] FIEG states that much of the data being requested as part of the change in status filing and change in connection submission is subject to frequent changes, particularly for larger institutions with many different legal and financial connections. FIEG posits that if change in status and change in connection updates were required within 30 days of a change, then many participants would be filing notices weekly, if not more frequently. FIEG states that quarterly ongoing reporting updates would be less burdensome for market participants and less prone to error, while still providing the Commission the information it seeks in a timely manner.[236]

163. NextEra states that the Commission should consider how the relational database and simplified reporting procedures could simplify other reporting obligations. For example, NextEra notes that certain updates to the relational database could eliminate or simplify change in status filings.[237]

164. Commenters also question how the various updates will work in concert with each other. AVANGRID contends that the NOPR is ambiguous on how multiple data submissions would work

[224] NOPR, 156 FERC ¶ 61,045 at P 61.

[225] FMP, data dictionary Appendix at 10–13; *see also* EEI at DD Appendix 10–16.

[226] GE at 29.

[227] *See* AVANGRID at 17; EEI at 2; FMP at 2; MISO TOs at 8.

[228] In the event of a conflict between the Commission-accepted market-based rate tariff and the information submitted to the relational database, the language in the tariff takes precedence.

[229] *See Filing Requirements for Electric Utility Service Agreements,* 155 FERC ¶ 61,280, *order on reh'g,* 157 FERC ¶ 61,180.

[230] NOPR, 156 FERC ¶ 61,045 at P 67. The Commission typically does not notice or issue orders on informational filings. *See PSEG Services Corp.,* 134 FERC ¶ 61,080, at P 15 n.9 (2011).

[231] The Commission's change in status regulation regarding generation-related assets is limited to cumulative net increases of 100 MW or more; thus, not all changes in generation assets create a change in status filing obligation. *See* 18 CFR 35.42(a).

[232] NOPR, 156 FERC ¶ 61,045 at P 66.

[233] *Id.* P 67.

[234] *See id.* P 65; *see also* 18 CFR 35.42(b).

[235] *See* AVANGRID at 22–23; EPSA at 17; FIEG at 14–15; GE at 13–14; EEI at 23 (requesting quarterly reporting for change in connection submissions); NextEra at 7–8; NRG at 8–9; Working Group at 18–19; *see also* Independent Generation at 11 (requesting that change in connection submissions be due on an annual basis or, in the alternative, on a quarterly basis).

[236] FIEG at 15.

[237] NextEra at 10 (''under the change in status reporting requirements the affiliated entities that were each identified in the applicant's MBR filing, must now make their own filing show they have become affiliated with the earlier MBR applicant . . . The change in status filing thus operates as a mirror version of the earlier filing. There is little efficiency in this arrangement. . . .'').

together to ensure the continued accuracy of the relational database.[238]

165. MISO TOs are concerned about ''the potential for repetitive filings and the 'ripple effect' that a filing by one entity may have on other [entities]—whether a change by one entity can lead to fifty additional filings because fifty related [entities] are affected.'' [239]

166. TAPS notes that the proposed reporting of changes do not require the same level of comprehensive reporting of affiliate owners as the baseline and triennial filings.[240]

167. APPA notes that the comments submitted by TAPS show how seriatim updates could go awry—affiliate data might be lost, and the relational database permanently distorted—unless the updating protocols are clear.[241] APPA also requests that the final rule clarify the relational database updating protocols to ensure that an accurate picture of Seller's affiliate relationships is maintained.[242]

168. AVANGRID states that it appears that each of its affiliates would be required to submit changes to the database separately, thus requiring dozens of individual filings whenever there is a change triggering a notice of change in status. Thus, making the process of submitting changes to database burdensome for companies with multiple affiliated Sellers. AVANGRID estimates that after initial implementation, it will take its companies with market-based rate authority approximately 90–120 hours per year to comply with the Commission's proposals, including monitoring for changes triggering a reporting obligation, submission of change in status and quarterly updates and ongoing training.[243] AVANGRID requests that the Commission allow information, including asset appendices for all affiliated Sellers to be submitted in a single filing.[244]

169. Independent Generation requests that the Commission ensure that information already provided via market-based rate related filings is only reported once and according to the existing timelines for those submissions. For example, Independent Generation notes that changes in ultimate upstream affiliate information submitted through the market-based rate program should suffice for reporting purposes under the Connected Entity regime.

170. Some commenters also question the need for quarterly updates to the relational database. ELCON and AFPA note that the requirement for quarterly updates to the relational database creates a reporting obligation for information that the Commission has already determined does not warrant a change in status or implicate a Seller's market-based rate authority, for example, changes in capacity under 100 MW. ELCON and AFPA claim that the justification for the quarterly updating to the relational database thus ''may be contradictory and inconsistent with the longstanding approach'' that the Commission has taken with respect to its market-based rate program.[245] ELCON and AFPA state that with an obligation to report changes in connection, Sellers are already likely to see increased reporting obligations, even without the requirement to update the relational database quarterly, and they believe that the burdens of the quarterly updating requirement outweigh the benefits and the requirement should be deleted from the final rule.

C. Commission Determination

171. After considering the comments received, we agree that there are benefits to setting the timing of the ongoing relational database updates on a fixed date, but, as discussed below, we observe the need for database updates to occur on a monthly rather than quarterly basis. Therefore, we are revising the NOPR proposal to require monthly relational database updates on the 15th day of the month following the change. In light of this modification, we will change the time for filing notices of change in status from 30 days after such event, to quarterly reporting, which will reduce the burden for Sellers considerably.

172. Quarterly database updates would not be sufficient to maintain the level of accuracy the Commission needs for market-based rates or the analytics and surveillance program. In order to fully capture the activity in a given quarter, quarterly submissions are necessarily submitted after the end of the quarter. For example, second quarter EQR submissions are due by July 31, a month after the end of the second quarter, June 30. Applied here, Sellers would submit their second quarter database updates on July 31, which is particularly problematic for Sellers with triennial obligations. Triennials, for Sellers who are obligated to submit them, are always due by June 30 or December 31.

173. If the Commission were to adopt a quarterly database submission requirement, the last database update prior to the submission of triennials would be due on April 30 or October 31, respectively. This means that when preparing their triennial filings, Sellers would need to rely on, and their asset appendices would contain, data that is 60 days old or older. That is too great of a time lag and could result in inaccurate asset appendices. A monthly submission requirement, with submissions due by the 15th of each month, ensures that Sellers have the most current possible data for both their triennials and change in status filings. The frequency with which changes can occur within an organization underscore the need for more frequent reporting to ensure that the information in the relational database is not stale. We also find that more frequent updates will reduce the potential for errors or discrepancies in market-based rate filings through the auto-generated asset appendix, thereby minimizing the need for corrections and/or follow-up coordination and communication with affiliates. Additionally, given our determination to not pursue the Connected Entity requirements, and specifically the monthly change in connection updates, this helps to ensure that the Commission's analytics and surveillance program has access to updated and accurate information.

174. Contrary to AVANGRID's contention, we find the updates to the relational database require *less* coordination than is currently required among affiliated Sellers within a large corporate family. Under this final rule, a Seller need only report its own asset changes into the database and not the changes of each of its market-based rate affiliates.[246] While the MISO TOs correctly point out that in some situations a change in information submitted into the relational database may require multiple submissions for different Sellers within a corporate family (*e.g.,* to report a new affiliate ultimate upstream affiliate), we do not view the updating requirement as overly burdensome. The data will be readily available and the submissions will not require accompanying documents or analysis because they are not part of any

[238] AVANGRID at 11.

[239] MISO TOs at 9.

[240] TAPS at 15 (noting that under the NOPR, Sellers would need to include ultimate affiliate owner(s) as well as affiliate owners that have a franchised service area or market-based rate authority, or that directly own or control generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies).

[241] APPA at 9–10.

[242] *Id.* at 10.

[243] AVANGRID at 14.

[244] *Id.* at 21.

[245] ELCON and AFPA at 12.

[246] However, Sellers will be required to report changes to the assets of non-market-based rate affiliates.

market-based rate filing (*e.g.,* initial market-based rate application, notice of change in status filing, or updated market power analysis triennial filing).

175. Contrary to ELCON and AFPA's arguments, the requirement to update a Seller's previously submitted relational database information is necessary even when that update does not implicate a Seller's authorization to sell at market-based rates and would not rise to the level of a change in status filing. This is precisely why, unlike the change in status filing, the monthly submission is informational and does not require Commission action. These informational updates are necessary to ensure that the relational database is kept current and contains the most accurate information available, which is critical given that the relational database is used to create the asset appendix for all of a Seller's affiliates. As noted above, Sellers' monthly submission complements the notice of change in status filings and triennial filings by ensuring the accuracy of the asset appendices that may be included as part of those filings.[247] This should address APPA's concern related to how the previously proposed quarterly submission (now a monthly submission) would work with other filings to ensure accuracy of the relational database. We decline to adopt APPA's recommendation to have existing filing requirements overlap the new relational database requirements as such a requirement may pose an undue burden on filers.

176. The monthly relational database submission required of Sellers will include updates to show any changes to information previously submitted into the relational database, with the exception of the indicative screens.[248] Changes to data in the indicative screens will not be required as part of the monthly submission, but a Seller will submit new screen information to the relational database whenever it is making a market-based filing that includes screens, as detailed in the Submissions section.[249]

177. In light of our determination to set fixed monthly updates for previously submitted relational database information, we will also change the requirement for filing notices of change in status. Instead of being due within 30 days of the change, we will move to a quarterly change in status reporting requirement, with such reports due at the end of the month following the end of the quarter in which the change occurs.[250] Unlike the monthly relational database updates, which are informational and submitted purely through XML into the relational database, a notice of change in status results in a docketed proceeding in which the Seller describes a change in the characteristics the Commission relied upon in granting the Seller market-based rate authority, and on which the Commission must act.

178. For example, if a Seller acquires a 150 MW generator on March 20 and on March 27 an affiliate receives authorization to sell operating reserves in a new balancing authority area, each of those entities will need to submit an update to the relational database by April 15 to reflect their respective change. In addition, the Seller (and applicable affiliates) will need to file a notice of change in status by April 30 to report the net increase in generation, assuming that there have not been any offsetting decreases in generation that brings the net increase in generation below 100 MW. The relational database will already reflect the relevant changes because they will have been submitted to the database by no later than April 15, so there should be no need to make a submission into the relational database with the notice of change in status.[251]

179. As noted above, although there will be a slight increase in burden to Sellers by making the requirement to update the relational database monthly instead of quarterly, we expect that any such increase in burden will be more than offset by changing the due date for notices of change in status from 30 days after such a change to a quarterly requirement. In fact, in some instances, examining the entire quarter as a whole may decrease the need to report notices of change in status at all.

180. For example, if Seller A acquires 300 MW of generation on January 15 (which under existing regulations would require a notice of change in status by February 14) and its affiliate, Seller B, sells a 250 MW generator on March 1 in the same balancing authority area, there would be no requirement for either Seller to file a notice of change in status because there would have been only a 50 MW net increase in generation capacity during the quarter.[252] However, both the increase of 300 MW and the decrease of 250 MW would have been submitted into the relational database by the 15th day of the month following each change. We believe that the approach adopted in this final rule regarding reporting of changes will ensure that the relational database is updated in a timely manner, while minimizing burdens on Sellers.

181. Thus, we are adding 18 CFR 35.42(d) to reflect that any reportable change to relational database information is required to be submitted by the 15th day of the month following the change. In addition, we are revising the language at 18 CFR 35.42(b) to specify that notices of change in status must be submitted on a quarterly basis with such reports due at the end of the month following the end of the quarter in which the change occurs.

VI. Connected Entity Information

A. Commission Proposal

182. The Commission proposed that the Connected Entity reporting requirements would apply to all Sellers and to Virtual/FTR Participants. In addition, the Commission proposed to define the term ''Virtual/FTR Participants'' as entities that buy, sell, or bid for virtual instruments or financial transmission or congestion rights or contracts, or hold such rights or contracts in organized wholesale electric markets, not including entities defined in section 201(f) of the FPA. Under the proposal, the phrase ''organized wholesale electric markets'' would include ''ISOs and RTOs as those terms are defined in § 35.46 of the Commission's regulations.'' The Commission also proposed to use the same definition for ''Seller'' as used in the market-based rate context and defined in § 35.36(a)(1) of the Commission's regulations. The Commission did not propose to require entities that hold only Auction Revenue Rights (ARRs) to submit Connected Entity Information, but sought comment on that aspect of the proposal.[253]

B. Comments

183. The Connected Entity reporting requirement proposal was among the most commented upon proposal from the NOPR. Some commenters support the Commission's proposal to collect

[247] Regarding APPA's request for updating protocols to ensure the accuracy of the relational database, we discuss the mechanics of submissions and filings in greater detail on the Commission's website.

[248] NOPR, 156 FERC ¶ 61,045 at P 66.

[249] If a screen is going to apply to many Sellers, only one Seller needs to submit the screen to the database. The other Sellers can reference the screen's serial number in their filings.

[250] Thus, notice of changes in status filings will be on the same timeline as Sellers' EQR reporting obligations. *See* 18 CFR 35.10b.

[251] However, to the extent that the Seller submits indicative screens as part of a change in status, the Seller would need to submit the indicative screen information into the relational database prior to filing the notice of change in status.

[252] 300 MW − 250 MW = 50 MW, which is below the 100 MW threshold for filing notices of change in status.

[253] NOPR, 156 FERC ¶ 61,045 at P 51.

Connected Entity Information,[254] while many express concerns or oppose this proposal. For example, several commenters object to the requirement that Sellers be required to submit Connected Entity Information. AVANGRID comments on the burdens of collecting Connected Entity Information from Sellers and claims that the NOPR would dramatically increase the degree of coordination required by expanding the classes of information that must be reported to the Commission.[255] Berkshire states that its subsidiaries with market-based rate authority do not have ready access to information about their more than 5,000 commonly owned affiliates and lack the ability to require their affiliates to provide information regarding their activities.[256] AVANGRID and EEI believe that the actual time required to make baseline and subsequent update filings would greatly exceed the estimates provided in the NOPR.[257]

C. Commission Determination

184. After further consideration, we decline to adopt the proposal to require Sellers and Virtual/FTR Participants to submit Connected Entity Information in this final rule. We appreciate the concerns raised about the difficulties of and burdens imposed by this aspect of the NOPR. Accordingly, we will transfer the record to Docket No. AD19–17–000 for possible consideration in the future as the Commission may deem appropriate and will not amend the Commission's regulations to add Subpart K to title 18 of the CFR, as originally proposed in the NOPR, in this final rule.[258] We note that the determination in this final rule to collect market-based rate information in a relational database will provide value to both the Commission's market-based rate and analytics and surveillance programs.

VII. Initial Submissions

A. Commission Proposal

185. In the NOPR, the Commission proposed that, within 90 days after publication of the final rule in the **Federal Register**, existing Sellers make a baseline submission into the database.[259] The Commission explained that the baseline submission is intended to populate the relational database and not to evaluate the Seller's market-based rate authority; thus, the Commission would not take action on the baseline submission.[260] The Commission proposed that Sellers include the following specific information as part of the baseline submission: (1) Connected Entity ownership information; (2) the Seller's LEI; (3) ''market-based rate information'', including (a) Seller category status for each region in which the Seller has market-based rate authority, (b) each market in which the Seller is authorized to sell ancillary services at market-based rates, (c) mitigation if any, and (d) whether the Seller has limited the regions in which it has market-based rate authority; (4) ''market-based rate ownership information'' (including ultimate upstream affiliates; and affiliate owners with franchised service areas, market-based rate authority, or that directly own or control generation; transmission, intrastate natural gas transportation, storage or distribution facilities, physical coal supply sources or ownership of or control over who may access transportation of coal supplies); and (5) asset appendix information.[261]

186. In the NOPR, the Commission proposed to require new Sellers to submit Connected Entity Information and other market-based rate information within 30 days of after the grant of market-based rate authority.[262]

B. Comments

187. Most commenters argue that the baseline submission is an administrative burden on Sellers.[263] Commenters argue that Commission has underestimated the amount of time and labor it would take Sellers to comply with the baseline submission.[264] For example, FMP contends that the time estimate provided in the NOPR is extremely conservative and does not include preparatory time, time needed to learn data entry protocols, time addressing Commission staff inquires, and other associated work. FMP suggests that the Commission underestimates the statistically demonstrable burden of the NOPR by a factor that may approach 300 percent.[265] AVANGRID questions the NOPR estimates of 40–100 hours for baseline Connected Entity submissions and market-based rate filings, estimating that it will take each of its companies with market-based rate authority approximately 180–220 hours during the initial year to comply with the new requirements.[266]

188. As detailed more fully in the Implementation section, many entities commented on the timeline for baseline relational database submissions.[267] For example, Designated Companies request that the Commission increase the deadline for baseline submissions to at least 180 days after the publication of the final rule or preferably 180 days after a technical conferences on implementation. Designated Companies and EPSA also suggest a staggered implementation timeline where baseline market-based rate submissions are due after 180 days with Connected Entity data due 180 days after that.

189. NextEra proposes that the baseline requirement facilitate baseline submissions by Sellers within a large corporate family such that a submitting entity will be able to tie into data previously submitted as part of the corporate family and reduce burden in subsequent filings.

190. Finally, IECA notes that there are some requirements set forth in the NOPR such as the requirement for the baseline submission that should be expressly included in the regulations if the requirement is adopted in the final rule.[268] Similarly, Berkshire notes that the baseline submission requirement is not reflected in the regulatory text.[269]

C. Commission Determination

191. We will adopt the NOPR proposal to require Sellers to make baseline submissions to the relational database, but as discussed more fully in the Implementation section, we have adjusted the timeline for the baseline submissions in response to comments.

192. Beginning February 1, 2021, any new applicant seeking market-based rate authority will be required to make a submission into the relational database

[254] APPA at 4; New Jersey and Maryland Commissions at 3–4; Monitoring Analytics at 2.

[255] AVANGRID at 9–10. *See also* EEI at 18.

[256] Berkshire at 4.

[257] AVANGRID at 13–14 (estimating that it would take each of its market-based rate companies approximately 180 to 220 hours during the initial year to comply, and 90 to 120 hours in subsequent years); EEI at 18.

[258] Comments pertaining to the Connected Entity proposal will be re-designated as being in both Docket No. RM16–17–000 and Docket No. AD19–17–000.

[259] For purposes of this final rule, when discussing information to be included as part of a baseline submission or a monthly update to the relational database, such term does not include indicative screen information. However, where used outside of the context of the baseline submission and monthly relational database updates, indicative screen information is included.

[260] NOPR, 156 FERC ¶ 61,045 at PP 60, 62.

[261] *Id.* at P 61.

[262] *Id.* at Attachment C.

[263] *See, e.g.,* AVANGRID at 10; Financial Marketers Coalition 28–29; NRG at 7.

[264] *See* AVANGRID at 10; Financial Marketers Coalition at 28; NextEra at 13; NRG at 7.

[265] FMP at 5.

[266] AVANGRID at 8, 13 (stating that compliance will require a coordinated effort with multiple departments within each of over 50 entities that make up the AVANGRID market-based rate sellers).

[267] *See, e.g., id.* at 23–24; Brookfield at 10–11; Duke at 4–5; EEI at 25–26; EPSA at 6–7; MISO TOs at 9–10.

[268] IECA at 3.

[269] Berkshire at 2.

prior to filing an initial market-based rate application.

193. Although there will be some initial implementation burden associated with submitting data in the new relational database format and for collecting the new information, much of that burden would exist as part of moving to a relational database regardless of the requirement for a baseline filing. The NOPR's estimate of 40–100 hours in year one had included time spent on Connected Entity Information submissions. Because Connected Entity Information is not required as part of this final rule, and in light of commenters' concerns that the Commission underestimated the burden of initial compliance, we revise the time that the average Seller will spend in year one from 40–100 hours to 35–78 hours.[270]

194. We recognize that there may be some initial increase in burden while Sellers familiarize themselves with the new database and make their baseline submissions but note that, over time, the creation of the relational database is expected to reduce burden because Sellers will not be required to gather and report information on many of their affiliates to create their asset appendices and may have to file fewer notices of change in status. As discussed more fully in the Implementation section, we have extended the deadline for baseline submissions significantly beyond the original proposal to require Sellers to make such submissions within 90 days of publication of the final rule in the **Federal Register**. The new timeframe should alleviate some concerns and burdens associated with preparing and submitting the baseline by allowing sufficient time to have systems and software in place before the baseline submissions are due.[271]

195. Further, we expect that Sellers will already be familiar with most, if not all, of the information they will have to submit, because they have an existing requirement to provide this information.

196. With respect to NextEra's request that a Seller be able to tie together data previously submitted as part of its corporate family, the relational database will facilitate such coordination in several ways. As proposed in the NOPR, a major advantage to the relational database approach is that a Seller will only have to identify its own assets and those of other non-market-base rate affiliates that will not be making their own relational database submissions. Thus, the Seller will not have to identify any of the assets of other affiliated Sellers with market-based rate authority.

197. The elimination of the requirement to identify all affiliate assets should reduce burden in the case of Sellers within large corporate families with numerous submitters. In addition, a Seller will be able to use services that will be made available to determine whether another submitter has previously identified an entity, and if it has, to obtain information such as the CID, LEI, or FERC generated ID information on that entity. We believe that these features of the relational database will facilitate baseline submissions by Sellers in large corporate families.

198. Commenters also recommend that the Commission add the requirement for the baseline submissions to its regulations. We decline to adopt that recommendation. Given that the requirement for baseline submissions is a one-time requirement, we find that putting that requirement in the regulations may confuse future Sellers as to whether they are required to make baseline submissions in addition to the information that they must submit as part of their market-based rate applications. The Commission is taking steps to ensure that current Sellers are aware of the new requirements created under this rule, including publication of the final rule in the **Federal Register**, and the posting of materials on the Commission's website. We do not see any additional benefit to adding the baseline requirement into our regulations given that the requirement to make a baseline submission will not have any effect beyond the initial compliance period.

199. Regarding EEI's request for clarification with respect to asset appendices, we reiterate that Sellers should report current information only and should not attempt to match their baseline submission to their last-submitted market-based rate filings.[272] The purpose of the baseline submissions is to populate the relational database with the most current information available rather than the set of data already on file at the Commission. The baseline submissions will be informational, *i.e.,* they will not be noticed and the Commission will not issue orders addressing them.

200. Finally, we note that to the extent that we have modified what was proposed in the NOPR, those changes flow through to the requirements for the baseline submissions.[273]

VIII. Data Dictionary

A. Overview

1. Commission Proposal

201. In the NOPR, the Commission stated that as part of the final rule, a data dictionary, along with supporting documentation and specifications, would be posted on the Commission website to define the framework for Sellers to follow when submitting information. The NOPR data dictionary was also included as an attachment to the NOPR.[274]

202. Just as the NOPR specified the information that must be submitted, the NOPR data dictionary described the specific tables and fields that must be submitted to satisfy the requirements of the NOPR. The NOPR data dictionary also described data types, formats, and validation rules that would be used to ensure the quality of the data being submitted (*e.g.,* if the field should be a date, the specific date format is provided and the validation rule checks to ensure a valid date has been entered).

203. The Commission sought comment on the specific content for the relational database as set forth in the NOPR data dictionary. Prior to the due date for comments, Commission staff held a technical workshop to review the NOPR data dictionary in considerable detail.[275]

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[270] *See* Information Collection Statement section for more information.

[271] Several commenters requested that the Commission first require a baseline submission to address the market-based rate information, with a later submission to include Connected Entity information. Given our decision to not pursue the Connected Entity information as part of this final rule, we will not address those comments.

[272] *See* NOPR, 156 FERC ¶ 61,045 at P 61 (Sellers ''should submit current information, even if different from information included in their most recent [market-based rate] filing with the Commission.'')

[273] As noted in the Ownership Information section, we are no longer requiring Sellers to submit information on upstream affiliates with franchised service areas, market-based rate authority, or that directly own or control generation; transmission, intrastate natural gas transportation, storage or distribution facilities, physical coal supply sources or ownership of or control over who may access transportation of coal supplies. However, as discussed in the Market-Based Rate Ownership Information section, a Seller must still submit information on its ultimate upstream affiliate as part of the relational database baseline submission and a new Seller will have to submit ultimate upstream ownership information as part of its relational database submission that precedes and is incorporated in part into the Seller's market-based rate application.

[274] NOPR, 156 FERC ¶ 61,045, Attachment D at 75–100. In addition, the Commission stated that any minor or non-material changes to the data dictionary would be posted to the website and reporting entities would be alerted to the changes via email.

[275] The notes from this workshop are available at *http://www.ferc.gov/CalendarFiles/20160909154402-staff-notes.pdf.*

2. Comments

204. Commenters provided general comments on the Commission's proposed publication, implementation, and maintenance of the NOPR data dictionary as well as comments on specific tables and fields contained within the NOPR data dictionary.

205. Commenters suggest that inadequate notice and opportunity to comment were provided because the NOPR data dictionary contained tables and specific fields that were not explicitly referenced in the preamble or regulatory text of the NOPR.[276] Examples provided include: (1) Field specific details such as start and end date for connected entities relationships; [277] (2) the signed date for PPAs; [278] and (3) the date and docket number reflecting an entity's market-based rate authorization.[279] In addition, AVANGRID requested additional opportunity for Sellers to review and comment on the data dictionary prior to finalization.[280]

206. Other commenters request that the Commission publish a guidance document developed with industry input.[281] Duke suggests that the Commission follow these procedures for the development of such a document: (1) Issue a guidance order to address issues raised; (2) host several collaborative meetings on the NOPR data dictionary to further enhance the NOPR data dictionary and to draft a user's guide; (3) issue a final rule with the NOPR data dictionary; and (4) finalize the user guide based on that rule.[282]

207. Several commenters state that the NOPR data dictionary was too complex,[283] and that the proposed data collection required data that was irrelevant or unduly burdensome to collect.[284] For example, FMP states that the NOPR data dictionary contains tables and fields that ''exhibit no explained relationship to either market-based rate eligibility . . . nor to the identification or documentation of any particular type of transactions of even theoretical interest to the Commission'' [285] or ''seek[s] highly subjective and interpretative information that is not susceptible to the kind of abbreviated, administrative reporting that the NOPR suggests.'' [286] Some commenters express concern about the precision with which individual fields need to be reported. For instance, if the format of a date is 'yyyy-mm-dd', for dates sufficiently far in the past it may be excessively burdensome or impossible to identify a date, month, or in some cases even the year.[287]

208. For all fields, commenters generally request that the Commission make explicit whether the field is nullable,[288] clarify which fields will be populated by the relational database (rather than supplied by the filer/submitter),[289] clarify validation rules, and provide standardized formatting for date fields and docket numbers. Duke notes that this additional information is necessary for submitters and those developing software for this process.[290]

3. Commission Determination

209. In this final rule, we adopt the NOPR proposal to post the MBR Data Dictionary (with supporting documentation) to the Commission website. We have made changes to the NOPR data dictionary in response to comments as described below. In addition, other changes were made to the NOPR data dictionary to address technical aspects of developing the relational database and to account for the differences between the NOPR and this final rule. Any subsequent minor or non-material changes to the MBR Data Dictionary will be posted to the website and reporting entities will be alerted to the changes via email. Significant changes to the MBR Data Dictionary will be proposed in a Commission order or rulemaking, which will provide for an opportunity to comment.

210. As an initial matter, we disagree with commenters that there was inadequate notice and opportunity to comment on the MBR Data Dictionary. The NOPR provided adequate notice and opportunity to comment on the proposed reporting requirements, while the NOPR data dictionary described the implementation of collection of the proposed requirements, including identifying specific data fields and their characteristics that would be necessary for satisfying the requirements of the NOPR. While the NOPR data dictionary was presented as an attachment with detailed tables and fields that were not explicitly referenced in the preamble or regulatory text of the NOPR, industry participants were provided notice and an opportunity to comment on those documents. For example, the preamble and the regulatory text provided sufficient notice to market participants that the Commission was proposing that Sellers be required to report into the relational database information on ultimate upstream owners,[291] generator plant name, plant code, generator ID, and unit code using EIA Form EIA860,[292] and generator telemetered location.[293] In response, numerous commenters provided detailed suggestions and requests for clarifications to improve the NOPR data dictionary, including comments that tracked in chart form the tables and fields of the NOPR data dictionary. We therefore find no lack of notice or opportunity to comment on the proposed reporting requirements, including the NOPR data dictionary.

211. Moreover, prior to comments being due, staff held a technical workshop with industry participants to discuss the NOPR data dictionary, providing further notice and opportunity for comment and attendees were informed that they should submit any concerns, either general or technical in nature, in the form of written comments on the NOPR by the due date.

212. Therefore, we do not find a need for additional notice and opportunity for comment on the MBR Data Dictionary, including the additional processes suggested in the comments to develop the MBR Data Dictionary or guidance document(s). However, we note that Sellers may reach out to Commission staff for further information.

213. We have considered all of the comments received regarding the NOPR data dictionary, including those comments that the NOPR data dictionary specified data fields irrelevant to the reporting requirements, that certain fields are unduly burdensome, and that it is structured in an overly complex way. In response, we have made numerous changes to the NOPR data dictionary that are reflected in the MBR Data Dictionary.

214. We disagree that the MBR Data Dictionary is structured in an overly complex way and find that the structure and all of the tables and fields set forth in the MBR Data Dictionary are relevant for implementing the final rule. In fact, most of the information required to be

[276] AVANGRID at 17; Duke at 3; EEI at 2, 21–23, and 25; GE at 29, 32; FMP at 7.

[277] Berkshire at 11.

[278] EEI at DD Appendix 16–18; FMP at DD Appendix 15.

[279] EEI at DD Appendix 6–10; FMP at DD Appendix 6–8.

[280] AVANGRID at 18.

[281] Duke at 2–4; EEI at 28.

[282] Duke at 3.

[283] AVANGRID at 11; GE at 26.

[284] Brookfield at 8.

[285] FMP at 7.

[286] *Id.*

[287] Brookfield at 8–10; Berkshire at 11.

[288] Designated Companies at 17–28; EEI DD Appendix; FMP DD Appendix.

[289] Designated Companies at 17.

[290] Duke at 2.

[291] NOPR, 156 FERC ¶ 61,045 at P 28.

[292] *Id.* P 35.

[293] *Id.* P 36.

submitted under this final rule is already being collected by the Commission, albeit in largely unstructured formats (*e.g.,* in narratives and footnotes in routine current submissions). The MBR Data Dictionary provides tables and fields for capturing this same information from Sellers in a standardized format. Some fields (*e.g.,* CID, LEI, FERC generated ID) have been added to provide a consistent way in which to identify an entity, a feature that is missing in the current system. Certain fields are populated by internal systems and serve to create connections across tables. As discussed in the subsections below, we have made some changes to individual tables for clarity and feasibility.

215. In addition, certain tables that were present in the NOPR data dictionary are not being published with the MBR Data Dictionary because these tables are entirely populated by internal systems and require no additional input from reporting entities. These include the entities, genassets, and submission information tables (formerly termed Filing Information Table). However, the MBR Data Dictionary does include tables that report relationships between the data in the unpublished tables (*e.g.,* the entities_to_entities, entities_to_genassets, entities_to_vertical_assets, and entities_to_ppas tables.) and will require submitter input.

216. In finalzing the MBR Data Dictionary, we reevaluated each field in every table of the NOPR data dictionary and, where possible, we have removed fields or clarified definitions so as to further reduce the burden and subjectivity associated with compliance. In general, the specific fields and definitions in the MBR Data Dictionary serve to sharpen and clarify the reporting requirements. For this reason, the MBR Data Dictionary should reduce subjectivity where aspects of current information collections (*e.g.,* current market-based rate filings) lacks a specific structure. For commenters concerned that a high-level of precision may not be possible for some fields (*e.g.,* dates sufficiently far removed), the precision of reported information is subject to the standards described in the Due Diligence section. In addition, as noted above, we have provided default dates for many applicable fields and clarified, on a field-by-field basis, the level of precision required.[294]

217. To the extent that the MBR Data Dictionary may appear complex, we believe this reflects the complexity of the subject matter, and the flexibility of the MBR Data Dictionary allows it to capture the necessary information from a wide range of Sellers. In this regard, however, we address commenters' proposals to improve the NOPR data dictionary by explicitly marking where every field is nullable, clarifying which fields will be automatically populated by the relational database, clarifying validation rules and providing clear, consistent formatting guidance in the MBR Data Dictionary.

B. Updates to the Data Dictionary

1. Commission Proposal

218. The Commission proposed that minor or non-material changes to the MBR Data Dictionary and other supporting documentation, such as the XML, XSD, and associated documents, would be publicly posted to the Commission's website.

2. Comments

219. EEI ''encourages the Commission not to take this approach.'' [295] Commenters generally proposed alternative approaches. Designated Companies request that the Commission establish a regular stakeholder meeting to discuss non-material changes before posting them to the website, which Designated Companies claim can also help determine whether a given change is material and therefore should be noticed for comment.[296] FMP and EEI express concern that the proposal to post changes to the website does not satisfy the Commission's obligations under the FPA or Administrative Procedure Act for notice and comment,[297] and, for this reason, the Commission should make subsequent changes subject to public notice and comment.[298] EEI expresses concern that without notice and comment, there will be too many questions from affected entities for each minor, non-material change. EPSA suggests an approach where all formatting instructions and technical guidance proposing changes to the MBR Data Dictionary or submission process should be published in the docket with a comment period of no less than 15 days and any Technical Workshops should be followed by a minimum 15-day comment period commencing on the date on which staff notes are published in the docket.[299]

3. Commission Determination

220. As discussed above, we adopt the proposal in the NOPR to post minor or non-material changes to the MBR Data Dictionary/XML/XSD and associated documents to the Commission website. This is the same method provided in § 35.10b of the Commission's regulations, which states that EQRs ''must be prepared in conformance with the Commission's guidance posted on the FERC website (*http://www.ferc.gov*).'' [300] As with EQR, any significant changes to the MBR Data Dictionary will be proposed in a Commission order or rulemaking, which would provide an opportunity for comment.[301] We emphasize that the intent of posting future minor or non-material changes to the MBR Data Dictionary/XML/XSD and associated documents to the Commission's website is not to preclude feedback, but to streamline the reporting process. In response to EEI's concerns, submitters will still have the ability to seek guidance from staff.

C. Filing Information Table

221. The NOPR data dictionary Filing Information table was designed to accommodate the reporting of metadata for each filing made by a Seller.[302] This metadata consisted of, inter alia, for whom the submission is being made, when the submission is being made, and the reason for the submission (*e.g.,* initial application, information update). The Filing Information table from the NOPR data dictionary also contained fields for concurring to screens submitted by other participants and a field for referring to eTariff.

1. Comments

222. Commenters asked that the Commission clarify: (1) If multiple submission reasons are allowed,[303] (2) the process for identifying references to

[294] Unless otherwise specified, if submitters do not know and cannot ascertain with reasonable due diligence the actual day of the month for when a relationship (or other required date field) begins or ends, they may assume the first day of the month for when a relationship begins and the last day of the month for when a relationship ends. Similarly, if they know only the year, but not the month or day, they may assume a relationship began at the beginning of the year, *i.e.,* on January 1 (and if it is the end of a relationship they are reporting, they may assume the end of the year (December 31).

[295] EEI at DD Appendix 1.

[296] Designated Companies at 3.

[297] FMP at 7; EEI at DD Appendix 1–2.

[298] AVANGRID at 18; FMP at 7.

[299] EPSA at 13.

[300] 18 CFR 35.10b.

[301] *See, e.g., Filing Requirements for Electric Utility Service Agreements,* 155 FERC ¶ 61,280 at P 5, *order on reh'g,* 157 FERC ¶ 61,180 at PP 40–43.

[302] Metadata is data that provides information about other data. For example, in the XML schema for eTariff, one required element is a proposed effective date and another element is the text of the tariff provision. The proposed effective date is considered to be metadata relative to the tariff text. *See* Order No. 714, 124 FERC ¶ 61,270 at P 12 & n.10.

[303] EEI at DD Appendix 3; FMP at DD Appendix 2.

concurrences in tables; [304] and (3) how to include references to eTariff.[305]

2. Commission Determination

223. We have removed the entire Filing Information table because it no longer contains any fields required to be populated by reporting entities. For example, we have eliminated fields requiring the reason and type of filing being made. We have also eliminated fields for concurrences and for referencing eTariff, because the two systems will not be linked at this time. Therefore, we need not address the requests for further clarification. The submissions table requires no submitter input and therefore will not be published in the MBR Data Dictionary.

D. Natural Persons Table

224. The NOPR data dictionary Natural Persons table was designed to accommodate the reporting of information regarding traders and natural person affiliates (*e.g.,* first name, last name). The table contained fields for flagging a natural person as an affiliate (in the case where a natural person is a reportable owner), trader, or both. The NOPR data dictionary also provided a brief overview of the validation rules for contact information for natural persons, which served to ensure the quality of individual submissions as well as consistency between multiple submissions.

1. Comments

225. FMP states that the affiliate and trader flags which distinguish natural person affiliates from other affiliates are not necessary and require ''substantial editorial judgment.'' [306] Several commenters request clarification regarding what validation rules will be applied to contact information.[307] GE requests that the Commission clarify that it is adhering to the various labor, employment laws, rules, and regulations regarding the collection of this information and that it will remain non-public and subject to formal document retention and disposition protocols.[308]

2. Commission Determination

226. In response to commenters and for technical reasons, we have determined not to collect information in a separate ''Natural Persons'' table and instead determined to collect relevant information for natural persons on the entities_to_entities table. Although we are not collecting information on traders, we recognize that some ultimate upstream affiliates can be natural persons. Since we will not be collecting information on traders or employees, we need not address GE's comments about adherence to labor and employment laws.

E. Entities Table

227. The NOPR data dictionary Entities table was designed to accommodate the reporting of information regarding individual reporting entities and reportable entities. The Entities table utilized CID, LEI and/or, FERC generated ID as the principal means to uniquely identify a reporting or reportable entity.

1. Comments

228. Commenters sought clarification on the process for obtaining an FERC generated ID for entities that have neither a CID nor an LEI.[309]

2. Commission Determination

229. We have determined that FERC generated IDs, which are required for all reportable entities that do not have a CID or LEI (including natural persons), will be created through a service provided by the Commission upon request by Seller.[310] As discussed above, the entities table requires no submitter interaction and will not be included in the MBR Data Dictionary.

F. Generation Assets Table

230. The NOPR data dictionary Generation Assets table was designed to accommodate the reporting of information on reportable generation assets including in-service date, capacity ratings, and location. The Generation Assets table also contained a field for flagging information submitted on a generation asset as public or non-public.

1. Comments

231. EEI and FMP request clarification on why this table is separate from the Entities to Generation Assets table because, in their view, a separate table may increase reporting burden. Both EEI and FMP regard the publication flag for each generation asset as superfluous.[311]

2. Commission Determination

232. We have determined that certain changes are appropriate for the Generation Assets table (re-labeled here as the gen_assets table) to allow for the appropriate level of flexibility when reporting generation assets. Like the entities table, the gen_assets table will not require direct submitter interaction and will be excluded from the MBR Data Dictionary. As described in the Asset Appendix section above, the gen_assets table will store the basic information for all of the generators in the database. This table will initially be populated with information from the EIA–860. If a Seller wishes to add a generator to this table, they will be able to do so by requesting an Asset ID.

233. In response to EEI and FMP's requests for clarification on the gen_assets table and why it must exist separately from the entities_genassets table, we note that the tables serve different purposes. The gen_assets table will contain basic, descriptive information about each generation asset in the database, while the entities_genassets table will allow Sellers to identify their relationships with such assets. Many Sellers can have a relationship with the same generation asset; however, each Seller will have a different relationship with that asset. For example, two Sellers may attribute different amounts of capacity to themselves for market power purposes, use a different de-rating methodology, or pseudo-tie the energy to a different market/balancing authority area. Because these attributes are unique to a specific Seller, it is preferable to capture the relationship-specific information on a separate table.

234. As noted above, we have removed the requirement to provide certain information (*e.g.,* in-service dates) given that the Commission will be able to access that information either from EIA or through the pre-submission process Sellers will use to identify and obtain FERC Asset IDs for generators that are not part of the EIA database. Further, we have removed the field for flagging whether information submitted on a generation asset as public or non-public. As noted elsewhere, all information in this database will be considered public.

G. MBR Information Tables

235. The NOPR data dictionary MBR Information tables were a collection of similar tables designed to accommodate the reporting of up-to-date records of current MBR authorizations and related details for all Sellers. They included tables for MBR Authorization

[304] EEI at DD Appendix 3; FMP at DD Appendix 2.

[305] Designated Companies at 17; EEI at DD Appendix 3; FMP at DD Appendix 2.

[306] FMP at DD Appendix 4.

[307] Designated Companies at 17; EEI at DD Appendix 5; FMP at DD Appendix 4.

[308] GE at 27.

[309] *Id.*

[310] As noted above, the Commission will provide more details on the FERC generated ID process on its website.

[311] EEI at DD Appendix 10–13; FMP at DD Appendix 6–8, 10.

Information, Category Status by Region, Mitigations, Self-Limited MBR Authorization, Ancillary Services Authorization, and Operating Reserves Authorization.

1. Comments

236. EEI and FMP state that the Commission should consider deleting information already included in MBR Tariffs so as not to collect the same data twice. They also state that the Commission maintains a spreadsheet on the Commissions' website with information that includes much of the information included in the MBR Authorization Information table, and therefore, submitting that information is unnecessary.

237. GE suggests that the Commission set a default of 'no such authorization' for every participant with regard to the operating reserves market-based rate authorization. Since this authorization is relatively rare, only those participants so authorized would be required to submit information for this table. EEI agrees with GE and recommends renaming the table to indicate the optionality.[312]

238. EEI also recommends renaming the Self-Limited MBR Authorization table similarly. Regarding specific fields, Designated Companies request that the Commission clarify which docket number should be used for the Authorization Docket Number Field.[313] EEI asks why multiple LEIs should not be allowed for the Filer LEI in the same table.[314]

2. Commission Determination

239. We determine that, while aspects of these tables duplicate information contained in market-based rate tariffs, the inclusion of this data herein is critical to the success of moving market-based rate information into database form. Submitting this information in tabular form is largely a one-time effort that will make the information more accessible to all parties and avoids potential errors from staff inputting this information. The information contained in these tables, such as the regions where certain activities are authorized, constitute key inputs in the analysis of a market-based rate filing. When integrated into the relational database, this information provides access to crucial threshold-level determinants regarding the applicability of an analysis. We believe the analytical benefits resulting from including threshold information about a Seller's market-based rate authority in the relational database outweigh the burden.

240. Similarly, we determine that the data in the mbr_authorizations table needs to be included in the relational database. The spreadsheet on the Commission's website to which EEI and FMP refer is not automatically generated or updated.[315] Rather, it is a staff-generated product that relies on information from orders, requires frequent updates, and can easily become out-of-date. The mbr_authorizations table both integrates relevant descriptive data into the relational database and provides a source to automate the production of the spreadsheet that EEI and FMP cite. We further clarify that the appropriate docket number to use for the Docket Number field on the mbr_authorizations table is the docket number under which the filing entity, or its predecessor company, was first granted market-based rate authorization.[316] Further, we note that in the event of a conflict between the Commission-accepted market-based rate tariff and the information submitted to the relational database, the language in the tariff takes precedence.

241. While we retain most of the MBR Information Tables set forth in the NOPR data dictionary, we are eliminating the Ancillary Services Authorization table because we do not find it necessary to have this information in the relational database.

242. Regarding the mbr_self_limitations and the mbr_operating_reserves tables, we recognize that not every Seller will have information relevant to these tables and clarify that these tables should only be submitted if that information relevant. We do not adopt EEI's recommendation that we rename these tables to reflect reporting optionality. Table names exist as a high-level description of the information contained in the table not policies about who is required to report the information.

243. EEI's proposal to submit multiple LEIs is addressed in the section on Submission on Behalf of Multiple Entities.

244. We have added date fields to the mbr_cat_status, mbr_mitigations, mbr_self_limitations, and mbr_operating_reserves tables. Sellers will populate these fields with the effective date of the tariff, or tariff revision, when the Commission accepted the provision. Including these dates will ensure that the Commission can accurately understand the status of Sellers at any given point of time. Existing Sellers may use January 1, 2020 as the default date for the effective date fields when making their baseline submissions.[317]

H. PPAs Table

245. The NOPR data dictionary ppa_table was designed to accommodate the reporting of information on long-term firm power purchases and sales agreements.

1. Comments

246. GE, FMP and EEI comment that the NOPR data dictionary includes fields that were not explained or justified in the NOPR, such as Source/Sinks and Keys and Types.[318] EEI and FMP state that these fields should be eliminated, and if they are retained that the NOPR should be reissued with discussion of additional burden regarding collection of this information and an explanation as to why it is needed.[319] GE asks that the Commission clarify which point should be captured as the sink for contracts used as hedges that may specify different delivery and settlement pricing points.

247. Berkshire recommends that the Date of Last Change/Amendment field be removed because it is already reported by Sellers in EQR.[320] Similarly, Manitoba Hydro recommends eliminating the contractual details field because it is far too open to interpretation, therefore burdensome to report, and ultimately will not serve the Commission's objectives because information entered therein will be inconsistent and unusable.[321] Commenters also request further information on how the multi-lateral contract identifier should be used [322] and what should be reported in the Source Key and Sink Key fields.[323]

248. GE notes that in regards to contracts reported in the EQR, the Commission has clarified that only

[312] GE at 29; EEI at DD Appendix 9–16.

[313] Designated Companies at DD Appendix 19.

[314] EEI at DD Appendix 13.

[315] *Id.* at DD Appendix 9–16; FMP DD Appendix 9.

[316] That is, a Seller should not provide the docket number where it succeeded the market-based rate tariff of another Seller. Rather, it should provide the first docket number under which that tariff received market-based rate authorization.

[317] We note that Sellers may not use this default date to populate the authorization_effective_date field in the mbr_authorization table. As explained above, each Seller must provide the docket number under which the filing entity, or its predecessor company, was first granted market-based rate authorization. This information is easily discoverable through the spreadsheet list of Sellers currently published on the Commission's website.

[318] EEI at DD Appendix 16–17; FMP at DD Appendix at 15; GE at 29.

[319] EEI at DD Appendix 16–17; FMP at DD Appendix at 15; GE at 29.

[320] Berkshire at 17.

[321] Manitoba Hydro at 5–6.

[322] EEI at DD Appendix 18; FMP at DD Appendix 15.

[323] Designated Companies at 21–23.

material changes to contracts should trigger updates, whereas the PPAs table seeks the date of last change to a contract regardless of materiality. Berkshire recommends that an amendment date only be required of sellers when reporting contracts in EQR, and not required as an element of reporting power purchase agreements in market-based rate filings. Commenters also suggest clarifying or eliminating date signed field because there may be many signatures over many days.[324]

2. Commission Determination

249. We have revised and clarified the PPA table in response to comments and have implemented other changes to provide clarity. Since this table captures the relationship of an entity to a particular PPA, we are re-naming the table as the entities_to_ppas table. The entity associated with the PPA will be the Seller or the Seller's non-market-based rate affiliate, as reflected in the new reference fields. Where the Seller is reporting its own PPA, it should not provide its own identifier, and the Commission will assume that it is reporting its own PPA. Where the PPA reference is to a non-market-based rate affiliate, the reporting entity must enter either a CID, LEI, or a FERC generated ID.[325] Additional changes to the way Sellers will report their PPAs are discussed above in the Asset Appendix section.

250. In response to GE and Berkshire's comments regarding the date of last change field and materiality, we clarify that the date of last change field should only be populated when making a required update to a previously submitted PPA and we will not adopt a materiality threshold as GE suggests.[326] Required updates to a PPA include any change to the information that Sellers have previously submitted or required information in regard to that PPA. Because we are gathering only the basic information necessary to understand a PPA, changes to any of the fields will be considered material. Further, if a Seller makes a submission to update the amount field of a PPA, but fails to provide information on the date of last change the information in the relational database may become unclear or incorrect.

251. We accept commenters' recommendations that we drop the date signed field. Upon consideration, we do not believe this field will provide the Commission with information essential to the market power analysis.

252. We have replaced the source and sink key fields with source and sink balancing authority area fields, respectively. Sellers will populate these fields with the foreign key that corresponds to the appropriate market/balancing authority area.[327]

I. Indicative Screens Tables

253. The NOPR data dictionary Indicative Screens tables were designed to accommodate the reporting of the same content as what is reported now in market-based rate filings, but, instead of being submitted as a workable electronic spreadsheet, the information is formatted to be loaded and maintained in a relational database.

1. Comments

254. EEI comments that the tables should allow the entry of multiple identifiers to associate a screen with multiple filers.[328] GE prefers the Excel template currently used for submitting this information because conversion into a new format introduces the potential for error.[329]

2. Commission Determination

255. We have not modified the Indicative Screen tables to allow the entry of multiple identifiers to associate a screen with multiple filers. However, we clarify in response to comments that when multiple Sellers are on a filing that requires indicative screens, only one Seller needs to submit the indicative screens into the relational database. As noted above, each screen will receive a serial number that the Sellers can refer to in their filing. We further address EEI's multiple identifier request below, in the section on Submitting on Behalf of Multiple Entities.

256. Additionally, we have updated the Indicative Screens tables to better organize and streamline the information. Specifically, on both the indicative_pss and the indicative_mss tables we condensed the individual value fields into a study_parameter field and a study_parameter_value field in order to reduce the complexity and length of these tables. We have also added separate reference fields to allow Sellers to indicate whether the screen they are submitting is amending or relying on a previously submitted screen, and added a ''scenario_type'' field for Sellers to indicate whether the screen they are submitting is a base case scenario or a sensitivity analysis. Additionally, on the indicative_mss table we added the ''mss_group_id'' column to allow Sellers to properly associate the separate parameters for the four seasons of a market share screen.

257. While acknowledging GE's preference for the Excel template currently used, we do not adopt this proposal because we are adopting a standardized method of data submission that does not utilize Excel. The risk of error is much greater when each filer submits its own spreadsheet rather than using a standardized data package that is vetted through validation routines. The validation routines that are part of the submission process will verify that the structure of any filing is accurate and that the simple math that was part of the spreadsheets is correct. Because such errors, when they occur, will be identified more quickly and reliably, it should be easier for filers to correct them. In addition, as noted above, spreadsheet programs typically now have the capability to convert data entered into a given spreadsheet into an XML automatically.

J. Entities to Entities Table and Natural Person Affiliates to Entities

258. The NOPR data dictionary Entities to Entities table and Natural Person Affiliates to Entities table were designed to accommodate the reporting of relationship information between and among reporting and reportable entities. This relationship information is distinct from information about the entities (or natural persons) found on the Entities table and the Natural Persons table.

1. Comments

259. Commenters note that the description and field names do not adequately capture sibling-type relationships, such as when entities are commonly held, owned, or controlled. EEI recommends breaking the table into two tables, one for Connected Entities and one for other affiliates.[330] EEI also notes that the focus of this table is on establishing Ownership/Control relationships, but that control relationships among entities are not required to be reported per the regulatory text (though they note that control is reported when reporting generation assets).[331] EEI also asks, if only Affiliate Owners are to be reported as affiliates for purposes of § 35.36(a)(9),

[324] EEI at DD Appendix 18; FMP at DD Appendix 15.

[325] As noted elsewhere, the identifiers in order of preference are CID, LEI and FERC generated ID.

[326] We have renamed this field ''Date_of_last_change.''

[327] Similar to EQR reporting, Sellers will be able to choose ''Hub'' as the Source or Sink. Accordingly, we have added source_baa_hub and sink_baa_hub fields that Sellers will use to indicate which Hub, when the Source or Sink is a Hub.

[328] EEI at DD Appendix 21

[329] GE at 30–31.

[330] EEI at DD Appendix 21; Berkshire at 10–11 also suggests modifications.

[331] EEI at DD Appendix 21.

whether the option to report owning and controlling relationships is necessary because reportable Affiliate Owners will always be controlling entities.[332]

2. Commission Determination

260. We adopt with revisions the Entities to Entities table and combine attributes from the ''Natural Person Affiliates to Entities'' table referenced in the NOPR to form a single entities_to_entities table. This revised single table will capture a Seller's relationship with its ultimate upstream affiliate.

261. We have modified field descriptions and names to address concerns regarding sibling relationships; fields that were identified with the terms ''Ownership'' or ''Control'' have been changed to indicate a ''Relationship.'' We have also removed the Ownership Percentage field from this table. We do not adopt EEI's suggestion to split the table because doing so would add unnecessary complexity requiring two separate tables for the same types of data. EEI's assertion that ''control relationships among entities are not required to be reported per the regulatory text'' is inaccurate. Under § 35.36(a)(9) of the Commission's regulations, affiliate status can be based on owning, controlling or holding ''10 percent or more of the outstanding voting securities.'' Also, we are removing the control flag field; thus, questions regarding this field are no longer relevant.

K. Entities to Generation Assets Table

262. The NOPR data dictionary entities_to_genassets table [333] was designed to accommodate the reporting of information about how reporting entities were connected to generation assets. It was intended to allow analysts to see when multiple entities are related to a single generation asset and how particular relationships change over time.

1. Comments

263. GE states that the requirement to report connections between entities and generating assets does not currently exist and was not part of the NOPR.[334] GE states that the Commission has not justified its need for information regarding generation decreases.[335] It further notes that, even if the Commission explains its need for generation decreases, it is unclear why the Commission would only be interested in the end of ownership rather than events such as decommissioning of the asset.[336] EEI states that the ''ownership end date'' field is a new requirement not discussed in the NOPR.[337] Designated Companies request clarification on the meaning of ''control'' for generation assets.[338]

2. Commission Determination

264. We have made adjustments to the entities_genassets table to better accommodate the reporting of generation assets. As discussed above in the Asset Appendix section, Sellers will use the entities_genassets table to provide all of the details specific to its, or its non-MBR affiliate's, relationship to a generation asset. Through this table, a Seller will be able to indicate the following information regarding its relationship to a generation asset: (1) Whether it, or its non-MBR affiliate, owns or controls the asset; (2) where the asset is located; (3) the de-rated capacity and methodology it uses to perform the de-rate; (4) the amount of capacity that should be attributed to it or its non-MBR affiliate; and (5) any explanatory notes. The information to be provided in these tables is currently required in Appendix B to Subpart H of Part 35 of the Commission's regulations, and therefore the collection of this information falls within the scope of the NOPR. The NOPR data dictionary essentially proposed to change the format of the reported information from a spreadsheet format to the XML format for inclusion in the relational database. Regarding Designated Companies' request for clarification of the term ''control,'' we note that there has been no change to the meaning of ''control'' for the purpose of this final rule.

265. We disagree with GE's assertion that the Commission has not explained the need for information on generation decreases. In the NOPR, the Commission explained that maintaining the accuracy of the database is not only important to ensure the usefulness of the relational database for the Commission's analytics and surveillance program, but is also necessary to generate accurate asset appendices for Sellers to reference in their filings.

266. In response to GE, for decommissioned generators, Sellers can indicate ''zero'' in the amount field and use the explanatory notes field to indicate that the generator is decommissioned.

267. While we acknowledge that an end date field is not required in the current asset appendix, we deem this information necessary in order to provide the Commission with up-to-date information about generation asset ownership/control and to permit Sellers to remove generation assets that they no longer own or control from the asset appendices generated by the relational database.

L. Vertical Assets Table

268. The NOPR data dictionary Vertical Assets table was designed to accommodate the reporting of connections between reporting entities and various ''vertical assets'' that were necessary for Commission determinations regarding market-based rate filings.

1. Comments

269. EEI notes that at the data dictionary workshop, Commission staff stated that this table must include Vertical Assets of any affiliates that are not also reporting entities. Also, EEI states that the Commission should have separate tables for reporting the vertical assets of the Seller and non-reporting affiliates. EEI requests that a designated person be able to submit one submission on behalf of multiple reporting entities with separate LEIs rather than requiring individual submissions on behalf of each separate entity.[339] Designated Companies and EEI request clarification on the definition for the ''region'' and ''other inputs'' fields.[340]

2. Commission Determination

270. In this final rule, we simplify the vertical asset requirements as discussed in the Vertical Assets section, and the MBR Data Dictionary reflects these new requirements. In response to EEI's comments and consistent with our determinations with respect to generation assets and PPAs, we will require Sellers to report the vertical assets of their non-market-based rate affiliates, as this will ensure that the asset appendix contains all affiliated assets. Since this table captures the relationship of an entity to vertical assets, we are re-naming the table as the entities_to_vertical_assets table. The entity associated with the vertical asset will be the Seller or the Seller's non-market-based rate affiliate, as reflected in the new ref_cid, ref_lei, and ref_fid fields. Where the Seller is reporting its

[332] *Id.*

[333] As noted above, we have renamed the ''Entities to Generation'' table as ''entities_to_genassets.''

[334] GE at 32.

[335] *Id.*

[336] *Id.*

[337] EEI at DD Appendix 27.

[338] Designated Companies at 25.

[339] EEI at DD Asset Appendix 27.

[340] *Id.* at DD Asset Appendix 28; Designated Companies at 26.

own vertical asset, it will not separately report any identifier, and the Commission will assume that the asset is attributable to the Seller. Where the vertical asset reference is to a non-market-based rate affiliate, the reporting entity must enter the affiliate's CID, LEI or FERC generated ID. We will not address the meaning of ''other inputs,'' as the Commission did not propose, and this final rule does not adopt, any changes to the definition. Finally, we have renamed the region field to balancing authority area. As discussed above in the Asset Appendix section, knowing the balancing authority area will allow the Commission to determine the region in which an asset is located.

M. Posted Changes to the Reference Tables

1. Commission Proposal

271. The NOPR data dictionary contained descriptions of several tables that will be available for submitting entities to use for standard references when reporting information (*e.g.,* RTO/ISO names, balancing authority areas).

2. Comments

272. GE states that in the event the Commission makes any changes to the reference tables, reporting entities should not be required to include any posted changes in their submissions until 60 days after the changes and posting notice of the changes. GE also recommends that the Commission provide notice and opportunity to comment on any changes.[341]

3. Commission Determination

273. We decline to require notice and opportunity to comment on any minor, non-material change(s) to reference tables as for the same reasons described in the Updates to the Data Dictionary section above. Minor, non-material changes to the tables will be posted to the Commission's website. Upon the posting of the changes, submitters will be able to make submissions that conform to the most recent changes to the table. However, Sellers will not be required to make submissions using the revised tables until the next time that the Seller is required to update its relational database information. In other words, the Commission's revision of a table alone would not necessitate an update to the relational database for each Seller.

N. Submission on Behalf of Multiple Entities

1. Commission Proposal

274. The Commission proposed that reporting entities submit information in the prescribed format to the Commission.

2. Comments

275. Commenters request the ability for a reporting entity to designate a person to make submissions on behalf of the reporting entity.[342] In addition, commenters seek allowance for a designated person to make submissions on behalf of multiple reporting entities. In particular, commenters seek allowance for a designated person to make submissions on behalf of multiple reporting entities with only one submission.[343]

3. Commission Determination

276. With this final rule, we are leveraging the current eFiling infrastructure. This will allow reporting entities to designate a person to make submissions into the relational database on their behalf. The same person may be designated to make submissions on behalf of multiple reporting entities. However, the submission system for this database will not be able to accommodate a single submission to be made on behalf of multiple reporting entities. Stated another way, a designated person would not be able to submit an XML that updates the database information of multiple Sellers. Rather the designated person would need to submit separate XMLs for each Seller.

277. Nonetheless, certain features of the relational database and eFiling system are available to minimize any burden on a designated person making submissions on behalf of multiple, related reporting entities. In particular, the standardized formatting in the MBR Data Dictionary of reportable information readily allows such information to be ''cut and pasted'' into multiple submissions. Furthermore, nothing in this final rule affects the ability for multiple Sellers to be docketed on the same filing. Currently, Sellers with a shared reporting requirement, such as a triennial obligation, will often make a single filing that is placed into the dockets of all relevant Sellers. Moving forward, once Sellers have submitted the relevant information into the database and retrieved the serial numbers, they will still be able to make a single filing, *i.e.,* their triennial, which goes into the docket of all relevant Sellers. Further, we note that indicative screens that will apply to multiple Sellers on the same filing will only need to be submitted into the database by one of the Sellers.

IX. Confidentiality

A. Commission Proposal

278. In the NOPR, the Commission explained that information required to be submitted for market-based rate purposes would be made public via publication in eLibrary, and potentially through other means, such as the asset appendix, unless confidential treatment was requested pursuant to the Commission regulations.[344] The Commission stated that to the extent a Seller submits its relationship with an affiliate owner as privileged under § 388.112 of the Commission's regulations, the Seller-affiliate owner relationship would remain confidential if it qualifies for such treatment.

B. Comments

279. Independent Generation requests that the Commission provide a more detailed explanation of how it intends to protect confidential affiliate ownership information while still providing adequate public information to facilitate proper reporting by other entities that may share common relationships—*e.g.,* given the apparent tension between the proposal to publish a list of affiliate owners and the commitment to confidentiality of certain affiliate owner relationships.[345]

280. Financial Marketers Coalition requests that the Commission clarify how much information will be available to the public and whether filers will have a mechanism to request confidential treatment on the various parts of their market-based rate XML submissions. Financial Marketers Coalition also inquires whether the entirety of a company's XML submission will be available for public view and the security measures taken to keep sensitive data protected and the website secure.[346] Financial Marketers Coalition also requests clarification as to how passive investor information will be treated, including to what extent such information will be publicly available, either through the relational database or the proposed website interface.[347]

[341] GE at 32–33.

[342] Designated Companies at 14 (Commission could use authentication for filings (similar to EQR) to permit filer to control who can file on its behalf).

[343] EEI at 2, 24.

[344] *See* 18 CFR 388.112.

[345] Independent Generation at 12.

[346] Financial Marketers Coalition at 29–30.

[347] *Id.* at 16; *see* NOPR, 156 FERC ¶ 61,045 at P 26.

281. Several commenters noted that any final rule should address how confidentiality will be maintained in response to requests under Freedom of Information Act (FOIA), including the standard the Commission will apply in considering whether to grant a request for disclosure under FOIA.

282. Similarly, EPSA suggests that submitters could request protection from public disclosure under the FOIA but notes that such protections are subject to third-party disputes, potentially requiring filers to participate in disputes about the *continued* applicability of the exemption even as the information was confidentially submitted at the outset. EPSA thus requests that the Commission consider specific protections which ensure this information is protected when it is being sought outside of the context of an investigation.[348]

283. Working Group and others state that Sellers must not be required to violate foreign privacy laws, employment laws, confidentiality requirements in contracts, or other regulatory regimes that are intended to protect information that otherwise would be reportable.[349] GE urges the Commission to consider the most limited means of obtaining the information and to make publicly available its current privacy protocols or to consider performing a Privacy Impact Assessment with respect to this data.[350]

C. Commission Determination

284. Consistent with the proposal in the NOPR, we clarify that certain aspects of a Seller's market-based rate filing can appear in eLibrary as either public or non-public. A Seller, like anyone else submitting information to the Commission, may request privileged treatment of its filing if it contains information that is claimed to be exempt from FOIA's mandatory public disclosure requirements.[351] While aspects of a Seller's filing may qualify for privileged treatment, we do not expect that the information required to be submitted into the database will qualify for privileged treatment. As discussed in the Ownership section of this rule, the Commission has determined that the relationship between the Seller and its ultimate upstream affiliate(s) does not qualify for privileged treatment under the Commission's regulations, particularly given that this affiliate relationship informs the horizontal and vertical market power analyses.[352] Similarly, other information that must be submitted into the database will not qualify for privileged treatment because it is either: (1) Already publicized in the Seller's tariff; (2) part of the Seller's asset portfolio, which informs the Commission's market power analysis; or (3) part of the indicative screens, which informs the Commission's market power analysis. Accordingly, we are not incorporating any confidentiality safeguards to the database.

285. Financial Marketers Coalition request clarification regarding the treatment of passive investor information. As discussed in the Passive Ownership section, the Commission will not be collecting information on passive owners in the relational database.

X. Due Diligence

A. Commission Proposal

286. In the NOPR, the Commission explained that with respect to any inadvertent errors in the data submission process, it would accept corrected submittals and would not impose sanctions where due diligence had been exercised.[353] However, the Commission also stated that the intentional or reckless submittal of incorrect or misleading information could result in the imposition of sanctions, including civil penalties, as has occurred in other contexts.[354] The Commission stated that an entity can protect itself against such a result by applying due diligence to the retrieval and submission of the required information.[355]

B. Comments

287. Several commenters argue that the Commission should grant a special ''safe harbor'' for good faith mistakes in the information reported by Sellers. Commenters are concerned that legitimate, good-faith mistakes in market-based rate submissions will be subject to penalties for reporting erroneous information under a strict liability standard and request a ''safe harbor,'' [356] including a safe harbor for when other laws or regulations, such as under foreign privacy laws or the Commission's Standards of Conduct, would prevent disclosing the data to the Commission.[357]

288. For example, AVANGRID requests that the Commission establish an express safe harbor for the submission of market-based rate information to: (1) Establish a presumption of good faith on the party of entities submitting market-based rate Information; and (2) expressly provide that the Commission will not bring an enforcement action against any entity for the accuracy of such data absent evidence demonstrating that the entity intentionally submitted inaccurate or misleading information to the Commission.[358] EPSA requests that the Commission clearly state in the final rule that errors discovered in good faith by a reporting entity may be corrected in its next submission upon discovery post-submission either by the reporting entity, its affiliate, or Commission staff, without incurring penalty for not having reported these minor errors to the Commission at an earlier date.[359]

289. While the Commission stated in the NOPR that it expects affiliates ''to work together to have the correct information submitted into the relational database,'' [360] commenters further assert that the reporting entity should not have a duty to verify the data collected from its affiliates, when the information is outside its control and cannot be verified; rather, such reporting entity should be permitted to rely upon representations from their affiliates that such information is accurate absent any reasonable basis suggesting otherwise. Working Group questions how a Seller would be able to verify market-based rate data that was submitted by an affiliate as confidential and asserts that a Seller cannot be responsible for the accuracy of its affiliates' or any other third-party data submissions that are incorporated by

[348] EPSA at 33.

[349] Working Group at 32–33.

[350] GE at 19; PTI at 7–8 (''MBR Sellers should not be required to share/gather information with/from affiliates where standards of conduct or other legal requirements could limit or preclude them from sharing such information. Under any final rule, the Commission should not require MBR Sellers . . . to violate foreign privacy laws, contractual confidentiality requirements, or other regulation designed to protect information that would otherwise be reportable under the Data Collection NOPR.'').

[351] For example, a seller may request confidential treatment of workpapers and other proprietary information in support of its application.

[352] *See Ambit,* 167 FERC ¶ 61,237 at PP 26, 30.

[353] NOPR 156 FERC ¶ 61,045 at P 58.

[354] *Id.*

[355] *Id.*

[356] Designated Companies at 7 (Commission should establish a safe harbor specifying what will constitute sufficient due diligence for reporting Connected Entity data, with explicit parameters similar to the Commission's safe harbor presumption in price reporting); FIEG at 13 (''[T]he Commission should provide an explicit safe harbor in its regulations for instances where there is a demonstration of good faith effort to comply with the regulations—even if a report contains omissions or mistakes.''); PTI at 7; Working Group at 28–29 (requesting good faith mistake safe harbor and citing safe harbor to entities that make legitimate, good-faith mistakes or errors in index price reporting).

[357] Working Group at 30–31.

[358] AVANGRID at 21–22.

[359] EPSA at 32–33.

[360] NOPR, 156 FERC ¶ 61,045 at n.40.

reference based on data in the Commission's relational database.[361]

290. Some commenters recommend that the Commission confirm that a Seller has a duty only to notify the affiliate of a perceived error in data submitted by the affiliate if the Seller should discover one, and the affiliate, only if it agrees with the Seller, has a duty to submit corrected information within 30 days, while no such duty would apply if the Seller does not know the source of the data.[362] Working Group further asserts that the Seller's market-based rate authority should not be conditioned upon or rescinded if the Commission suspects or determines the Seller's data submissions are incorrect and that requiring corrected submissions would be more appropriate.[363] EEI requests that the Commission clarify that self-reports to Office of Enforcement for minor errors do not need to be made, and that the next quarterly submission should be used to correct these types of errors once discovered.[364]

C. Commission Determination

291. We provide the following clarifications as to how the Commission will apply the due diligence standard included in § 35.41(b) with respect to inadvertent errors, misstatements, or omissions in the data submission process. The Commission generally will not seek to impose sanctions for inadvertent errors, misstatements, or omissions in the data submission process. We expect that Sellers will apply due diligence to the retrieval and reporting of the required information by establishing reasonable practices and procedures to help ensure the accuracy of their filings and submissions, which should minimize the occurrence of any such inadvertent errors, misstatements, or omissions. However, the intentional or reckless submittal of incorrect or misleading information could result in the imposition of sanctions, including civil penalties.

292. Accuracy and candor by Sellers in their respective filings and submissions under the final rule are essential to the Commission's mandate of ensuring just and reasonable rates and its ability to monitor for anomalous activity in the wholesale energy markets.

293. We appreciate that when extensive data must be submitted to a regulatory agency some data may, occasionally, despite an entity's best efforts to achieve accuracy, turn out to be incomplete or incorrect. In the case of inadvertent errors, the Commission's usual practice is simply to require that a corrected submittal be made without sanctions of any kind. Likewise, any necessary corrections to a submission under the final rule should be submitted on a timely basis, as soon as practicable after the discovery of the inadvertent error or omission, and should not be delayed until the next periodic reporting requirement. However, under certain circumstances, the submittal of incorrect, incomplete, or misleading information could result in a violation and the imposition of sanctions, including civil penalties. These circumstances might include, for example, systemic or repeated failures to provide accurate information and a consistent failure to exercise due diligence to ensure the accuracy of the information submitted. Any entity can protect itself against such a result by adopting and following timely practices and procedures to prevent and remedy any such failures in the retrieval and submission of accurate and complete information.

294. We decline to adopt a ''safe harbor'' or a ''presumption of good faith'' or ''good faith reliance on others defense,'' nor do we limit bringing enforcement actions to only when there is evidence demonstrating that an entity intentionally submitted inaccurate or misleading information to the Commission, as urged by some commenters. Section 35.41(b) does not have a scienter requirement, and we decline to adopt one in this final rule. Rather, the Commission will continue to evaluate the circumstances surrounding the submission of erroneous information to determine whether the entity submitting information exercised due diligence. While we expect that most inadvertently erroneous or incomplete submissions will be promptly corrected by reporting entities without the imposition of any penalty, the Commission will continue to exercise its discretion based on the particular circumstances to determine whether erroneous or incomplete submissions warrant a sanction.

295. As the Commission has stated, a due diligence standard provides the Commission with sufficient latitude to consider all facts and circumstances related to the submission of inaccurate or misleading information (or omission of relevant information) in determining whether such submission is excusable and whether any additional remedy beyond correcting the submission is warranted.[365]

296. Therefore, establishing adequate due diligence practices and procedures ultimately depends on the totality of facts and circumstances, and can vary case to case, depending upon the evidence presented and whether, for example, reliance on third-parties or affiliates is justified under the specific circumstances. For example, most Sellers necessarily have knowledge of their affiliates' generation portfolios because they must submit this information for purposes of generating the indicative screens. To the extent the auto-generated asset appendix is clearly incongruous with the screens, presumably due to an incorrect submission by the Seller's affiliate, we expect that the Seller will make note of the perceived error in the transmittal letter.

297. However, if a Seller does not have accurate or complete knowledge of its affiliates' market-based rate information, in most cases it should be able to rely on the information provided by its affiliates about such information, unless there is some indication or red flag that the information the affiliate supplies is inaccurate or incomplete. In response to Working Group's concern about the difficulty in verifying confidential information, we note that most of the information that a Seller would need to rely upon from its affiliate (*e.g.,* ownership and asset information) generally should not be submitted as non-public. In the event that it is, a Seller should contact the affiliate for additional information.

298. While Sellers should not ignore obvious inaccuracies or omissions, relying on information from affiliates should be sufficient to satisfy the due diligence standard, provided there is reasonable basis to believe that such information obtained from affiliates (or other third-parties) is reliable, accurate, and complete.

[361] Working Group at 28–29 (asserting ''data outside of a reporting entity's control cannot be attributed to it''); *see also* FIEG at 14 (''an entity providing Connected Entity data would need to rely upon information from multiple sources within a market participant's corporate family'').

[362] Working Group at 29–30; PTI at 7 (recommending that Sellers have a duty only to notify the affiliate of a perceived error, and the affiliate have 30 days to submit the corrected information to the Commission only if it agrees).

[363] Working Group at 30.

[364] EEI at 6.

[365] *Investigation of Terms and Conditions of Public Utility Market-Based Authorizations,* 107 FERC ¶ 61,175, at P 96 (2004) (order denying reh'g and granting, in part, clarification of *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations,* 105 FERC ¶ 61,218 (2003)) (''While we agree that a false or misleading communication (or omission of relevant information) may, in a given case, be excusable based on the facts and circumstances presented, we are not convinced that our due diligence standard would be inadequate for the purpose of considering such a defense.'').

XI. Implementation and Timing

A. Commission Proposal

299. In the NOPR, the Commission proposed that, within 90 days of the date of the publication of a final rule in the **Federal Register**, existing Sellers submit an informational baseline submission to the relational database that includes certain information in order to establish a baseline of information in the relational database to be used for purposes of future filings.[366]

B. Comments

300. Numerous commenters state that the Commission's proposal to have baseline filings submitted 90 days after publication of the final rule in the **Federal Register** is unrealistic.[367] Duke states that there are ''fairly significant substantive issues that must be resolved and clarified'' before a data dictionary and User Guide can be prepared and recommends that the Commission issue a guidance order and conduct collaborative meetings with industry prior to finalizing the MBR Data Dictionary and User Guide.[368] Duke references EEI's comments regarding conflicts between the NOPR data dictionary and the NOPR text and for issues regarding need for certain data.[369] Brookfield states that filing format and structure issues will need to be resolved before filers and software vendors can begin to take the steps necessary to implement the relational database submission requirements.[370] Similarly, FMP states that there are ''fundamental questions about filing contents, timing, processes, and even about the identification of inapplicable disclosure requirements'' that were not addressed in the NOPR and recommends that the Commission treat the NOPR as an advanced notice of rulemaking or non-rulemaking notice of inquiry.[371] FMP states that even if the Commission can resolve all of the issues in the final rule that ''the answers would constitute amendments to the NOPR, and affected parties would have no clear, final NOPR proposal to address.'' [372] EPSA also notes that absent resolution of pending issues, filers would have to build a system without knowing precisely to what they are building.[373]

301. Numerous commenters allege that the NOPR did not take into account the time needed to develop and test software needed to implement the relational database and, where necessary, to purchase such software.[374] EEI notes that filers often need to budget for new software a year before such expenditures.[375] Commenters also note the need for employees to be trained to use the software.[376]

302. Commenters also note the need to adjust and/or develop internal processes and train staff regarding how to capture and report the required information.[377] EEI notes that business practices will need to be developed to get relevant information from a variety of business units to the persons trained to use the software.[378] Designated Companies note the need to establish new controls, coordination, and to allow for due diligence review of initial submission by internal legal, risk management and compliance departments, which they estimate will take at least 45 days.[379] IECA states that the NOPR requirements could cause structural changes to commodities trading to ensure that trading or hedging processes are re-aligned with the NOPR and may require revisions to trading strategies to prevent inadvertent violations.[380] NextEra estimates that, given the Commission's estimate of 40–100 hours to collect and provide the relational database information, it would take NextEra's portfolio of over 125 Sellers between 5,000–12,500 hours to prepare and submit their filings.[381]

303. In addition, commenters note the need to provide adequate time and an opportunity for filers to test the software to ensure that submissions can be made on a timely basis.[382] EEI states that once the test period has ended the Commission should provide sufficient time for final implementation.[383]

304. Many commenters propose timelines tied to particular milestones to ensure realistic and reasonable compliance deadlines. Commenters also identify the need for technical conferences prior to implementation and recommend that the Commission extend the deadline for baseline filings, proposing deadlines ranging generally from 12 months to 24 months after issuance or publication of the final rule.[384] GE states that the Commission's implementation plan should include a detailed technical review of the MBR Data Dictionary by stakeholders led by Commission staff.[385] EEI states that the Commission needs to take into account discussions at technical workshops when preparing the XML schema and draft guidance/user documents.[386] EPSA states that the Commission needs to provide the opportunity for filers to share concerns about nomenclature and the need for clarity regarding various prongs of Connected Entity definition.[387] EPSA also recommends that the Commission explore implementation possibilities in a technical workshop focusing on submission issues prior to issuance of the final rule.[388]

305. Designated Companies, EEI and GE all recommend some form of staggered implementation.[389] ''EPSA proposes a 180-day initial period to prepare [market-based rate] baseline filings subsequent to the date that XML format and MBR Data Dictionary terms

[366] NOPR, 156 FERC ¶ 61,045 at PP 60–62. The Commission proposed that it would not act on these baseline submissions. *Id.* P 62.

[367] *See, e.g.,* AVANGRID at 23–24; Brookfield at 10–11; Duke at 4–5; EEI at 25–27; EPSA at 6–7; MISO TOs at 9–10.

[368] Duke at 3–4.

[369] *Id.* at 3.

[370] Brookfield at 11.

[371] FMP at 3–4 (stating that the NOPR ''is nowhere near ready for adoption as a final rule'').

[372] *Id.* at 4.

[373] EPSA at 7–8.

[374] *See, e.g.,* AVANGRID at 23–24; EEI at 25–26 (''[o]nce the data dictionary is finalized and the XML schema is developed for submitting data to the relational database, software will need to be developed in consultation with the industry and tested by the software producers which will likely take one to two years''), EPSA at 34 (''need for adequate time to develop internal software capability should account for the fact that companies may need well over 180 days from the date of a finalized XXL format's publication, to develop cost-effective, internal-facing software tools to capture the necessary information, rather than relying solely on a series of vendor solutions.'').

[375] EEI at 27.

[376] *See, e.g.,* AVANGRID at 23–24; Duke at 5; EEI at 25–26; Independent Generation at 16; MISO TOs at 9–10; NRG at 7.

[377] AVANGRID at 23–24; Brookfield at 10–11; Duke at 5; EEI at 25–26; MISO TOs at 9–10; NextEra at 14–15.

[378] EEI at 26.

[379] Designated Companies at 9–10.

[380] IECA at 21–22.

[381] NextEra at 14.

[382] EEI at 28.

[383] *Id.*

[384] *See, e.g.,* Brookfield at 11 (18 to 24 months after issuance of final rule); GE at 11 (12–18 months after final rule effective date); EEI at 26 (two-years to implement), EPSA at 6–7 (at least one year after the Commission releases final XML format); FIEG at 15 (at least 180 days after finalization of data dictionary and completion of technical conferences); Independent Generation at 16 (minimum of 180 days); NRG at 8 (minimum of 18 months after issuance of final rule); Working Group at 19–20 (at least 18 months).

[385] GE at 3–4.

[386] EEI at 28; *see also* MISO TOs at 7.

[387] EPSA at 9.

[388] *Id.* at 10–11; *see also* Designated Companies at 10 (adequate time for technical conferences and workshops is necessary before finalizing the requirements and deadline for submission of baseline filings in order to maximize data quality and usefulness); PTI at 9 (requesting workshops on the scope of regulatory definitions and on enforcement).

[389] Designated Companies at 9–10 (stagger implementation with first compliance date (Sellers' baseline submissions) due at 180 days with deadline of an additional 180 days for all submitters to submit Connected Entity Information); EEI at 27; GE at 11–12 (recommend baselines submissions be submitted on a regional basis).

have been finalized, with a subsequent 180-days to prepare and submit the new Connected Entity data. The second compliance period deadline should also be the due date for filers to replace their FERC-issued unique identifiers with [LEIs].'' [390] Some commenters recommend phasing in relational database submission either based on geographic regions or by type of information, with several commenters recommending requiring market-based rate information be submitted to the relational database before requiring any Connected Entity Information because most of the market-based rate information is already being collected and reported.[391]

306. Similarly, some commenters recommend that the Commission have a parallel system whereby market-based rate filers continue to submit certain information, *e.g.,* ownership information, as part of the old style filing and simultaneously submit the same information to the relational database.[392] Specifically, APPA states that it would be prudent to temporarily continue elements of existing filing requirements after the new requirements are rolled out, and that once the new filing regime is working as intended, the Commission can discontinue the old filing requirements.[393]

307. Finally, Financial Markets Coalition requests that the Commission provide a process for requesting an extension to the initial submission deadlines and the ongoing reporting deadlines.[394]

C. Commission Determination

308. The submitted comments, feedback received at the August 2016 workshop, and other outreach with the industry and software vendors, indicate a clear concern with regard to the implementation schedule as set forth in the NOPR. In light of these concerns, after further consideration, we are revising the implementation schedule as set forth below. At the outset, we revise the NOPR proposal, such that baseline submissions will be due February 1, 2021, as discussed below.

309. After issuance of this final rule, documentation for the relational database will be posted to the Commission's website, including XML, XSD, the MBR Data Dictionary, and a test environment user guide. Additionally, after issuance of this final rule, a basic relational database test environment will be available to submitters and software developers. The Commission intends to add to the new test environment features on a prioritized, scheduled basis until complete. We note that the Commission will inform the public of when releases will be made publicly available. This will allow internal and external development to occur contemporaneously as new features are made available for outside testing.

310. During this development/testing phase, we encourage feedback from outside testers. To facilitate such feedback, we anticipate that staff will conduct outreach with submitters and external software developers, and make any necessary corrections to available requirements and/or documentation, thereby allowing for the relational database to be fine-tuned prior to the submission of baseline submittals. By so doing, we expect that when the relational database is launched, it will be well-vetted and robust enough to handle the submission of the required data and to appropriately generate reports and respond to queries as needed. Therefore, contrary to commenters' suggestions, once the relational database is launched, existing filing procedures will be altered to require all applicable data to be submitted into the database.

311. In spring 2020,[395] the Commission will make available on its website a User Guide and a list of Frequently Asked Questions regarding the process for preparing and submitting information into the relational database.

312. Lastly, although the effective date of this part of the final rule will be October 1, 2020, submitters will have until close of business on February 1, 2021 to make their initial baseline submissions.

313. In fall 2020, submitters will be required to obtain FERC generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without an EIA code. Specifically, submitters will need to ensure that every ultimate upstream affiliate or other reportable entity has a CID, LEI, or FERC generated ID and that all reportable generation assets have an EIA code or Asset ID. More information on discovering or obtaining these IDs will be published on the Commission's website. Subsequent to the receipt of all necessary IDs, submitters must then submit their baseline submissions into the relational database.

314. Sellers that have received market-based rate authority by December 31, 2020, must make a baseline submission into the relational database by close of business on February 1, 2021. Sellers that have filed for market-based rate authority, but have not received an order granting market-based rate authority as of January 1, 2021, must make a baseline submission into the relational database by close of business on February 1, 2021. The information requirements for these submissions are described above. We note that although Sellers with market-based rate applications filed between the October 1, 2020 effective date of the final rule and February 1, 2021 are required to submit their information into the relational database during this interim period, this information will not be used to process their filings.[396] Thus, such Sellers are also required to submit their indicative screens and asset appendices as attachments to their filings through the eFiling system.

315. As of February 1, 2021, prior to filing an initial market-based rate application, a new Seller will be required to make a submission into the relational database. This will allow the relational database to create the asset appendices and indicative screens and provide the Seller with the serial numbers that it needs to reference in its transmittal letter as discussed above. We affirm that after January 31, 2021, no asset appendices or indicative screens are to be submitted as attachments to filings through the eFiling system.

316. Additionally, in light of this implementation schedule, any changes to the facts and circumstances upon which the Commission relied when granting a Seller market-based rate authorization that take place between October 1, 2020 and December 31, 2020, will need to be filed as a notice of change in status by February 28, 2021, rather than February 1, 2021, thereby allowing for the relational database to be fully populated prior to the filing of such notices of changes in status. Thereafter, future notice of change in status obligations will align with the timeline used for EQRs as described in Ongoing Reporting Requirements section.

[390] EPSA at 5.

[391] *See, e.g., id.* at 9 (proposing requiring ''known'' market-based rate requirements as part of the relational database before migrating ''unknown'' Connected Entity requirements); Working Group at 19–20 (recommending market-based rate relational database submissions occur six months prior to initial Connected Entity submissions).

[392] *See, e.g.,* APPA at 12.

[393] *Id.*

[394] Financial Marketers Coalition at 26.

[395] The dates provided with respect to implementation are the expected dates for such milestones. However, in the event that unforeseen issues develop, the Commission may extend any such dates as necessary.

[396] Sellers are required to submit this information by February 1, 2021 so that their affiliates' asset appendices will be correct and complete.

317. With regard to recommendations that we explore implementation possibilities in a technical workshop focusing on submission issues prior to issuance of the final rule, we note that staff hosted two technical workshops in 2016 and will conduct regular outreach as the database is developed. Thus, we do not find there is a need to hold additional workshops prior to issuance of this final rule. To the extent that the Commission finds that workshops would be helpful after publication of the final rule, it will provide for such workshops.

318. With regard to Financial Marketers Coalition's request that the Commission provide a process for requesting an extension to the initial submission deadlines and the ongoing reporting deadlines, we note that such a request can be submitted similar to the way in which a current request for extension of time would be submitted to the Commission for consideration.[397]

XII. Information Collection Statement

319. OMB regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[398] Upon approval of a collection(s) of information, OMB will assign an OMB control number and expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

320. The Commission is submitting these reporting and recordkeeping requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). The NOPR solicited comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimate, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. Comments received were addressed in their respective sections of this final rule. The final rule adopts data collection requirements that will affect Sellers. The reporting requirements will be included in the FERC–919A information collection.[399] Burden and cost estimates are provided for the information collection.[400] The total number of Sellers has increased since the NOPR was issued; this increase is reflected in the estimates for FERC–919A in the burden chart below.

321. As proposed in the NOPR and adopted in the final rule, the Commission recognizes that there will be an initial implementation burden associated with providing the Commission with the required data. While Sellers already submit most of the requested information to the Commission as part of their initial applications, notices of change in status, and triennial updated market power analyses, we acknowledge that there will be an initial increase in burden associated with providing this information in the new format for submission into the database. Thus, we estimate that the average Seller will spend 35 to 78 hours collecting and providing this information in the first year, mostly as part of the baseline submission requirement. After the initial baseline submission, Sellers will generally only need to make submissions to the database to correct errors in their submissions, update previously submitted information, or submit the indicative screens, submissions that are significantly less burdensome than the baseline submission. Further, we expect that many Sellers will not need to make any submissions to the database after their baseline submissions because they will not have any updates to report and will not need to provide indicative screens. Thus, we estimate that the average Seller will experience an ongoing yearly burden of approximately 1.5 to 6 hours.

322. In contrast to the NOPR, the final rule adopts the requirement that Sellers are required to report changes in status quarterly. This will reduce burden from current change in status filing requirements because Sellers are no longer required to file each change as it occurs, but are required to file the net change that has occurred at the end of the quarter. This reduction in burden is not large enough to properly quantify in the burden chart included below, so we conservatively exclude this reduction from the calculations. Additionally, the reduction in burden from reporting less ownership information than currently required in market-based rate applications is not reflected quantitatively in the calculations below. We estimate that Category 1 sellers will spend close to half of the hours that Category 2 sellers will spend on first year incremental and ongoing burden incurred from this final rule according to comments received about burden to Sellers. Additionally, because Category 1 sellers are not typically affiliated with much generation, we estimate that about one-third of Category 1 sellers will report ongoing monthly and quarterly information.

323. The following table summarizes the estimated burden and cost changes due to the final rule:

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[397] 18 CFR 385.212.

[398] 5 CFR 1320.11.

[399] The new reporting requirements and burden that would normally be submitted to OMB under FERC–919 (OMB Control No 1902–0234) will be submitted under a ''placeholder'' information collection number (FERC–919A). FERC–919 is currently under OMB review for an unrelated FERC activity.

[400] The estimated hourly cost (salary plus benefits) provided in this section are based on the figures for May 2018 posted by the Bureau of Labor Statistics for the Utilities sector (available at *http://www.bls.gov/oes/current/naics2_22.htm*) and updated March 2019 for benefits information (at *http://www.bls.gov/news.release/ecec.nr0.htm*). The hourly estimates for salary plus benefits are:

Legal (code 23–0000), $142.86

Computer and Information Systems Managers (code 11–3021), $98.81

Computer and Mathematical (code 15–0000), $62.89

Information Security Analysts (code 15–1122), $63.54

Information and Record Clerks, All Other (referred to as administrative work in the body) (code 43–4199), $40.84

The following weights were applied to estimate the average hourly costs:

$46 [(.05 * $142.86) + (.95 * $40.84)]

$82 [(.16 * $142.86) + (.16 * $98.81) + (.33 * $62.89) + (.33 * $63.54)

Burden Changes in RM16-17-000										
Respondent/ Incremental Burden Category	Number of Respondents (1)	Annual Number of Responses per Respondent (2)	Total Number of Responses (1)*(2)=(3)	Burden Hours per Response (4)	Hourly Cost per Response (5)	Total Burden Cost Per Response (6)	Total Burden Hours Per Respondent (2)*(4)=(7)	Total Burden Cost Per Respondent (2)*(6)=(8)	Total Annual Burden Hours (1)*(7)=(9)	Total Annual Burden Cost (1)*(8)=(10)
First year, incremental costs associated with the collection of Market-Based Rate information										
Category 1 Sellers	1,000	1	1,000	5	$ 46	$ 230	5	$ 230	5,000	$ 230,000
Category 2 Sellers	1,500	1	1,500	8	$ 46	$ 368	8	$ 368	12,000	$ 552,000
First year, incremental cost of formatting changes and initial filing										
Category 1 Sellers	1,000	1	1,000	30	$ 82	$ 2,460	30	$ 2,460	30,000	$ 2,460,000
Category 2 Sellers	1,500	1	1,500	70	$ 82	$ 5,740	70	$ 5,740	105,000	$ 8,610,000
Ongoing monthly and quarterly reporting of additional Market-Based Rate information										
Category 1 Sellers	1,000	0.33	333	4	$ 46	$ 184	1.3	$ 61	1,332	$ 61,272
Category 2 Sellers	1,500	1	1,500	6	$ 46	$ 276	6	$ 276	9,000	$ 414,000
Sub total for Market-Based Rate					**First year (Cat. 1)**		**35**	**$ 2,690**	**35,000**	**$ 2,690,000**
					First year (Cat. 2)		**78**	**$ 6,108**	**117,000**	**$ 9,162,000**
					Ongoing (Cat. 1)		**1.3**	**$ 61**	**1,332**	**$ 61,272**
					Ongoing (Cat. 2)		**6**	**$ 276**	**9,000**	**$ 414,000**
Total burden changes due to Final Rule RM16-17-000								**First year**	**152,000**	**$11,852,000**
								Ongoing	**10,332**	**$ 475,272**

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324. We estimate that there are 2,500 Sellers based on the number of market-based rate filings; of those approximately 1,000 are Category 1 in all regions and 1,500 are Category 2 in one or more regions. The total Paperwork Reduction Act related cost for Year 1 implementation is $11,852,000 and ongoing cost (starting Year 2) is $475,272.

325. *Titles:* Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities (FERC–919A)

326. *Action:* Revisions to existing information collection.

327. *OMB Control No.:* 1902–TBD.

328. *Respondents for this Rulemaking:* Market-based rate sellers.

329. *Frequency of Responses:* Initial implementation, compliance filing, and periodic updates (monthly and quarterly).

330. *Necessity of Information:* The Commission's data collection requirements and processes must keep pace with market developments and technological advancements. Collecting and formatting data as discussed in this final rule will provide the Commission with the necessary information to identify and address potential manipulative behavior, better inform Commission policies and regulations, and generate asset appendices and organizational charts, all while eliminating duplicative reporting requirements. The new process will also make the information more usable and accessible to the Commission in the least burdensome manner possible.

331. *Internal Review:* The Commission has made a determination that the adopted revisions are necessary in light of technological advances in data collection processes. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimate associated with the information requirements.

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

333. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the Commission, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street NW, Washington, DC 20503, [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–4638, fax: (202) 395–7285].

334. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov*. Comments submitted to OMB should include Docket Number RM16–17–000 and/or, FERC–919A.

XIII. Environmental Analysis

335. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[401] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[402] The actions proposed here fall within a categorical exclusion

[401] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 41 FERC ¶ 61,284 (1987).

[402] Order No. 486, 41 FERC ¶ 61,284.

in the Commission's regulations because they involve information gathering, analysis, and dissemination.[403] Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is required for this final rule and has not been performed.

XIV. Regulatory Flexibility Act

336. The Regulatory Flexibility Act of 1980 (RFA) generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and minimize any significant economic impact on a substantial number of small entities. In lieu of preparing a regulatory flexibility analysis, an agency may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities.

337. *Sellers.* The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[404] The SBA size standard for electric utilities is based on the number of employees, including affiliates.[405] Under SBA's current size standards, an electric utility (one that falls under NAICS codes 221122 [electric power distribution], 221121 [electric bulk power transmission and control], or 221118 [other electric power generation]) [406] are small if it, including its affiliates, employs 1,000 or fewer people.[407]

338. Of the 2,500 affected entities discussed above, we estimate that approximately 74 percent of the affected entities (or approximately 1,850) are small entities. We estimate that each of the 1,850 small entities to whom the proposed modifications apply will incur one-time costs of approximately $4,741 per entity to implement the approved revisions, as well as the ongoing paperwork burden reflected in the Information Collection Statement (approximately $190 per year per entity). We do not consider the estimated costs for these 1,850 small entities to be a significant economic impact. Accordingly, we propose to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

XV. Document Availability

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

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

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

XVI. Effective Dates and Congressional Notification

342. These regulations are effective October 1, 2020. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

Issued: July 18, 2019.

Kimberly D. Bose,

Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35 chapter I, title 18, Code of Federal Regulations, as follows.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r; 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.36 by adding paragraph (a)(10) to read as follows:

§ 35.36 Generality.

(a) * * *

(10) *Ultimate upstream affiliate means* the furthest upstream affiliate(s) in the ownership chain. The term ''upstream affiliate'' means any entity described in § 35.36(a)(9)(i).

* * * * *

■ 3. Amend § 35.37 by:

■ a. Revising paragraphs (a);

■ b. Removing paragraph (c)(4); and

c. Redesignating paragraph (c)(5) through (7) as paragraphs (c)(4) through (6), respectively.

The revision reads as follows:

§ 35.37 Market power analysis required.

(a)(1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: When seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule posted on the Commission's website; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff. The market power analysis must be preceded by a submission of information into a relational database that will include a list of the Seller's own assets, the assets of its non-market-based rate affiliate(s) and identification of its ultimate upstream affiliate(s). The relational database submission will also include information necessary to generate the indicative screens, if necessary, as discussed in paragraph (c)(1) of this section. When seeking market-based rate authority, the relational database submission must also include other market-based information concerning category status, operating reserves authorization, mitigation, and other limitations.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include a description of its ownership structure that identifies all ultimate upstream affiliate(s). With respect to any investors or owners that a Seller represents to be passive, the Seller must affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners' investments and do not confer control. The Seller must also include an appendix of assets and, if necessary, indicative screens as discussed in

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[403] 18 CFR 380.4.

[404] 13 CFR 121.101.

[405] 13 CFR 121.201.

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

[407] 13 CFR 121.201 (Sector 22—Utilities).

paragraph (c)(1) of this section. A Seller must include all supporting materials referenced in the indicative screens. The appendix of assets and indicative screens are derived from the information submitted by a Seller and its affiliates into the relational database and retrievable in conformance with the instructions posted on the Commission's website.

* * * * *

■ 3. Amend § 35.42 by:

■ a. Revising paragraphs (a)(2)(iii) and (iv);

■ b. Adding (a)(2)(v);

■ d. Revising paragraphs (b) and (c); and

■ e. Adding paragraph (d).

The revisions and additions read as follows:

§ 35.42 Change in status reporting requirement.

(a) * * *

(2) * * *

(iii) Owns, operates or controls transmission facilities;

(iv) Has a franchised service area; or

(v) Is an ultimate upstream affiliate.

(b) Any change in status subject to paragraph (a) of this section must be filed quarterly. Power sales contracts with future delivery are reportable once the physical delivery has begun. Sellers shall file change in status in accordance with the following schedule: For the period from January 1 through March 31, file by April 30; for the period from April 1 through June 30, file by July 31; for the period July 1 through September 30, file by October 31; and for the period October 1 through December 31, file by January 31. Failure to timely file a change in status constitutes a tariff violation.

(c) Changes in status must be prepared in conformance with the instructions posted on the Commission's website.

(d) A Seller must report on a monthly basis changes to its previously-submitted relational database information, excluding updates to the horizontal market power screens. These submissions must be made by the 15th day of the month following the change. The submission must be prepared in conformance with the instructions posted on the Commission's website.

Appendix A to Subpart H of Part 35 [Removed]

■ 4. Remove appendix A to subpart H of part 35.

Appendix B to Subpart H of Part 35 [Removed]

■ 5. Remove appendix B to subpart H of part 35.

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

Appendix

LIST OF COMMENTERS AND ACRONYMS

Commenter	Short name/acronym
American Public Power Association	APPA.
AVANGRID, Inc	AVANGRID.
Berkshire Hathaway Energy Company	Berkshire.
Designated Companies (Macquarie Energy LLC, DC Energy, LLC and Emera Energy Services, Inc.)	Designated Companies.
Duke Energy Corporation	Duke.
EDF Renewable Energy, Inc	EDF.
Edison Electric Institute	EEI.
Electricity Consumers Resource Council (ELCON) and The American Forest and Paper Association (AFPA).	ELCON and AFPA.
Energy Ottawa, Inc	Energy Ottawa.
Financial Institutions Energy Group	FIEG.[408]
Financial Marketers Coalition	Financial Marketers Coalition.[409]
Fund Management Parties	FMP.[410]
Futures Industry Association	FIA.
GE Energy Financial Services, Inc	GE.
Independent Generation Owners & Representatives	Independent Generation.
International Energy Credit Association	IECA.
Manitoba Hydro	Manitoba Hydro.
MISO Transmission Owners	MISO TOs.
New Jersey Board of Public Utilities and the Maryland Public Service Commission	New Jersey and Maryland Commissions.
NextEra Energy, Inc	NextEra.

[408] FIEG is comprised of financial institutions that provide a broad range of services to all segments of the U.S. and global economy. Its members and their affiliates play a number of roles in the wholesale power markets, including acting as power marketers (with market-based rate authority), lenders, underwriters of debt and equity securities, and providers of investment capital.)

[409] Financial Marketers Coalition include financial market participants who trade a variety of physical and/or financial products in the organized wholesale electric markets.

[410] FMP includes Ares EIF Management, LLC Monolith Energy Trading LLC and its public utility affiliates,

[411] Working Group includes commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of Working Group are producers, processors, merchandisers, and owners of energy commodities.

LIST OF COMMENTERS AND ACRONYMS—Continued

Commenter	Short name/acronym
Old Dominion Electric Cooperative; The National Rural Electric Cooperative Association; East Kentucky Power Cooperative, Inc.	Joint Cooperatives.
Southern California Edison Company	SoCal Edison.
Starwood Energy Group Global, L.L.C	Starwood.
The Brookfield Companies	Brookfield.
The Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California	CA Cities.
The Commercial Energy Working Group	Working Group.[411]
The Electric Power Supply Association, Independent Power Producers of New York, Inc., and PJM Power Providers Group.	EPSA.
The Independent Market Monitor for PJM	PJM Monitor.
The NRG Companies	NRG.
The Power Trading Institute	PTI.
Transmission Access Policy Group	TAPS.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM16–17–000

Data Collection for Analytics and Surveillance and Market-Based Rate Purposes

(Issued July 18, 2019)

GLICK, Commissioner, *dissenting in part:*

1. I support the aspects of today's final rule that streamline collection of the data needed to regulate market-based rates by creating a relational database and revising certain information requirements. I dissent in part, however, because the Commission is declining to finalize a critical aspect of the underlying notice of proposed rulemaking [1] (NOPR) that would have required Sellers [2] and entities that trade virtual products or that hold financial transmission rights (Virtual/FTR Participants) [3] to report information regarding their legal and financial connections to various other entities (Connected Entity Information). That information is critical to combatting market manipulation [4] and the Commission's retreat from the NOPR proposal will hinder our efforts to detect and deter such manipulation.

2. When it comes to policing market manipulation, context matters. A transaction that seems benign when viewed in isolation may raise serious concerns when viewed with an understanding of the relationships between the transacting parties and/or other market participants.[5] Unfortunately, information regarding the legal and contractual relationships between market participants is not widely available and may, in some cases, be impossible to ascertain without the cooperation of the participants themselves. That lack of information can leave the Commission in the dark and unable to fully monitor wholesale market trading activity for potentially manipulative acts.

3. That problem is particularly acute when it comes to market participants that transact only in virtual or FTR products. Virtual/FTR Participants are very active in RTO/ISO markets and surveilling their activity for potentially manipulative acts consumes a significant share of the Office of Enforcement's time and resources. It may, therefore, be surprising that the Commission collects only limited information about Virtual/FTR Participants and often cannot paint a complete picture of their relationships with other market participants. Similarly, the Commission has no mechanism for tracking recidivist fraudsters who deal in these products and perpetuate their fraud by moving to different companies or participating in more than one RTO or ISO. And, perhaps most egregiously, the Commission's current regulations do not impose a duty of candor on Virtual/FTR Participants, meaning that bad actors can lie with impunity, at least insofar as the Commission is concerned.[6] The abandoned aspects of the NOPR would have addressed all three deficiencies, among others.

4. Those deficiencies have real-world consequences. Consider a recent example from a Commission order of how an individual involved in one manipulative scheme was able to move, rather seamlessly, to allegedly perpetuate a similar scheme at another entity. On July 10, 2019, the Commission issued an Order to Show Cause with an accompanying report and recommendation from the Office of Enforcement that detailed how Federico Corteggiano allegedly engaged in a cross-product market manipulation scheme in the California Independent System Operator's (CAISO).[7] As described in that order, this alleged scheme used techniques that were similar to another manipulative scheme involving Corteggiano while he was employed at Deutsche Bank.[8] Without

[1] *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* 156 FERC ¶ 61,045 (2016) (NOPR).

[2] ''Seller means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.'' 18 CFR 35.36(a)(1) (2018).

[3] As explained in the final rule, the Commission proposed to define the term ''Virtual/FTR Participants'' as entities that buy, sell, or bid for virtual instruments or financial transmission or congestion rights or contracts, or hold such rights or contracts in organized wholesale electric markets, not including entities defined in section 201(f) of the FPA. *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* 168 FERC ¶ 61,039, at P 182 (2019) (Final Rule).

[4] *See, e.g., Cal. ex rel. Lockyer* v. *FERC,* 383 F.3d 1006, 1013 (9th Cir. 2004) (recognizing the role that ''strict reporting requirements'' play in ensuring that rates are just and reasonable and that the markets are not subject to manipulation).

[5] *See* NOPR, 156 FERC ¶ 61,045 at P 43.

[6] In contrast, section 35.41(b) of the Commission's regulations requires a Seller to ''provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission,'' market monitors, RTOs/ISOs, or jurisdictional transmission providers, unless the ''Seller exercises due diligence to prevent such occurrences. Virtual/FTR Participants are not subject to this duty of candor. The Connected Entity portion of the NOPR proposed to add a new section 35.50(d) to the Commission's regulations that would require the same candor from Virtual/FTR Participants in all of their communications with the Commission, Commission-approved market monitors, RTOs, ISOs, and jurisdictional transmission providers. *Id.* at P 20.

[7] *Vitol Inc. and Federico Corteggiano,* 168 FERC ¶ 61,013, at App. A (2019) (Enforcement Staff Report and Recommendation at 1).

[8] Enforcement investigated Corteggiano's conduct at Deutsche Bank, which resulted in the settlement of manipulation allegations with Deutsche Bank for a civil penalty of $1.5 million and disgorgement of $172,645, plus interest, in January 2013. *See Deutsche Bank Energy Trading, LLC,* 142 FERC ¶ 61,056 (2013) (approving a settlement agreement in which Deutsche Bank neither admitted nor denied alleged violations). Although Corteggiano was not identified by name in the Order to Show Cause in the Deutsche Bank enforcement matter, the

the Connected Entity reporting requirements contemplated in the NOPR, the Commission lacks any effective means of tracking individuals who perpetrate a manipulative scheme at one entity and then move locations and engage in similar conduct elsewhere, as Corteggiano is alleged to have done. That makes no sense. We should not be leaving the Office of Enforcement to play ''whack-a-mole,'' addressing recidivist fraudsters only when evidence of their latest fraud comes to light.

5. Alternatively, consider the recent example of GreenHat Energy, LLC's (GreenHat) default on its FTRs in PJM Interconnection, L.L.C. (PJM), at least as it is described in an independent report prepared for PJM's Board.[9] That report alleges that GreenHat told PJM it had bilateral contracts that would provide a future revenue stream, alleviating the need for additional collateral.[10] The report further contends that PJM mistakenly relied on GreenHat's representations and the contracts in question did not provide the promised revenue stream, significantly exacerbating GreenHat's collateral shortfall.[11] Under the Commission's current regulations, no duty of candor attached to GreenHat's allegedly misleading statements. It is, of course, impossible to know how a duty of candor for Virtual/FTR Participants would affect potential misstatements. But, if there were a duty of candor for Virtual/FTR Participants, it would give the Commission a basis for investigating potentially misleading statements and, if appropriate, sanctioning that conduct.[12]

6. Although the Commission does not dispute the benefits that the Connected Entities Information would provide, it ''declines to adopt'' this aspect of the NOPR without any real analysis or explanation and based only on its ''appreciat[ion]'' of the ''difficulties of and burdens imposed by this aspect of the NOPR.'' [13] Nothing in the record suggests that any burdens associated with this reporting obligation would outweigh its considerable benefits. As an initial matter, the NOPR already paired back the scope of Connected Entity Information compared to the previous NOPR addressing this issue.[14] The Commission could have further explored ways to limit the impact of this rule if it were truly concerned about that burden by, for example, eliminating the inclusion of contracts for defining connected entities, which received strong pushback from industry. Alternatively, the Commission could have established a phased-in implementation schedule to provide industry time to adjust to the new reporting requirements.

7. Instead, the Commission makes only a conclusory statement based on an unspecified burden to industry. It makes no effort to explain why that burden outweighs the benefits that Connected Entities Information would provide to the Commission's ability to carry out its enforcement responsibilities. Without such information, the predictable result of today's order is that market participants are more likely to find themselves subject to a manipulative scheme than if we had proceeded to a final rule on these aspects of the NOPR.

* * * * *

8. Identifying, eliminating, and punishing market manipulation must remain one of the Commission's chief priorities, as it has been since Congress vested the Commission with that responsibility when it enacted the 2005 amendments to the FPA in the wake of the Western Energy Crisis.[15] In addition to the financial losses directly attributable to a particular instance of fraud, market manipulation erodes participants' confidence in wholesale electricity markets—a dynamic that has serious deleterious consequences for the long-term health and viability of those markets. Although I appreciate the importance of avoiding unnecessary regulatory burdens, the record in this proceeding indicates that the Connected Entity Information is necessary and would, in the long-term, benefit all market participants, including those subject to the regulations, by helping to ensure confidence in the integrity of wholesale electricity markets.

For these reasons, I respectfully dissent in part.

Richard Glick,
Commissioner.

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public Enforcement Staff Report attached to the order explained his central role in the trading scheme and referred to him by name. *Deutsche Bank Energy Trading, LLC,* 140 FERC ¶ 61,178, at App. A (2012).

[9] I take no position on the accuracy of the events as discussed in that report or whether, even if true, the actions described therein would be improper. I use this report only as an illustrative example of what could occur in the absence of a duty of candor.

[10] Robert Anderson & Neal Wolkoff, *Report of the Independent Consultants on the GreenHat Default* 23–25 (Mar. 26, 2019), *available at https://www.pjm.com/-/media/library/reports-notices/special-reports/2019/report-of-the-independent-consultants-on-the-greenhat-default.pdf.*

[11] *Id.* (the report refers to this as ''a seductive but problematic pledge'').

[12] There is an open Office of Enforcement investigation into GreenHat's alleged misconduct. *PJM Interconnection, L.L.C.,* 166 FERC ¶ 61,072, at P 36 (2019) (noting that ''the Commission's Office of Enforcement began a non-public investigation under Part 1b of the Commission's regulations into whether Green Hat engaged in market manipulation or other potential violations of Commission orders, rules, and regulations'').

[13] Final Rule, 168 FERC ¶ 61,039 at P 184. The Commission also notes that the creation of the relational database for market-based rate purposes will provide value for the Commission's analytics and surveillance program. While true, that will not provide the distinct and critical Connected Entity Information needed to aid the Commission in detecting and deterring market manipulation. Without this information, the Commission continues to have little visibility into Sellers' and Virtual/FTR Participants' affiliates with solely financial market participants.

[14] For example, in the initial proposal, the Commission proposed to collect information concerning ownership, employee, debt, and contractual connections, while this proposal replaced ''employee'' with the much narrower ''trader'' definition and eliminated the reporting of debt instruments. *Compare Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators,* 152 FERC ¶ 61,219, at P 23 (2015) (defining ''Connected Entity'') *with* NOPR, 156 FERC ¶ 61,045 at P 17 (explaining changes from the 2015 proposal to the 2016 proposal); *see also Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators,* 156 FERC ¶ 61,046 (2016) (withdrawing and terminating the proposed 2015 notice of proposed rulemaking).

[15] Energy Policy Act of 2005, Public Law 109–58, § 1283, 119 Stat. 979.

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Part VI

Commodity Futures Trading Commission

17 CFR Part 41

Securities and Exchange Commission

17 CFR Part 242

Customer Margin Rules Relating to Security Futures; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 41

RIN 3038–AE88

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–86304; File No. S7–09–19]

RIN 3235–AM55

Customer Margin Rules Relating to Security Futures

AGENCY: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Joint proposed rules.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'') and the Securities and Exchange Commission (''SEC'') (collectively, the ''Commissions'') are proposing amendments to regulations that establish minimum customer margin requirements for security futures. More specifically, the proposed amendments would lower the margin requirement for an unhedged security futures position from 20% to 15%, as well as propose certain revisions to the margin offset table consistent with the proposed reduction in margin.

DATES: Comments should be received on or before August 26, 2019.

ADDRESSES: Comments should be sent to both agencies at the addresses listed below.

CFTC: You may submit comments, identified by RIN 3038–AE88, by any of the following methods:

- *CFTC Website: https://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 *https://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish for the CFTC 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 CFTC Rule 145.9, 17 CFR 145.9.

The CFTC 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://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 rulemaking 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.

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

Electronic Comments

- Use the SEC's internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–09–19 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–09–19. This file number should be included on the subject line if email is used. To help the SEC process and review your comments more efficiently, please use only one method. The SEC will post all comments on the SEC's website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the SEC's Public Reference Room, 100 F Street NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the SEC does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

Studies, memoranda, or other substantive items may be added by the SEC or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT:

CFTC: Melissa A. D'Arcy, Special Counsel and Sarah E. Josephson, Deputy Director, Division of Clearing and Risk, at (202) 418–5430; and Michael A. Penick, Economist at (202) 418–5279, and Ayla Kayhan, Economist at (202) 418–5947, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SEC: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Associate Director, at (202) 551–5521; Randall W. Roy, Deputy Associate Director, at (202) 551–5522; Sheila Dombal Swartz, Senior Special Counsel, at (202) 551–5545; or Abraham Jacob, Special Counsel, at (202) 551–5583; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

The CFTC is proposing to amend CFTC Rule 41.45(b)(1), 17 CFR 41.45(b)(1), and the SEC is proposing to amend SEC Rule 403(b)(1), 17 CFR 242.403(b)(1),[1] under authority delegated by the Board of Governors of the Federal Reserve System (''Federal Reserve Board'') pursuant to Section 7(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'').[2] The Commissions also are proposing to revise the margin offset table, consistent with the proposed reduction in margin.

I. Background

The Commodity Futures Modernization Act of 2000 (''CFMA''),[3] which became law on December 21, 2000, lifted the ban on trading security futures[4] and established a framework for the joint regulation of security futures by the CFTC and the SEC. A security future is a futures contract on a single security or on a narrow-based security index.[5]

[1] CFTC regulations referred to herein are found at 17 CFR Ch. 1; SEC regulations referred to herein are found at 17 CFR Ch. 2.

[2] 15 U.S.C. 78g(c)(2).

[3] Appendix E of Public Law No. 106–554, 114 Stat. 2763 (2000).

[4] *See* Section 1a(31) of the Commodity Exchange Act (''CEA''), 7 U.S.C. 1a(44); and Section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55) (defining the term ''security future'').

[5] *Id.* A ''security future'' is distinguished from a ''security futures product,'' which is defined to include security futures as well as any put, call, straddle, option, or privilege on any security future. *See* Section 1a(45) of the CEA, 7 U.S.C. 1a(45); and Section 3(a)(56) of the Exchange Act, 15 U.S.C. 78c(a)(56) (defining the term ''security futures product''). Futures on indexes that are not narrow-based security indexes are subject to the exclusive jurisdiction of the CFTC. This rule proposal applies only to margin on security futures and not to margin on options on security futures. For the purposes of this proposal, most discussion will relate to security futures only. For the sake of clarity and consistency, the term ''security futures products'' will be used when discussing security futures and the options on security futures together throughout this proposal. Under CEA Section 2(a)(1)(D)(iii)(II) and Exchange Act Section 6(h)(6), the CFTC and SEC may, by order, jointly determine to permit the listing of options on security futures; that authority has not been exercised.

A. Applicable Statutory Framework

As part of the statutory scheme for the regulation of security futures, the CFMA provided for the issuance of regulations governing customer margin for security futures. Customer margin for security futures includes two types of margin, (i) initial margin, and (ii) maintenance margin. Together, the initial and maintenance margin must satisfy the required margin established by the Commissions.[6]

The CFMA added a new subsection (2) to Section 7(c) of the Exchange Act,[7] which directs the Federal Reserve Board to prescribe regulations establishing initial and maintenance customer margin requirements imposed by brokers, dealers, and members[8] of national securities exchanges[9] for security futures. In addition, Section 7(c)(2) provides that the Federal Reserve Board may delegate this rulemaking authority jointly to the Commissions.

Section 7(c)(2)(B) of the Exchange Act provides that the customer margin requirements, ''including the establishment of levels of margin[10] (initial and maintenance) for security futures products,'' must satisfy four requirements. First, they must preserve the financial integrity of markets trading security futures products. Second, they must prevent systemic risk. Third, they must (1) be consistent with the margin requirements for comparable options traded on any exchange registered pursuant to Section 6(a) of the Exchange Act;[11] and (2) provide for initial and maintenance margin levels that are not lower than the lowest level of margin, exclusive of premium, required for any comparable exchange-traded options. Fourth, they must be, and remain consistent with, the margin requirements established by the Federal Reserve Board under Regulation T (''Regulation T'').[12]

With regard to the third requirement, there is limited legislative history[13] regarding how or why the comparison should be to exchange-traded options. As discussed further below, under certain circumstances the products behave similarly in terms of their overall risk profiles. However, from the perspective of market participants, exchange-traded options and security futures often serve two distinct economic functions.

Exchange-traded options are tools for hedging and speculating on the underlying equity markets. On the other hand, security futures are ''delta one derivatives''[14] that are more similar to total return equity swaps insofar as they provide exposure to equities without requiring ownership of the underlying instrument. Specifically, security futures are used to (1) establish synthetic long or short exposure to the underlying equity security or equity securities, and/or (2) temporarily transfer securities, similar to securities

[6] Initial margin must be deposited as collateral when a customer makes an initial investment in security futures. Maintenance margin is the minimum amount a customer must maintain in its margin account while owning security futures. If a customer's margin level falls below the maintenance margin amount, a customer may be required to make an additional deposit. Maintenance margin for security futures is different from variation settlement. Variation settlement is a daily or intraday mark to market payment for a security future. *See* CFTC Rule 41.43(a)(32), 17 CFR 41.43(a)(32); SEC Rule 401(a)(32), 17 CFR 242.401(a)(32).

[7] 15 U.S.C. 78g(c)(2).

[8] Futures commission merchants (as defined in Section 1(a)(28) of the CEA), which may be members of national securities exchanges, clearing members at clearinghouses, or customers of clearing members at clearinghouses, are discussed in detail below.

[9] OneChicago, LLC (''OCX''), the only U.S. national securities exchange currently listing security futures, filed a rulemaking petition, dated August 1, 2008, requesting that the minimum required margin for unhedged security futures be reduced from 20% to 15%. Letter from Donald L. Horwitz, Managing Director and General Counsel, OCX, to David Stawick, Secretary, CFTC, and Nancy M. Morris, Secretary, SEC, dated Aug. 1, 2008, at 2 (''OCX Petition''). OCX also is a designated contract market registered with the CFTC.

[10] The terms ''margin level'' and ''level of margin'', when used with respect to a security futures product, mean the amount of margin required to secure any extension or maintenance of credit, or the amount of margin required as a performance bond related to the purchase, sale, or carrying of a security futures product. 15 U.S.C. 78c(a)(57)(B).

[11] Given the statutory language, for the sake of clarity and consistency, the term ''comparable exchange-traded options'' will be used to describe single stock options throughout this proposal.

[12] 12 CFR 220 *et seq.*

[13] For example, earlier versions of the statutory language stated that margin should be set at levels appropriate to ''prevent competitive distortions between markets offering similar products'', and the reasons given for instituting the margin requirements was that ''[u]nder the bill, margin levels on these products would be required to be harmonized with the options markets.'' *See* S. Report 106–390 (Aug. 25, 2000) at pp.5 and 39.

[14] Delta one derivatives are financial instruments with a delta that is close or equal to one. Delta measures the rate of change in a derivative relative to a unit of change in the underlying instrument. Delta one derivatives have no optionality, and therefore, as the price of the underlying instrument moves, the price of the derivative is expected to move at, or close to, the same rate.

lending or equity repurchase agreements.[15] However, while exchange-traded options and security futures can serve distinct economic functions, they generally share similar risk profiles for purposes of assessing margin. For example, both short security futures positions and certain exchange-traded options strategies produce unlimited downside risk. Investors in security futures and writers of options may lose their margin deposits and premium payments and be required to pay additional funds. As a result, the margin requirements for security futures can be compared to margin practices for exchange-traded options in order to determine appropriate margin levels.

In comparison, security futures traded in Europe are subject to risk-based margin calculations that differ from the margin requirements that apply to security futures in the U.S. LCH Ltd. applies a Standard Portfolio Analysis of Risk (''SPAN'') margin methodology for the security futures it clears,[16] and Eurex applies portfolio-based margining through its new margin methodology, Eurex Clearing Prisma, to its cleared security futures.[17] As described below, in the U.S., security futures may be portfolio margined under current rules only if they are held in a securities account.[18]

B. Prior Regulatory Action by the Commissions

On March 6, 2001, the Federal Reserve Board delegated its authority under Section 7(c)(2) to the Commissions.[19] Pursuant to that authority, the SEC and the CFTC adopted customer margin requirements for security futures.[20]

The 2002 Final Rules establish margin requirements for security futures to be collected by security futures intermediaries from their customers.[21] A security futures intermediary is a creditor, as defined under Regulation T, with respect to its financial relations with any person involving security futures, and includes registered entities such as brokers, dealers, and futures commission merchants (''FCMs'').[22] The amendments proposed today to CFTC regulation 41.45(b)(1) and SEC rule 242.403(b)(1) concern the minimum required margin such entities would be required to collect from customers in this context.

In the 2002 Final Rules, the Commissions established minimum initial and maintenance margin levels for unhedged security futures at 20% of their ''current market value.'' [23] In addition, the Commissions' rules permit self-regulatory organizations and self-regulatory authorities (together ''SROs''),[24] to set margin levels lower than 20% of current market value for customers with certain strategy-based offset positions involving security futures and one or more related securities or futures.[25]

Neither the current regulations nor the proposed amendments prohibit SROs or security futures intermediaries from establishing higher initial or maintenance margin levels than the required margin or from taking appropriate action to preserve their own financial integrity.[26] SROs and security futures intermediaries may determine that higher margin levels are required for security futures under certain market conditions. Similar to current regulations, the Commissions are proposing to preserve this flexibility because it is important for SROs and security futures intermediaries to be able to manage their customers' risks appropriately.

The Commissions enumerated specific exclusions from the margin rule for security futures, and those exclusions would continue under the proposed amendments.[27] For example, margin requirements that derivatives clearing organizations (''DCOs'') or clearing agencies impose on their members are not subject to the 20% security futures margin requirement, as this provides clearinghouses flexibility and discretion in managing their members' exposures. In addition, Section 7(c)(2) of the Exchange Act does not confer authority over margin requirements for clearing agencies and DCOs.[28] The margin rules of clearing agencies registered with the SEC are approved by the SEC pursuant to Section 19(b)(2) of the Exchange Act.[29] The CFTC has authority to ensure compliance with core principles for DCOs registered with the CFTC under Sections 5b and 5c of the CEA.[30]

Another exclusion is for margin calculated by a portfolio margining system under rules that meet the four criteria set forth in Section 7(c)(2)(B) of the Exchange Act [31] and that have been approved by the SEC and, as applicable, the CFTC.[32] Subsequent to the adoption of 2002 Final Rules, and consistent with the exclusion, three SROs [33] initiated

[15] *See e.g.,* OCX (describing trading strategies for security futures), *available at https://www.onechicago.com/?page_id=25157.*

[16] *See* LCH's discussion of ''London SPAN'', *available at https://www.lch.com/risk-collateral-management/group-risk-management/risk-management-ltd/ltd-margin-methodology/london.*

[17] *See* Eurex Exchange's discussion of ''Risk parameters and initial margins'', *available at http://www.eurexchange.com/exchange-en/market-data/clearing-data/risk-parameters.*

[18] *See* the Financial Industry Regulatory Authority, Inc. (''FINRA'') Rule 4210(g) and the Cboe Exchange, Inc. (''CBOE'') Rule 12.4. *See also* Section 713 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). Public Law 111–203,124 Stat. 1376 (2010). The Dodd-Frank Act provided the SEC and CFTC with authority to facilitate portfolio margining by allowing cash and securities to be held in a futures account, and futures and options on futures and related collateral to be held in a securities account, subject to certain conditions. *See* Exchange Act Section 15(c)(3)(C) and CEA Section 4d(h), 15 U.S.C. 78o(c)(3)(C), and 7 U.S.C. 6d(h).

[19] Letter from Jennifer J. Johnson, Secretary of the Board, Federal Reserve Board, to James E. Newsome, Acting Chairman, CFTC, and Laura S. Unger, Acting Chairman, SEC (Mar. 6, 2001) (''FRB Letter''), reprinted as Appendix B to Customer Margin Rules Relating to Security Futures, 66 FR 50720, 50741 (Oct. 4, 2001) (joint proposed rulemaking by the Commissions) (''2001 Proposed Rules'').

[20] *See Customer Margin Rules Relating to Security Futures,* 67 FR 53146 (Aug. 14, 2002) (joint rulemaking by the Commissions, hereinafter the ''2002 Final Rules''); 17 CFR 41.42–41.49 (CFTC regulations); 17 CFR 242.400–242.406 (SEC regulations).

[21] *See* CFTC Rule 41.45(a), 17 CFR 41.45(a); SEC Rule 403, 17 CFR 242.403.

[22] *See* CFTC Rule 41.43(a)(29), 17 CFR 41.43(a)(29); SEC Rule 401(a)(29), 17 CFR 242.401(a)(29). A security future is both a security and a future, so customers who wish to buy or sell security futures must conduct the transaction through a person registered both with the CFTC as either an FCM or an introducing broker and the SEC as a broker-dealer. The term ''security futures intermediary'' includes FCMs that are clearing members or customers of clearing members of the Options Clearing Corporation (''OCC''), which is the clearinghouse that clears security futures listed on OCX.

[23] *See* CFTC Rule 41.45(b)(1), 17 CFR 41.45(b)(1); SEC Rule 403(b)(1), 17 CFR 242.403(b)(1). *See also* CFTC Rule 41.43(a)(4), 17 CFR 41.43(a)(4); SEC Rule 401(a)(4), 17 CFR 242.401(a)(4) (defining the term ''current market value'').

[24] For the sake of clarity and consistency, the defined term ''SRO'' will be used to describe self-regulatory organizations and self-regulatory authorities throughout this proposal. ''Self-regulatory authority'' is defined at CFTC Rule 41.43(a)(30), 17 CFR 41.43(a)(30) and SEC Rule 401(a)(30), 17 CFR 242.401(a)(30).

[25] *See* CFTC Rule 41.45(b)(2), 17 CFR 41.45(b)(2); SEC Rule 403(b)(2), 17 CFR 242.403(b)(2).

[26] *See* CFTC Rule 41.42(c)(1), 17 CFR 41.42(c)(1); SEC Rule 400(c)(1), 17 CFR 242.400(c)(1).

[27] *See* CFTC Rule 41.42(c)(2)(i)–(v), 17 CFR 41.42(c)(2)(i)–(v); SEC Rule 400(c)(2)(i)–(v), 17 CFR 242.400(c)(2)(i)–(v).

[28] *See* CFTC Rule 41.42(c)(2)(iii), 17 CFR 41.42(c)(2)(iii); SEC Rule 400(c)(2)(iii), 17 CFR 242.400(c)(2)(iii). *See also* 15 U.S.C. 78g(c)(2) and FRB Letter (''The authority delegated by the [Federal Reserve Board] is limited to customer margin requirements imposed by brokers, dealers, and members of national securities exchanges. It does not cover requirements imposed by clearing agencies on their members.'').

[29] 15 U.S.C. 78s(b)(2).

[30] 7 U.S.C. 7a–1 and 7 U.S.C. 7a–2.

[31] 15 U.S.C. 78g(c)(2)(B).

[32] *See* CFTC Rule 41.42(c)(2)(i), 17 CFR 41.42(c)(2)(i); SEC Rule 400(c)(2)(i), 17 CFR 242.400(c)(2)(i).

[33] The three SROs that proposed pilot programs are FINRA, the New York Stock Exchange LLC (''NYSE'') and CBOE (formerly known as Chicago

pilot programs for risk-based portfolio margining rules that permit a security futures intermediary to combine certain of a customer's securities and futures positions in a securities portfolio margin account to compute the customer's margin requirements based on the net market risk of all the customer's positions in the account.[34] As discussed in more detail below, these SRO risk-based portfolio margin rules established a margin requirement for unhedged exchange-traded options and security futures of 15% (*i.e.,* a valuation point range of +/− 15%).[35] In proposed rule filings seeking to make the pilots permanent, the SROs noted that they did not encounter any problems or difficulties relating to such pilot programs.[36] These SRO risk-based portfolio margining rules—originally adopted as a pilot program—became permanent in 2008. These SRO rules require 15% margin (*i.e.,* a valuation point range of +/− 15%) for an unhedged exchange-traded option on an equity security or narrow-based index.[37]

Subsequent to the adoption of 2002 Final Rules, each Commission adopted rules to enhance core principles and standards for the operation and governance of DCOs and covered clearing agencies that, as discussed below, also are generally applicable to the clearance and settlement of security futures. In 2011, the CFTC issued regulations applicable to DCOs, including CFTC Rule 39.13, which concerns margin—both initial and variation margin—that is required to be collected by a DCO from its clearing members.[38] Any DCO clearing security futures is subject to CFTC Rule 39.13,[39] and most of the requirements under CFTC Rule 39.13 apply broadly to all transactions cleared by the DCO, but in some cases security futures transactions are excluded.[40] Any of a DCO's clearing members that are FCMs and that are clearing security futures on behalf of customers would be subject to CFTC Rule 41.45(b)(1).[41]

In 2016, the SEC adopted final rules applicable to clearing agencies registered with the SEC, including SEC Rule 17Ad–22(e)(6), to establish enhanced standards for the operation and governance of registered clearing agencies that meet the definition of ''covered clearing agency.[42] This rule requires a covered clearing agency that provides central clearing services to establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, cover its credit exposures to its participants by establishing a risk-based margin system that meets certain minimum standards prescribed in the rule.[43] OCC, as a covered clearing agency, is subject to these rules, and its broker-dealer clearing members that clear security futures are subject to SEC Rule 403(b)(1).[44]

C. Consideration of SROs' Risk-Based Portfolio Margining Approaches

As discussed below, the Commissions are proposing to amend the customer margin requirements for security futures that are held outside of risk-based portfolio margining accounts. This amended margin requirement would equal the level of margin required to be collected for security futures under risk-based portfolio margining methodologies. The amended margin requirement also would equal the margin requirement for an unhedged exchange-traded option held in a securities portfolio margin account. Security futures and exchange-traded options held in securities accounts are permitted to take advantage of SRO risk-based portfolio margining, and the Commissions are seeking to align the margin requirement for security futures not held in portfolio margin accounts (by lowering their overall margin rate) with security futures and exchanged-traded options held in these securities accounts.

Under the SRO risk-based portfolio margining rules, the minimum initial and maintenance margin on a customer's entire portfolio, including an unhedged position in a security future or exchange-traded option, shall be the greater of: (i) The amount of any of the ten equidistant valuation points representing the largest theoretical loss in the portfolio as calculated under the rule,[45] or (ii) the total calculated by multiplying $0.375 for each position by the instrument's multiplier, not to

Board Options Exchange, Inc.). The SEC has regulatory authority over all three SROs. In 2010, the CBOE conducted a restructuring transaction in which CBOE became a wholly-owned subsidiary of CBOE Holdings, Inc. The CFTC regulates the Cboe Futures Exchange, LLC (a wholly-owned subsidiary of CBOE Holdings, Inc.) as a designated contract market under Section 5 of the CEA.

[34] *See* Exchange Act Release No. 55471 (Mar. 14, 2007), 72 FR 13149 (Mar. 20, 2007) (SR–NASD–2007–013, relating to the National Association of Securities Dealers' (now known as FINRA) rule change to permit members to adopt a portfolio margin methodology on a pilot basis); Exchange Act Release No. 54918 (Dec. 12, 2006), 71 FR 75790 (Dec. 18, 2006) (SR–NYSE–2006–13, relating to further amendments to the NYSE's portfolio margin pilot program); Exchange Act Release No. 54919 (Dec. 12, 2006), 71 FR 75781 (Dec. 18, 2006) (SR–CBOE 2006–14, relating to amendments to CBOE's portfolio margin pilot program to include security futures); Exchange Act Release No. 54125 (Jul. 11, 2006), 71 FR 40766 (Jul. 18, 2006) (SR–NYSE–2005–93, relating to amendments to the NYSE's portfolio margin pilot program to include security futures); Exchange Act Release No. 52031 (Jul. 14, 2005), 70 FR 42130 (Jul. 21, 2005) (SR–NYSE–2002–19, relating to the NYSE's original portfolio margin pilot proposal); Exchange Act Release No. 52032 (Jul. 14, 2005), 70 FR 42118 (Jul. 21, 2005) (SR–CBOE–2002–03, relating to the CBOE's original portfolio margin pilot proposal).

[35] *See* discussion in section I.C. below.

[36] *See* Exchange Act Release No. 58251 (Jul. 30, 2008), 73 FR 45506 (Aug. 5, 2008) (SR–FINRA–2008–041, relating to the FINRA's proposal to make the portfolio margin pilot program permanent under NASD Rule 2520(g) and Incorporated NYSE Rule 431(g)); Exchange Act Release No. 58243 (Jul. 29, 2008), 73 FR 45505 (Aug. 5, 2008) (SR–CBOE–2008–73, relating to the CBOE's proposal to make the portfolio margin pilot program permanent); and Exchange Act Release No. 58261 (Jul. 30, 2008), 73 FR 46116 (Aug. 7, 2008) (SR–NYSE–2008–66, relating to the NYSE's proposal to make the portfolio margin pilot program permanent). FINRA Rule 4210 (Margin Requirements) became effective December 2, 2010. *See* Exchange Act Release No. 62482 (July 12, 2010) 75 FR 41562 (July 16, 2010) (SR–FINRA–2010–024, relating to FINRA's proposal to adopt FINRA Rule 4210 (Margin Requirements) as part of the process of developing a consolidated FINRA rulebook) and FINRA Regulatory Notice 10–45. As of February 14, 2019, of the 3,777 broker-dealers registered with the SEC, FINRA is the designated examining authority for 3,654 firms (96.7%).

[37] *Id.*

[38] *See DCO General Provisions and Core Principles,* 76 FR 69334, 69364–69379 (Nov. 8, 2011).

[39] The CFTC adopted enhanced risk management requirements for all registered DCOs in 2011. *See id.*

[40] For example, CFTC Rule 39.13(g)(8)(ii) (requiring DCOs to collect customer initial margin, for non-hedge positions, at a level that is greater than 100% of the DCO's initial margin requirements) does not apply to initial margin collected for security futures positions. In September 2012, the CFTC's Division of Clearing and Risk issued an interpretive letter regarding CFTC Rule 39.13(g)(8)(ii) to provide clarifications to DCOs complying with the rule. CFTC Letter No. 12–08 (Sept. 14, 2012). CFTC Letter No. 12–08 states that the customer margin rule under CFTC Rule 39.13(g)(8)(ii) ''does not apply to customer initial margin collected as performance bond for customer security futures positions.'' CFTC Letter No. 12–08 is limited in its discussion to CFTC Rule 39.13(g)(8)(ii) only and, accordingly, the remaining provisions of CFTC Rule 39.13 continue to apply to DCOs clearing security futures.

[41] Currently, the OCC is the only clearinghouse in the United States that clears security futures. OCC is registered with the SEC as a clearing agency pursuant to Section 17A of the Exchange Act and registered with the CFTC as a DCO pursuant to Section 5b of the CEA.

[42] *See Standards for Covered Clearing Agencies,* Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016).

[43] 17 CFR 240.17Ad–22(e)(6).

[44] 17 CFR 242.403(b)(1).

[45] The actual percentage used to stress a financial instrument will depend on the financial instrument. For example, the up/down market move (high and low valuation points) is +6%/−8% for high capitalization, broad-based market indexes; +/−10% for non-high capitalization, broad-based market indexes; and +/−15% for any other eligible product that is, or is based on, an equity security or a narrow-based index. *See* FINRA Rule 4210(g)(2)(F) and CBOE Rule 12.4(a)(11). Portfolio types containing volatility indexes are subject to market moves of +/−20% for 30-day implied volatility, and +/−40% for 9-day implied volatility. *See* CBOE Rule 12.4(a)(11).

exceed the market value in the case of long positions.[46]

The SRO risk-based portfolio margining system approved by the SEC is a methodology for determining a customer's margin requirement by calculating the greatest theoretical loss on a portfolio of financial instruments at ten equidistant points along a range representing a potential percentage increase and decrease in the value of the instrument or underlying instrument in the case of a derivative. Theoretical gains and losses for each instrument in the portfolio are netted at each valuation point along the range to derive a potential portfolio-wide gain or loss for the point. Under current SRO risk-based portfolio margining rules, the range of theoretical gains and losses for portfolios of security futures and exchange-traded options that are based on a single equity security or narrow-based index is a market increase of 15% and a decrease of 15% (*i.e.,* the valuation points would be +/− 3%, 6%, 9%, 12%, and 15%).[47]

In addition to requiring a 15% margin for unhedged security futures and exchange-traded options, as a pre-condition to offering portfolio margining to customers under the SRO risk-based portfolio margining system, security futures intermediaries are required to establish a comprehensive, written risk analysis methodology to assess the potential risk to the security futures intermediary's capital over a specified range of possible market movements for positions held in a securities portfolio margin account.[48]

D. Consideration of Statutory Requirements

As noted above, in Section 7(c)(2)(B)(iii) of the Exchange Act[49] Congress provided that the margin requirements for security futures must be consistent with the margin requirements for comparable exchange-traded options, and that the initial and maintenance margin levels for security futures may not be lower than the lowest level of margin, exclusive of premium, required for any comparable exchange-traded option.

As noted above, despite some distinct economic uses for exchange-traded options and security futures, both products share similar risk profiles. Accordingly, the Commissions are proposing to apply margin requirements to security futures that are consistent with the margin requirements for comparable exchange-traded options.

In summary, as discussed in detail below, because unhedged exchange-traded options and security futures in SRO risk-based portfolio margining programs were permitted to be margined at a lower 15% rate as early as 2008, when the SRO risk-based portfolio margining programs became permanent,[50] the Commissions are proposing to amend their joint margin rules relating to security futures to reduce the minimum required margin for unhedged security futures from 20% to 15%, reflecting the current margin requirements available for comparable exchange-traded options.[51]

With regard to the other three statutory requirements, the Commissions preliminarily believe this proposed action is consistent with preserving the financial integrity of the security futures market, is unlikely to lead to systemic risk, and is consistent with the margin requirements established by the Federal Reserve Board under Regulation T.[52]

II. DISCUSSION

A. Minimum Margin for Unhedged Positions

1. Current Security Futures Margin Rules

Under existing CFTC and SEC regulations, the current minimum initial and maintenance margin levels required of customers for each unhedged long or short position in security futures is 20% of the current market value of such a security future.[53] This margin level was based on the margin requirements for an unhedged short, at-the-money exchange-traded option in 2002.[54] Currently, the margin requirement for an unhedged short, at-the-money exchange-traded option held in a customer account that is not subject to SRO risk-based portfolio margining, where the underlying instrument is either an equity security or a narrow-based index of equity securities, is 100% of the exchange-traded option proceeds, plus 20% of the value of the underlying security or narrow-based index.[55]

2. SRO Risk-Based Portfolio Margin Accounts May Hold Comparable Exchange-Traded Options

When the Commissions adopted the 2002 Final Rules, market participants had no opportunity to margin short exchange-traded options on an equity security or a narrow-based index, at a rate lower than 20%. Therefore, according to Section 7(c)(2)(B)(iii)(II) of the Exchange Act, the Commissions could not establish a margin level for security futures that was lower than the 20% margin level applicable to exchange-traded options. Now, after the adoption of the SRO risk-based portfolio margining for securities customer accounts, market participants may choose to hold their exchange-traded options in accounts that are margined at levels of 15% or lower.[56]

At the time of the 2002 Final Rules, the SROs had not yet proposed portfolio margining rules for exchange-traded options. As of the publication of the 2002 Final Rules, all short exchange-traded options on an equity security or a narrow-based index were required to satisfy a 20% margin rate and it was the Commissions' view that security futures should be subject to the same margin rate for those comparable exchange-traded options.

Today, there is an alternative margin methodology for exchange-traded options that are held in a securities

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[46] *See* FINRA Rule 4210(g)(7) and CBOE Rule 12.4(e).

[47] A theoretical options pricing model is used to derive position values at each valuation point for the purpose of determining the gain or loss. *See* FINRA Rule 4210(g)(2)(F) (defining the term ''theoretical gains and losses''). For example, assuming that the 15% market move creates the largest theoretical loss in the portfolio and that security futures have a linear function (*i.e.,* a price movement in the underlying instrument will translate into a specific dollar value change in the security future), the initial and maintenance margin for a security future will equal close to 15% of the overall unhedged security futures portfolio.

[48] *See* FINRA Rule 4210(g)(1) and CBOE Rule 15.8A. *See also* CFTC Rule 1.11 (requiring FCMs to establish risk management programs that address market, credit, liquidity, capital and other applicable risks, regardless of the type of margining offered).

[49] 15 U.S.C. 78g(c)(2)(B)(iii).

[50] *See supra* note 36.

[51] *See* 2001 Proposed Rules, 66 FR at 50726 (''Pending adoption of such [portfolio margin] systems by regulatory authorities, however, the 20 percent level is consistent with the current requirements for comparable equity options.'').

[52] As discussed in the CFTC's Consideration of Costs and Benefits and the SEC's Economic Analysis, in sections IV.A and B, respectively, the Commissions believe that margin coverage is sufficient and tailored to preserve financial integrity and prevent systemic risk in the security futures market.

[53] *See* CFTC Rule 41.45(b), 17 CFR 41.45(b); SEC Rule 403(b), 17 CFR 242.403(b).

[54] *See* 2002 Final Rules, 67 FR at 53157.

[55] *See generally* FINRA Rule 4210 and CBOE Rule 12.3. For long, exchange-traded options, the purchaser is generally required to pay the full amount of the contract.

[56] As stated above, SRO risk-based portfolio margin rules permit a security futures intermediary to combine certain of a customer's securities positions to compute margin requirements. In cases where a customer holds hedged positions (such as options) on the same underlying security, the portfolio margin requirement may be less than 15%. For purposes of the analysis of the proposed rule amendments, however, the Commissions are determining whether the proposed 15% margin requirement for an unhedged security future held outside a securities portfolio margin account is comparable to a 15% margin requirement for unhedged exchanged-traded options held in a securities portfolio margin account.

margin account and subject to permanent portfolio margin requirements implemented successfully by market participants. The Commissions preliminarily believe that they have satisfied the third prong of the Exchange Act's margin requirements to determine that the margin rate for security futures should be consistent with the margin rate for those exchange-traded options. The Commissions preliminarily believe there is sufficient basis to make that determination at this time, and are proposing that the margin rate for unhedged security futures be consistent with, and the same as, the margin rate for unhedged exchange-traded options held in a risk-based portfolio margining account.

3. Minimum Levels of Margin Required for Security Futures

Congress stated explicitly that the margin level for a security future should not be lower than the lowest level of margin for any comparable exchange-traded option,[57] but it did not state a specific amount that the Commissions would be required to set as a minimum margin requirement. Today, there are exchange-traded options based on an equity security or narrow-based index that are margined at 15%, or lower, as a result of portfolio margining that is now being offered by a number of SROs. Congress intended for the Commissions to set a margin level for a security future that was not lower than the margin rate required for comparable exchange-traded options, which is to say that the Commissions cannot set a margin rate for security futures lower than 15%. The margin required for an unhedged exchange-traded option in a risk-based portfolio margin account, calculated using the SROs' current rules, will equal 15% or less of the underlying equity security's value, because the largest theoretical loss produced by shocking the portfolio will not be more than 15%.

Because the current SRO required margin levels for unhedged exchange-traded options held in a portfolio margin account are set at a level based on shocking the portfolio at 15% price movements, the Commissions preliminarily believe that the unhedged security futures margin rate should not be lower than 15%. Therefore, the Commissions' proposal to lower the margin requirement for security futures complies with the statutory requirement that the margin level for a security future be consistent with the margin for any comparable exchange-traded option.

4. The Commissions Have Authority to Determine Which Exchange-Traded Options Are Comparable to Security Futures

In this proposal, the Commissions seek to align the margin rate for security futures with the lower portfolio-based margin rate for exchange-traded options because the Commissions view exchange-traded options held in portfolio margin accounts as comparable to security futures that may be held alongside the exchange-traded options.

Congress did not instruct the Commissions to set the margin requirement for security futures at the same exact level as the margin requirements for exchange-traded options. The Commissions are required to establish a margin requirement that is ''consistent'' with the margin requirements for ''comparable'' exchange-traded options. Because the Commissions have some flexibility in establishing the margin rate for security futures, the Commissions are making the determination that establishing the margin rate for unhedged security futures at the same rate as the margin rate for exchange-traded options that are held alongside security futures inside a portfolio margin account subject to an SRO's portfolio margining rules will provide the most consistent result for security futures.

The Commissions are proposing to decrease the margin requirement for unhedged security futures from 20% to 15% in order to reflect the comparability between unhedged security futures and exchange-traded options that are held in risk-based portfolio margin accounts. The SRO portfolio margining rules, upon which this change is based, are discussed in more detail below.

The Commissions explained in the 2001 proposing release for customer margin for security futures that ''the Federal Reserve Board has expressed the view that 'more risk-sensitive, portfolio-based approaches to margining security futures products' should be adopted [citing the FRB Letter]. Pending adoption of such systems by regulatory authorities, however, the 20% level is consistent with the current requirements for comparable equity options.'' [58]

With the adoption of the SRO securities risk-based portfolio margining rules—including portfolio margining for security futures—the Commissions have preliminarily determined that a proposed minimum margin level of 15% meets the comparability standard of Section 7(c)(2) of the Exchange Act.[59] Under the SROs' securities risk-based portfolio margining rules, a security futures intermediary may combine a customer's related products and calculate margin for a group of similar products on a portfolio margin basis. Each group of products may be subject to a different margin calculation, depending on its risk profile.[60] Portfolios containing exchange-traded options and security futures based on the same underlying security, such as an individual equity or narrow-based index are grouped together.[61] SRO rules calculate the margin requirement for these exchange-traded options and security futures by exposing the instruments to market moves that are +/−15%. The Commissions are proposing to allow security futures intermediaries to margin security futures held outside of these portfolios the same as security futures held inside of the portfolios with other instruments. As a result of this change, security futures held in futures accounts and strategy-based securities margin accounts would be subject to the same margin requirements as unhedged security futures held in securities portfolio margin accounts. The Commissions are proposing to require 15% margin for unhedged security futures because it would bring security futures held outside of a securities portfolio margin account into alignment with the margin requirements for unhedged security futures held within a securities account using risk-based portfolio margining.

5. The Margin Requirements Are Consistent for Comparable Exchange-Traded Options

Under the statutory requirement, customer margin requirements,

[57] 15 U.S.C. 78g(c)(2)(B)(iii)(II).

[58] *See* 2001 Proposed Rules, 66 FR at 50726.

[59] *See* 15 U.S.C. 78g(c)(2).

[60] Each of the SROs has different portfolio types that will be margined according to the portfolio's risk profile. These portfolio types include: (i) High capitalization, broad-based market index (margin required is calculated using +6/−8% market moves), (ii) non-high capitalization, broad-based market index (margin required is calculated using +/−10% market moves), (iii) narrow-based index (margin required is calculated using +/−15% market moves), (iv) individual equity (margin required is calculated using +/−15% market moves), (v) volatility index (30-day implied) (margin required is calculated using +/−20% market moves), and (vi) volatility index (9-day implied) (margin required is calculated using +/−40% market moves). *See, e.g.,* FINRA Rule 4210(g)(2)(F) and CBOE Rule 12.4(a)(11).

[61] Certain portfolios are allowed offsets such that, at the same valuation point, for example, 90% of a gain in one portfolio may reduce or offset a loss in another portfolio. These offsets would be allowed between portfolios within the narrow-based index group, but not for class groups containing different individual equity securities or eligible products (such as options and security futures) as the underlying security.

including the establishment of levels of margin (initial and maintenance) for security futures must be consistent with the margin requirements for comparable options traded on any exchange registered pursuant to Section 6(a) of the Exchange Act. As noted above, the Commissions believe that certain types of exchange-traded options, no matter what type of an account they are in, are comparable to security futures. The margin requirements for comparable exchange-traded options and security futures must be consistent.

Under this proposal, the Commissions are using a stress level percentage set out for unhedged exchange-traded options based on an equity security or narrow-based index in a portfolio margin account (*e.g.,* +/−15%) to establish a consistent margin level for security futures held outside of a securities portfolio margin account, which use a fixed-rate percentage of market value to set margin.[62] While these two regimes reflect certain differences (in that portfolio margin calculates margin on a portfolio or net basis for securities with the same underlying position, and outside a securities portfolio margin account, margin is calculated on a position-by-position basis), the Commissions believe that these two regimes are consistent when comparing unhedged security futures with comparable exchange-traded options.

As stated above, the Commissions noted in the 2001 Proposed Rules that ''[p]ending adoption of such [portfolio margining] systems by regulatory authorities, however, the 20% level is consistent with the current requirements for comparable equity options.'' [63] Since the adoption of the SRO risk-based portfolio margin rules, subsequent to the adoption of the 2002 Final Rules, unhedged exchanged-traded options based on an equity security or a narrow-based index and unhedged security futures held in a securities portfolio margin account may be margined at 15%. As a result of these developments, the Commissions are proposing to reduce the margin requirement for an unhedged security future held outside of a securities portfolio margin account from 20% to 15%. Consequently, the Commissions preliminarily believe that the proposed level of margin is consistent with the margin requirements for comparable options traded on any exchange registered pursuant to Section 6(a) of the Exchange Act.

6. The Proposed Margin Rule Is Consistent With the Federal Reserve's Regulation T

Section 7(c)(2)(B)(iv) of the Exchange Act requires that margin requirements for security futures (other than levels of margin), including the type, form, and use of collateral, must be consistent with the requirements of Regulation T.[64] In the 2002 Final Rules, while the Commissions determined not to apply Regulation T in its entirety to margin requirements for security futures, the Commissions adopted final rules which included certain provisions that govern account administration, type, form, and use of collateral, calculation of equity, withdrawals from accounts, and the treatment of undermargined accounts. In the 2002 Final Rules, the Commissions stated that ''the inclusion of these provisions in the Final Rules satisfies the statutory requirement that the margin rules for security futures be consistent with Regulation T.'' [65] Because the proposed amendments today solely relate to a reduction in the ''levels of margin'' for security futures, which are not required under the Exchange Act to be consistent with Regulation T, the Commissions preliminarily believe that the margin requirements for security futures as proposed to be amended would continue to be consistent with Regulation T.

7. The Proposed Margin Rule Permits Higher Margin Requirements

Again, under this proposal, the joint margin regulations will continue to permit SROs and security futures intermediaries to establish higher margin levels and to take appropriate action to preserve their own financial integrity.[66] The proposed minimum margin requirement of 15% would apply to an unhedged position in a security future, whether the position is held in a securities account or a futures account.[67] The 15% margin requirement for unhedged security futures would not preclude the use of an existing portfolio margining system, such as SPAN, by an FCM for security futures held in a futures account, so long as the portfolio margining system is modified to produce results that comply with the margin requirements for security futures.[68]

8. Request for Comments

In summary, the Commissions propose that the required minimum margin for each long or short position in a security future shall be 15% of the current market value of such security future. The Commissions request comment on all aspects of the proposed amendment to reduce the margin requirement to 15%. In addition, the Commissions request comment, including empirical data in support of the comments, on the following questions related to the proposal:

- As discussed above, the Commissions believe that because the margin requirement for a comparable option held in a portfolio margin account is calculated by exposing the option to market moves that are +/−15%, the margin methodologies for security futures and comparable exchange-traded options are consistent. Is the Commissions' belief correct? If not, why not?
- Is the proposed reduction in margin for security futures to 15% consistent with the margin requirements for comparable exchange-traded option contracts based on an equity security or narrow-based index held in a securities portfolio margin account? Is it appropriate to compare the proposed margin requirement for an unhedged security futures position held outside a portfolio margin account to an unhedged exchange-traded option held in a securities portfolio margin account for purposes of the comparability standard in Section 7(c)(2)(B)(iii)(I) of the Exchange Act?

[62] While the Commissions are using a single unhedged option for comparison, the Commissions note that a long (short) security future position can be replicated by a portfolio containing one long (short) at-the-money call and one short (long) at-the-money put. This options portfolio creates a synthetic security futures position. The margin requirement applicable to the options portfolio, under approved SRO portfolio margin system rules, is also 15%. In addition, a very deep-in-the-money call or put on the same security (with a delta of one) is an option contract comparable to a security futures contract that will also result in a consistent 15% margin level.

[63] 2001 Proposed Rules, 66 FR at 50726.

[64] 15 U.S.C. 78g(c)(2)(B)(iv).

[65] 2002 Final Rules, 67 FR at 53155.

[66] *See* CFTC Rule 41.42(c)(1), 17 CFR 41.42(c)(1); SEC Rule 400(c)(1), 17 CFR 242.400(c)(1).

[67] In its petition, OCX stated that ''because of operational issues at the securities firms, almost all security futures positions are carried in a futures account regulated by the CFTC and not in a securities account. The proposed joint rulemaking would permit customers carrying security futures in futures accounts to receive margin treatment consistent with that permitted under the [portfolio] margining provisions of CBOE.'' *See* OCX Petition at 2.

[68] For example, a SPAN risk-based portfolio margining methodology can be used to compute required initial or maintenance margin that results in margin levels that are equal to or higher than the margin levels required by the proposed rules. In this regard, for example, the minimum margin requirement for unhedged security futures under the proposed rules would be 15%, and SPAN could not recognize any offset for combination positions that is not permitted under SRO rules, as provided in CFTC Rule 41.45(b)(2), 17 CFR 41.45(b)(2); SEC Rule 403(b)(2), 17 CFR 242.403(b)(2). *See also* note 27 in the 2002 Final Rules, 67 FR at 53148.

• Are there any other comparisons or methodologies for comparison that the Commissions should consider in determining whether the proposed reduction in margin to 15% for security futures meets the standards in Section 7(c)(2)(B)(iii) of the Exchange Act with respect to comparing the margin requirements for security futures with the margin requirements for comparable exchange-traded options? For example, should the comparison or methodologies for comparable options be based on a specific option position (or positions) held in a securities portfolio margin account, such as a deep in-the-money options position or matched pairs of long-short options positions? If so, please identify the position or positions and explain how they would meet the comparability standards under the Exchange Act.

• Are there any other risk-based margin methodologies that could be used to prescribe margin requirements for security futures? If so, please identify the margin methodologies and explain how they would meet the comparability standards under the Exchange Act.

B. Margin Offsets

The Commissions' joint margin rules permit SROs [69] to establish margin levels for offsetting positions involving security futures, which are lower than the required margin levels for unhedged positions.[70] Thus, an SRO may adopt rules that set the required initial or maintenance margin level for an offsetting position involving security futures and related positions at a level lower than the level that would be required if the positions were margined separately. Such rules must meet the criteria set forth in Section 7(c)(2)(B) of the Exchange Act [71] and must be effective in accordance with Section 19(b)(2) of the Exchange Act [72] and, as applicable, Section 5c(c) of the CEA.[73]

In issuing the 2002 Final Rules, the Commissions published a table of offsets for security futures that the Commissions had identified as consistent with those permitted for similar offsetting positions involving exchange-traded options and that would qualify for reduced margin levels.[74] The Commissions are proposing to re-publish the table of offsets to reflect the proposed 15% minimum margin requirement.

As compared to the offsets identified at the time of the adoption of the joint margin rules, certain offsets would reflect a 15% minimum margin requirement for certain offsetting positions (as opposed to the current 20% requirement) and would retain the same percentages for all other offsets.[75] There are no additional adjustments to the offsets table, other than minor footnote edits.

The Commissions preliminarily believe that the offsets identified in the following re-stated table are consistent with the strategy-based offsets permitted for comparable offset positions involving exchange-traded options. SROs seeking to permit trading in security futures generally should modify their rules that impose levels of required margin for offsetting positions involving security futures in accordance with the margin percentages identified in the following table of offsets.

Description of offset	Security underlying the security future	Initial margin requirement	Maintenance margin requirement
1. Long security future or short security future.	Individual stock or narrow-based security index.	15% of the current market value of the security future.	15% of the current market value of the security future.
2. Long security future (or basket of security futures representing each component of a narrow-based securities index[1]) and long put option[2] on the same underlying security (or index).	Individual stock or narrow-based security index.	15% of the current market value of the long security future, plus pay for the long put in full.	The lower of: (1) 10% of the aggregate exercise price[3] of the put plus the aggregate put out-of-the-money[4] amount, if any; or (2) 15% of the current market value of the long security future.
3. Short security future (or basket of security futures representing each component of a narrow-based securities index[1]) and short put option on the same underlying security (or index).	Individual stock or narrow-based security index.	15% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any. Proceeds from the put sale may be applied.	15% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any.[5]
4. Long security future and short position in the same security (or securities basket[1]) underlying the security future.	Individual stock or narrow-based security index.	The initial margin required under Regulation T for the short stock or stocks.	5% of the current market value as defined in Regulation T of the stock or stocks underlying the security future.
5. Long security future (or basket of security futures representing each component of a narrow-based securities index[1]) and short call option on the same underlying security (or index).	Individual stock or narrow-based security index.	15% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any. Proceeds from the call sale may be applied.	15% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any.
6. Long a basket of narrow-based security futures that together tracks a broad based index[1] and short a broad-based security index call option contract on the same index.	Narrow-based security index	15% of the current market value of the long basket of narrow-based security futures, plus the aggregate call in-the-money amount, if any. Proceeds from the call sale may be applied.	15% of the current market value of the long basket of narrow-based security futures, plus the aggregate call in-the-money amount, if any.

[69] As noted above, for the sake of clarity and consistency, the defined term ''SRO'' is used to describe both self-regulatory organizations and self-regulatory authorities throughout this proposal.

[70] *See* CFTC Rule 41.45(b)(2), 17 CFR 41.45(b)(2); SEC Rule 403(b)(2), 17 CFR 242.403(b)(2).

[71] 15 U.S.C. 78g(c)(2)(B).

[72] 15 U.S.C. 78s(b)(2).

[73] 7 U.S.C. 7a–2(c).

[74] *See* 2002 Final Rules, 67 FR at 53159. The offset table was published in the 2002 Final Rules. It is not part of the Code of Federal Regulations. *See also* FINRA Rule 4210(f)(10)(B)(iii), CBOE Rule 12.3(k)(6), OCX Rule 515(m), and Schedule A to Chapter 5 of the OneChicago Exchange Rulebook.

[75] The offset table lists the margin percentages for a long security future and a short security future. These percentages are the baseline, not offsets, but they are included in the table to preserve consistency with the earlier offset table.

Description of offset	Security underlying the security future	Initial margin requirement	Maintenance margin requirement
7. Short a basket of narrow-based security futures that together tracks a broad-based security index[1] and short a broad-based security index put option contract on the same index.	Narrow-based security index	15% of the current market value of the short basket of narrow-based security futures, plus the aggregate put in-the-money amount, if any. Proceeds from the put sale may be applied.	15% of the current market value of the short basket of narrow-based security futures, plus the aggregate put in-the-money amount, if any.
8. Long a basket of narrow-based security futures that together tracks a broad-based security index[1] and long a broad-based security index put option contract on the same index.	Narrow-based security index	15% of the current market value of the long basket of narrow-based security futures, plus pay for the long put in full.	The lower of: (1) 10% of the aggregate exercise price of the put, plus the aggregate put out-of-the-money amount, if any; or (2) 15% of the current market value of the long basket of security futures.
9. Short a basket of narrow-based security futures that together tracks a broad-based security index[1] and long a broad-based security index call option contract on the same index.	Narrow-based security index	15% of the current market value of the short basket of narrow-based security futures, plus pay for the long call in full.	The lower of: (1) 10% of the aggregate exercise price of the call, plus the aggregate call out-of-the-money amount, if any; or (2) 15% of the current market value of the short basket of security futures.
10. Long security future and short security future on the same underlying security (or index).	Individual stock or narrow-based security index.	The greater of: 5% of the current market value of the long security future; or (2) 5% of the current market value of the short security future.	The greater of: (1) 5% of the current market value of the long security future; or (2) 5% of the current market value of the short security future.
11. Long security future, long put option and short call option. The long security future, long put and short call must be on the same underlying security and the put and call must have the same exercise price. (Conversion)	Individual stock or narrow-based security index.	15% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any, plus pay for the put in full. Proceeds from the call sale may be applied.	10% of the aggregate exercise price, plus the aggregate call in the money amount, if any.
12. Long security future, long put option and short call option. The long security future, long put and short call must be on the same underlying security and the put exercise price must be below the call exercise price. (Collar).	Individual stock or narrow-based security index.	15% of the current market value of the long security future, plus the aggregate call in-the-money amount, if any, plus pay for the put in full. Proceeds from call sale may be applied.	The lower of: (1) 10% of the aggregate exercise price of the put plus the aggregate put out-of-the-money amount, if any; or (2) 15% of the aggregate exercise price of the call, plus the aggregate call in-the-money amount, if any.
13. Short security future and long position in the same security (or securities basket[1]) underlying the security future.	Individual stock or narrow-based security index.	The initial margin required under Regulation T for the long stock or stocks.	5% of the current market value, as defined in Regulation T, of the long stock or stocks.
14. Short security future and long position in a security immediately convertible into the same security underlying the security future, without restriction, including the payment of money.	Individual stock or narrow-based security index.	The initial margin required under Regulation T for the long security.	10% of the current market value, as defined in Regulation T, of the long security.
15. Short security future (or basket of security futures representing each component of a narrow-based securities index[1]) and long call option or warrant on the same underlying security (or index).	Individual stock or narrow-based security index.	15% of the current market value of the short security future, plus pay for the call in full.	The lower of: (1) 10% of the aggregate exercise price of the call, plus the aggregate call out-of-the-money amount, if any; or (2) 15% of the current market value of the short security future.
16. Short security future, Short put option and long call option. The short security future, short put and long call must be on the same underlying security and the put and call must have the same exercise price. (Reverse Conversion)	Individual stock or narrow-based security index.	15% of the current market value of the short security future, plus the aggregate put in-the-money amount, if any, plus pay for the call in full. Proceeds from put sale may be applied.	10% of the aggregate exercise price, plus the aggregate put in-the-money amount, if any.
17. Long (short) a basket of security futures, each based on a narrow-based security index that together tracks the broad-based index[1] and short (long) a broad based-index future.	Narrow-based security index	5% of the current market value of the long (short) basket of security futures.	5% of the current market value of the long (short) basket of security futures.

Description of offset	Security underlying the security future	Initial margin requirement	Maintenance margin requirement
18. Long (short) a basket of security futures that together tracks a narrow-based index[1] and short (long) a narrow based-index future.	Individual stock and narrow-based security index.	The greater of: (1) 5% of the current market value of the long security future(s); or (2) 5% of the current market value of the short security future(s).	The greater of: (1) 5% of the current market value of the long security future(s); or (2) 5% of the current market value of the short security future(s).
19. Long (short) a security future and short (long) an identical security future traded on a different market[6].	Individual stock and narrow-based security index.	The greater of: (1) 3% of the current market value of the long security future(s); or (2) 3% of the current market value of the short security future(s).	The greater of: (1) 3% of the current market value of the long security future(s); or (2) 3% of the current market value of the short security future(s).

[1] Baskets of securities or security futures contracts replicate the securities that compose the index, and in the same proportion.

[2] Generally, unless otherwise specified, stock index warrants are treated as if they were index options.

[3] ''Aggregate exercise price,'' with respect to an option or warrant based on an underlying security, means the exercise price of an option or warrant contract multiplied by the numbers of units of the underlying security covered by the option contract or warrant. ''Aggregate exercise price'' with respect to an index option means the exercise price multiplied by the index multiplier.

[4] ''Out-of-the-money'' amounts are determined as follows:

(1) for stock call options and warrants, any excess of the aggregate exercise price of the option or warrant over the current market value of the equivalent number of shares of the underlying security;

(2) for stock put options or warrants, any excess of the current market value of the equivalent number of shares of the underlying security over the aggregate exercise price of the option or warrant;

(3) for stock index call options and warrants, any excess of the aggregate exercise price of the option or warrant over the product of the current index value and the applicable index multiplier; and

(4) for stock index put options and warrants, any excess of the product of the current index value and the applicable index multiplier over the aggregate exercise price of the option or warrant.

[5] ''In the-money'' amounts are determined as follows:

(1) for stock call options and warrants, any excess of the current market value of the equivalent number of shares of the underlying security over the aggregate exercise price of the option or warrant;

(2) for stock put options or warrants, any excess of the aggregate exercise price of the option or warrant over the current market value of the equivalent number of shares of the underlying security;

(3) for stock index call options and warrants, any excess of the product of the current index value and the applicable index multiplier over the aggregate exercise price of the option or warrant; and

(4) for stock index put options and warrants, any excess of the aggregate exercise price of the option or warrant over the product of the current index value and the applicable index multiplier.

[6] Two security futures are considered ''identical'' for this purpose if they are issued by the same clearing agency or cleared and guaranteed by the same derivatives clearing organization, have identical contract specifications, and would offset each other at the clearing level.

The Commissions request comment on the re-stated table of offsets to reflect the proposed 15% minimum margin requirement. In addition, the Commissions request comment, including empirical data in support of the comments, on the following questions related to the re-stated table of offsets:

- In light of the proposed reduction in margin requirements for unhedged security futures from 20% to 15%, should any of the other percentages in the offsets table also be reduced? If so, would those percentages still be consistent with the margin requirements for comparable exchange-traded options?
- Are there offset positions in addition to those enumerated in the above chart that are consistent with the margin requirements for comparable exchange-traded options, and which the Commissions should consider adding to the list of offsets?
- Are there offset positions included in the above chart which the Commissions should delete from the list of offsets?

III. Paperwork Reduction Act

A. CFTC

The Paperwork Reduction Act of 1995 (''PRA'')[76] imposes certain requirements on federal agencies (including the CFTC and the SEC) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed rules do not require a new collection of information on the part of any entities subject to these rules. Accordingly, the requirements imposed by the PRA are not applicable to these rules.

B. SEC

The PRA[77] imposes certain requirements on federal agencies (including the CFTC and the SEC) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed amendments do not contain a ''collection of information'' requirement within the meaning of the PRA. Accordingly, the PRA is not applicable.

[76] 44 U.S.C. 3501 *et seq.*

[77] *Id.*

IV. Consideration of Costs and Benefits (CFTC) and Economic Analysis (SEC) of the Proposed Amendments

A. CFTC

1. Introduction

Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[78] 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. The CFTC considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors below. Where reasonably feasible, the CFTC has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the CFTC identifies and describes costs and benefits qualitatively.

[78] 7 U.S.C. 19(a).

2. Economic Baseline

The CFTC's economic baseline for purposes of considering the proposed amendment is the security futures margin rule that exists today. In the 2002 Final Rules, the Commissions adopted security futures margin rules that complied with the statutory requirements under Section 7(c)(2)(B) of the Exchange Act. The rules state that, ''the required margin for each long or short position in a security future shall be twenty (20) percent of the current market value of such security future.'' [79] The 2002 Final Rules also allow SROs to set margin levels lower than the 20% minimum requirement for customers with ''an offsetting position involving security futures and related positions.'' [80] In addition, the 2002 Final Rules permit certain customers to take advantage of exclusions to the minimum margin requirement for security futures.

The CFTC will consider the costs and benefits of this rule proposal as compared with the baseline of the current minimum initial and maintenance margin levels for unhedged security futures, which is set at 20% of the current market value of such security future.

3. Summary of Proposed Amendment

The proposed amendment would lower the minimum margin level for an unhedged position in a security future from 20% of its current market value to 15% of its current market value. In connection with this change, the security futures margin offsets table would be restated so that it is consistent with the proposed reduction in margin.

4. Description of Possible Costs

The CFTC has preliminarily determined that, to the extent that there are operational or technology costs associated with modifying operational and administrative systems for calculating security futures customer margin, such costs are not likely to be significant given that the infrastructure for calculating such margin already exists and is not likely to require major reprogramming.

i. Risk-Related Costs for Security Futures Intermediaries and Customers

There are three types of risk-related costs that could result from the adoption of the proposed amendment. The first risk-related cost is reducing margin requirements for security futures that could expose security futures intermediaries and their customers to losses in the event that margin collected is insufficient to protect against market moves and there is a default of a security futures intermediary or its customer. Pursuant to OCC's bylaws, any security futures intermediary that is a clearing member of OCC grants a security interest in any account it establishes and maintains to OCC, and therefore a customer's assets may be obligated to OCC upon default.[81] As a result, FCMs could be exposed to a loss if the 15% margin rate for security futures is insufficient. However, this risk is mitigated by the fact that if a 15% margin level is determined to be insufficient, the security futures intermediary has the authority to collect margin in an amount that exceeds the minimum requirement in order to protect its financial integrity.[82]

A second type of risk-related cost might arise where an FCM collects the minimum margin required from customers in order to maintain or expand its customer business. Lower margin requirements might facilitate an FCM permitting its customers to take on additional risk in their positions in order to increase business for the FCM. Such additional risks could put the FCM at risk if the customer were to default, and other customers at the FCM could risk losses if the FCM or one of its customers defaulted. A related third type of risk-related cost stems from the possibility of increased leverage among security futures customers. Customers posting less margin to cover security futures positions might be able to increase their overall market exposure and thereby increase their leverage.

The second and third risk-related costs are mitigated, to some degree, by regulations that apply to security futures intermediaries that are registered as FCMs. For example, FCMs are subject to capital requirements under CFTC regulations,[83] and in instances where the security futures intermediary is jointly registered as a broker-dealer FCM, the SEC's capital rules also apply.[84] In addition, FCMs are required to establish a system of risk management policies and procedures pursuant to CFTC Rule 1.11. This risk management program is designed to protect the FCM and its customers against a variety of risks, including the potential future exposure of a security futures position that initial and maintenance margin is designed to address.

Lastly, risk-related costs to the security futures intermediary are further mitigated by the fact that OCX represents that the vast majority of its open interest is held by eligible contract participants (''ECPs'') as defined in Section 1a(18) of the CEA.[85] Generally speaking, ECPs are financial entities or individuals with significant financial resources or other qualifications, that make them appropriate persons for certain investments.[86] According to data provided by OCX, over 99% of the notional value of OCX's products was held by ECPs as of March 1, 2016 and March 1, 2017.

ii. Appropriateness of Margin Requirements

A possible risk-related cost of lowering margin requirements for security futures is that a DCO may not have sufficient margin on deposit to cover the potential future exposure of cleared security futures positions. However, as explained above, a review of margin coverage data for related options on futures supports the view that decreasing margin requirements from 20% to 15% margin will not have a significant effect on the safety and soundness of the security futures intermediaries and DCOs. Moreover, the risk management expertise at security futures intermediaries and DCOs, as well as the general applicability of CFTC Rule 39.13 to security futures, supports a view that DCOs and security futures intermediaries will continue to manage the risks of these products effectively even with lower margin requirements.[87]

The CFTC has reviewed the security futures markets under normal market

[79] CFTC Rule 41.45(b)(1), 17 CFR 41.45(b)(1). *See* CFTC Rule 41.43(a)(4), 17 CFR 41.43(a)(4) (defining the term ''current market value.'').

[80] CFTC Rule 41.45(b)(2), 17 CFR 41.45(b)(2).

[81] *See* OCC Bylaws, Maintenance of Accounts, Section 3, Interpretations and Policies .07, adopted September 22, 2003, last accessed on January 3, 2018, *available at https://www.theocc.com/components/docs/legal/rules_and_bylaws/occ_bylaws.pdf.*

[82] *See* CFTC Rule 41.42(c)(1), 17 CFR 41.42(c)(1); SEC Rule 400(c)(1), 17 CFR 242.400(c)(1).

[83] *See* CFTC Rule 1.17, 17 CFR 1.17.

[84] *See* SEC Rule 240.15c3–1, 17 CFR 240.15c3–1.

[85] *See also* CFTC Rule 1.3, 17 CFR 1.3.

[86] For example, an individual can qualify as an ECP if the individual has amounts invested on a discretionary basis, the aggregate of which is in excess of: (i) $10,000,000; or (ii) $5,000,000 if the individual also enters into an agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

[87] As discussed above, security futures intermediaries are authorized to collect margin above the amounts required by the Commissions. However, as for-profit entities, security futures intermediaries may be incentivized to lower their margin rates in order to compete for customer business. If security futures intermediaries engage in competition for business based on margin pricing, it is possible that security futures intermediaries will collect only the required level of margin (*i.e.,* 15% under the proposed rule change), regardless of the market conditions, which could impair their ability to protect against market risk and losses.

conditions and observed that a 15% level of margin would be sufficient to cover daily price moves in most instances (*i.e.,* more than 99.5%).[88] Therefore, the CFTC preliminarily believes that the proposed amendment will not have a substantial negative impact on (1) the protection of market participants or the public, (2) the financial integrity of security futures markets, or (3) sound risk management practices of DCOs or security futures intermediaries.

The risk customers and/or intermediaries face from reducing margin for security futures is addressed at the clearinghouse level because there are additional protections under CFTC regulations. For example, CFTC Rule 39.13 requires a DCO to establish initial margin requirements that are commensurate with the risks of each product and portfolio. In addition, CFTC Rule 39.13 requires that initial margin models meet set liquidation time horizons and have established confidence levels of at least 99%. These DCO initial margin requirements are distinct from the margin requirements that are the subject of this proposal and serve to mitigate the possibility that a DCO may default (resulting in a systemic event). In the event that a DCO determined that a 15% margin level for security futures is insufficient to satisfy a DCO's obligation under CFTC Rule 39.13, the DCO would be required to collect additional margin from its clearing members.[89]

The CFTC observes that the current and proposed margin requirements for security futures are materially distinct from initial margin requirements for DCOs. The initial margin requirements for DCOs are risk-based and designed to permit DCOs to use risk-based margin models to determine the appropriate level of margin to be collected, subject to the CFTC's minimum requirements under CFTC regulations in Part 39. The current and proposed margin requirements for security futures do not incorporate risk-based strategies or calculations. Despite proposing a non-risk-based margin requirement for security futures, the CFTC continues to support the use of risk-based margin models for all derivatives because use of such models are a sound way for DCOs to manage their clearing risks appropriately.

iii. Costs Associated With Margin Offsets Table

The Commissions are proposing to restate the table of offsets for security futures to reflect the proposed 15% minimum margin requirement. The CFTC does not believe that lowering the margin requirements for certain offsets will increase costs to customers, security futures intermediaries, or DCOs. The categories of permissible offsets will remain the same and there will be no change to the inputs used to calculate the offset, other than to decrease the initial and maintenance margin on all security futures from 20 to 15%. Moreover, the same risk to the customers and security futures intermediaries will exist if the Commissions decrease the margin required for security futures trading combinations eligible for offsets as it will with security futures without an offset.

Finally, the CFTC notes that security futures intermediaries and customers will continue to be required to comply with daily mark-to-market and variation settlement procedures applied to security futures, as well as the large trader reporting regime that applies to futures accounts.

5. Description of Possible Benefits

The CFTC has preliminarily determined that there are significant benefits associated with the proposed amendment. The proposed amendments would align customer margin requirements for security futures held in a futures or securities account with those that are held in a securities risk-based portfolio margin account. The CFTC believes that it would increase competition by establishing a level playing field between security futures carried in the SRO securities risk-based portfolio margining account and security futures carried in a futures account or a securities account.

Additionally, the reduced minimum margin level could facilitate more trading in security futures, which would increase market liquidity to the benefit of market participants and the public. Increased liquidity could contribute to the financial integrity of security futures markets, particularly in the event an FCM finds that it must manage the default of a customer's security futures positions.

The lower minimum margin requirement also might decrease the direct cost of trading in security futures and increase capital efficiency because more funds would be available for other uses. Lowering the minimum margin requirement also could enable the one U.S. security futures exchange to better compete in the global marketplace, where security futures traded on foreign exchanges are subject to risk-based margin requirements that are generally lower than those applied to security futures traded in the U.S.

The proposal restates the table of offsets for security futures to reflect the proposed 15% minimum margin requirement. These offsets would continue to provide the benefits of capital efficiency to customers because offsets recognize the unique features of certain specified combined strategies and would permit margin requirements that better reflect the risk of these strategies. Moreover, the same benefits of lowering margin costs for customers and increasing business in security futures could result from lowering margin requirements for offsetting security futures positions.

[88] Conducting a value-at-risk analysis of 74 of the most liquid security futures contracts during a limited time-frame (November 2002–June 2010), CFTC staff found that there were 195 instances where a 15% margin was insufficient and 99 instances where a 20% margin was insufficient. For all observations, a 15% margin was sufficient for 99.81% of all observations while a 20% margin was sufficient for 99.91% of all observations. CFTC staff notes that this period covers the fall of 2008, one of the most volatile quarters in history. The CFTC staff also notes that since 2010, volatility in the equity markets has typically been lower (*e.g.,* as measured by the Chicago Board Options Exchange Volatility Index (''VIX'')) than in the 2002 to 2010 period. In particular, the VIX, which measures market expectations of near term volatility as conveyed by stock index option prices, has, at its highest levels since June 2010, never reached levels higher than 48 (as compared to almost 90 at the peak during the financial crisis). It is therefore reasonable to conclude that a 15% margin would be sufficient for almost all days since 2010. *See, e.g.,* VIX data available from the Federal Reserve Bank of Saint Louis at *https://fred.stlouisfed.org/series/VIXCLS.*

[89] The CFTC expects that any difference between the margin charged at the DCO and the margin charged by the security futures intermediary will be addressed by additional margin calls, if necessary. The DCO can require additional margin from its clearing members (which in some cases will be the security futures intermediary), to cover changes in market positions. DCOs and clearing members are familiar with margin call procedures and have established rules and policies to efficiently transfer funds when needed. If a customer's account has insufficient funds to meet the margin call, its clearing member may provide the amount to the DCO and collect it from the customer at a later time. In this scenario, the clearing member may take on a liability or additional risk on the customer's behalf for a short period of time. The CFTC notes that this practice is the same for security futures as it is for other products subject to clearing and it does not view this temporary shifting of risk between the clearing member and the customer as a unique source of risk to security futures. Furthermore, this proposed change in required margin from 20% to 15% would not alter the relationship between DCOs and their clearing members, or between clearing members and their customers. The CFTC acknowledges that it is possible that DCOs and security futures intermediaries will collect different levels of margin, but it is not necessarily a result of this proposed rule change. Moreover, the difference in margin collected is not an unmitigated source of risk for the security futures intermediaries because they have the authority to collect additional funds from their customers in the event of a margin call and can choose to set margin levels higher than the minimum level required by the Commissions.

6. Consideration of Section 15(a) Factors

This section will discuss the expected results of the proposal to amend CFTC Rule 41.45(b)(1) to reduce the minimum initial and maintenance margin levels for each security future to 15% of the current market value of such contract from the current requirement of 20% in light of the five factors under Section 15(a) of the CEA, as itemized above.

i. Protection of Market Participants and the Public

The proposed amendment continues to protect market participants and the public from the risks of a default in the security futures market. As discussed above, the CFTC believes that a 15% minimum initial and maintenance margin requirement in combination with other protections, such as the general applicability of CFTC Rule 39.13 to DCOs that offer to clear security futures products, will protect U.S. market participants, including security futures customers and security futures intermediaries, from the risk of a default in security futures. In addition, security futures intermediaries, such as FCMs, are authorized to collect additional margin from their customer if the FCM believes a customer's positions may pose excessive risk.

The existence of separate margin requirements at the DCO level provides assurance to the CFTC that lowering the minimum margin level for security futures will not present a risk to the financial system.[90] In cases where the 15% margin level as determined by the security futures intermediary is insufficient to satisfy a DCO's obligation under CFTC Rule 39.13, the DCO would be required to collect additional margin from its clearing members. As a result, DCOs will always have adequate margin to manage risks presented by security futures.

Finally, the CFTC staff has reviewed market activity in security futures and found that a 15% level of margin would be sufficient to cover daily price moves in a significant number of instances (*i.e.,* more than 99.5%).[91]

ii. The Efficiency, Competitiveness and Financial Integrity of the Markets

This proposal is intended to enhance the efficiency and competitiveness of the security futures market in the U.S. by bringing the initial and maintenance margin requirements for security futures in line with requirements for security futures subject to an SRO risk-based portfolio margining program.[92] Market participants trading in security futures will benefit from lower margin requirements, that more accurately reflect their risk exposures, and they will be able to use their capital more efficiently in other investment opportunities. Furthermore, a decrease in initial and maintenance margin requirements from 20% to 15% of the current market value of each security futures contract may increase the attractiveness of the U.S. security futures market and may increase the competitiveness of the U.S. security futures market with international markets. The proposal also improves the competitiveness of security futures as compared to exchange-traded options. For example, it would help to re-establish a level playing field between options exchanges and the security futures exchange, and between broker-dealers/securities accounts and FCMs/futures accounts. Overall, the CFTC preliminarily believes that this proposal will have a positive effect on competition in the U.S. security futures market.[93]

Furthermore, this proposal could enhance the financial integrity of the security futures market in the U.S. Lowering the amount of initial and maintenance margin required for customers trading in security futures may increase the number of customers trading in security futures and/or increase the amount of trading. Either an increase in the number of customers or trades in security futures market would strengthen the financial integrity of the security futures market by enhancing its liquidity.

The CFTC preliminarily believes that a 15% margin requirement will be sufficient to protect against the risk of default in greater than 99% of cases. After examining the economic data, the CFTC believes that a 15% margin requirement for security futures will protect other customers and DCOs against most risks of default.

Again, the CFTC notes that the DCOs clearing security futures are subject to CFTC regulations requiring the DCO to maintain adequate risk management policies, including initial margin requirements. DCOs may require additional margin, in an amount that is greater than 15%, on certain security futures positions or portfolios if the DCO notes particular risks associated with the products or portfolios. Accordingly, the proposed rule amendment would maintain or possibly improve the financial integrity of the security futures markets in the U.S.

iii. Price Discovery

As discussed above, the CFTC preliminarily believes that the proposed amendment is expected to have a positive effect on competition, which may result in some new customers entering the security futures market and increased trading by existing customers. In addition, trading from foreign markets may shift to the U.S. security futures market. This increased activity in the U.S. security futures market may have a positive effect on price discovery in the security futures market. While changes in price discovery may be difficult to measure, this proposal is unlikely to harm price discovery and indeed may improve price discovery in the security futures market in the U.S.

iv. Risk Management

As discussed further above, margin requirements are a critical component of any risk management program for cleared financial products. Security futures have been risk-managed through central clearing and initial and maintenance margin requirements for over fifteen years. The CFTC recognizes the necessity of sound initial and maintenance margin requirements for DCO and FCM risk management programs. Initial and maintenance margin collected addresses potential future exposure, and in the event of a default, such margin protects non-defaulting parties from losses.

v. Other Public Interest Considerations

The CFTC has not identified any additional public interest considerations related to the costs and benefits of this proposal.

7. Request for Comment

The CFTC requests comment on all aspects of the costs and benefits associated with the proposed rule amendments, specifically, with regard to all Section 15(a) risk factors. In particular, the CFTC requests that commenters provide data and any other information or data upon which the commenters relied to reach any conclusions regarding the proposal. Finally, the CFTC seeks estimates and

[90] *See* CFTC Rule 39.13, 17 CFR 39.13.

[91] *See supra* note 88.

[92] The CFTC preliminarily believes that this proposal effectively balances the need for greater efficiency with the statutory requirements under Section 7(c)(2)(B)(iii) of the Exchange Act, which prevents the CFTC from considering any alternatives to this proposal that would reduce the minimum initial margin and maintenance margin levels for unhedged security futures below 15%. The CFTC worked to identify alternatives, but it does not believe that there are any reasonable alternatives to this proposal.

[93] *See also* the CFTC's analysis of anti-trust considerations in section VII. below. The CFTC has preliminarily identified no anticompetitive effects of this proposal.

views regarding the specific costs and benefits for a security futures clearing organization, exchange, intermediary, or trader that may result from the adoption of the proposed rule amendment.

The CFTC seeks estimates of the costs and benefits that may result from the adoption of the proposed rule amendments to reduce the minimum margin requirement to 15% of current market value or the application of permitted margin offsets.

B. SEC

1. Introduction

In the following economic analysis, the SEC considers the benefits and costs, as well as the effects on efficiency, competition, and capital formation that would result from the SEC's proposed amendments. [94] The SEC evaluates these benefits, costs, and other economic effects relative to a baseline, which the SEC takes to be the state of the markets for security futures products and the regulations applicable to those markets at the time of this proposal.

The amendments that the SEC is proposing would reduce minimum margin requirements for security futures positions held in customer accounts of broker-dealers [95] not subject to an approved portfolio margining system. As a result of the SEC's proposed amendments, the minimum margin requirements on customers' unhedged security futures positions would be lowered to 15%.[96] Similarly, the SEC's guidance on minimum margin requirements for certain hedged security futures positions would also be lowered in a conforming manner.[97] The SEC's proposed amendments would make minimum margin requirements on security futures positions held in securities accounts not eligible for portfolio margining consistent with the minimum margin requirements that would currently apply to those positions were they to be held in separate [98] accounts eligible for portfolio margining.[99]

As discussed below, the SEC believes that the proposed rule amendments will primarily benefit broker-dealers offering security futures trading accounts that are not eligible for portfolio margining, their customers who trade (or wish to trade) security futures at higher levels of leverage than currently permitted, and exchanges that offer trading in security futures products.[100] The SEC does not believe that the proposed rule amendments will impose any direct costs on market participants.

Although the SEC believes that the proposed rule amendments will not impose any direct costs, they could nonetheless impose various indirect costs. Most importantly, lower minimum margin requirements are likely to facilitate greater leverage, which can harm financial stability, imposing costs on the broader financial system. However, because of the very small size of the U.S. security futures markets and their insignificance to the broader U.S. financial markets, the SEC does not believe the proposed amendments will have material impact on financial stability.[101] In addition, the greater leverage permitted under the proposed rule amendments may result in customers taking on additional risk. Customers who are not aware of these risks may suffer unexpected losses as a result.[102]

The SEC believes that the proposed rule amendments will improve competition among providers of customer security futures accounts (*i.e.,* FCMs and broker-dealers), and increase the potential for competition across security futures, options, and other related markets. The SEC also believes that their impact on economic efficiency and capital formation will be minimal.[103]

Many of the costs, benefits, and other effects the SEC discusses are difficult to quantify. Therefore, much of the discussion is qualitative in nature. The SEC's inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant. The lack of a quantitative analysis is largely due to the SEC's lack of data on the markets for security futures.[104] The SEC requests that commenters provide relevant data and information to assist the SEC in analyzing the economic consequences of the proposed amendments. More generally, the SEC requests comment on all aspects of this initial economic analysis, including on whether the analysis has: (1) Identified all benefits and costs, including all effects on efficiency, competition, and capital formation; and (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation. The SEC also requests comment on any reasonable alternatives to the proposed rule amendments.

2. Baseline

The SEC evaluates the impact of rules relative to specific baselines. Here, the SEC takes the baseline to be the regulatory regime applicable to the markets for security futures as well as the state of these markets as of the end of 2017. As discussed above, the term ''security futures'' refers to futures on a single security and futures on narrow-based security indexes.[105] More generally, ''security futures product'' refers to security futures and options on security futures. Unlike futures markets on commodities or ''broad-based'' equity indexes, the U.S. market for security futures is currently small and does not play a significant role in the U.S. financial system.[106] The limited role of security futures markets is likely due to their short history,[107] uncertainty relating to tax treatment,[108] and competition from the more developed equity and options markets.[109] Incentives to participate in the security futures markets (rather than the markets

[94] The Exchange Act states that when the SEC is engaging in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the SEC shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the SEC, when making rules or regulations under the Exchange Act, to consider, among other matters, the impact that any such rule or regulation would have on competition and states that the SEC shall not adopt any such rule or regulation which would impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

[95] The 2002 Final Rules established margin requirements for customers' security futures accounts held through ''security futures intermediaries'', including registered entities such as brokers, dealers, and FCMs. The SEC's proposed amendments affect broker-dealers. *See supra* note 22 and accompanying text.

[96] *See* proposed SEC Rule 403(b)(1).

[97] Conforming reductions to minimum margin percentages on hedged security futures positions would be reflected in a restatement of the table of offsets published in the 2002 Final Rules. This table of offsets is not part of the Code of Federal Regulations. *See* 2002 Final Rules, 67 FR at 53159.

[98] The presence of other (related) securities in the portfolio margin account (*e.g.,* positions in the underlying) could affect the required margin for the security futures position.

[99] *See supra* note 47 and accompanying text.

[100] *See infra* sections IV.B.3.i. and ii.

[101] *See infra* section IV.B.2.

[102] *See infra* sections IV.B.3.i. and ii.

[103] *See infra* section IV.B.3.iii.

[104] *See infra* sections IV.B.2. and IV.B.3.i.

[105] *See supra* section I.

[106] *See infra* section IV.B.2.i.

[107] Trading in security futures became possible only after the passage of CFMA in 2000. *See supra* notes 4 and 5, and accompanying text.

[108] Specifically, the proposition that exchange-for-physical single stock security futures qualify for the same tax treatment as stock loan transactions under Section 1058 of the Internal Revenue Code has not been tested. *See e.g.,* Exchange Act Release No. 71505 (Feb. 7, 2014).

[109] Security futures markets face competition from equity and options markets because in principle, the payoff from a security futures position is readily replicated using either the underlying security, or through options on the underlying security.

for the underlying or the options markets) arise either from reduced market frictions (*e.g.,* short sale constraints, pin risk) or from a regulatory advantage (*e.g.,* lower margin requirements).

As with other types of futures, both the buyer and seller in a security futures transaction can potentially default on his or her respective obligation. Because of this, an intermediary to a security futures transaction will typically require a performance bond (''margin'') from both parties to the transaction. Higher margin levels imply lower leverage, which reduces risk. Private incentives encourage a counterparty that intermediates security futures transactions to require a level of margin that adequately protects its interests. However, in the presence of market failures, private incentives alone may lead to margin levels that are inefficient. For example, margin levels set by intermediaries may allow investors who do not fully understand the risk of security futures products to take highly leveraged positions that may result in unexpected losses. Moreover, even when all parties are fully aware of the risks of leverage, privately-negotiated margin arrangements may be too low. For example, the risk resulting from higher leverage levels can impose negative externalities on financial system stability, the costs of which would not be reflected in privately-negotiated margin arrangements. Such market failures provide an economic rationale for regulatory minimum margin requirements.[110]

i. The Security Futures Market

The security futures markets provide a convenient means of obtaining delta exposure to an underlying security.[111] To effectively compete with other venues for obtaining similar exposures (*i.e.,* equity and options markets), security futures markets must reduce market frictions or provide more favorable regulatory treatment.[112] Security futures markets may reduce market frictions by providing lower cost means of financing equity exposures. They can simplify taking short positions by eliminating the need to ''locate'' borrowable securities.[113] They can also provide an opportunity for customers to gain greater leverage through lower margin requirements (relative to margin in security or options transactions). The SEC does not currently have data on participants in the security futures markets or their trading motives.

Currently only one U.S. exchange, OCX, provides trading in security futures. OCX is a designated contract market regulated by the CFTC and a notice-registered national securities exchange.[114] As of the end of 2017, 13,652 security futures contracts on 1,759 names were traded on the exchange.[115] Of these 13,652 contracts, 730 had open interest at the end of the year. Total open interest at the end of the year was 476,430 contracts, with a gross notional value of $3 billion. Annual trading volume in 2017 was 15 million contracts, an increase of 39% from the prior year. Although growing, the security futures market is currently very small. For comparison, as of the end of 2017, open interest in equity options was 290 million contracts with annual trading volume of 3.7 billion contracts.[116]

According to OCX, almost all security futures positions were carried in futures accounts of CFTC-regulated FCMs and introducing brokers (''IBs'').[117] Consequently, the SEC believes only a small fraction of security futures accounts fall under the SEC's margin rules. The SEC believes that none of the accounts that are subject to the SEC's margin rules are currently using risk-based portfolio margining.[118] Therefore, the SEC believes that all of the accounts falling under the SEC's margin rules are currently subject to the general margin requirement and the associated strategy-based offsets.[119]

The SEC is seeking comment on the characterization of the market for security futures:

- What are the principal motives for participants transacting in security futures? What are the advantages of these markets (vis-à-vis options or equity markets)? What are the disadvantages?
- Do customers transact in security futures through securities accounts ? Why or why not?
- To the extent that customers transact security futures transactions through securities accounts, are these accounts subject to portfolio margining? If not, why not?

ii. Regulation

Under existing SEC rules the minimum margin requirement for a customer's unhedged security futures position not subject to an exemption is 20%.[120] SROs may allow margin levels lower than 20%for accounts with ''strategy-based offsets'' (*i.e.,* hedged positions).[121] Strategy-based offsets can involve security futures as well as one or more related securities or futures positions. Accounts subject to an SRO's approved portfolio margining system are also exempt from the minimum margin requirement.[122] Under currently approved SRO portfolio margining systems, the effective margin requirement for an unhedged exposure to a security futures position on a narrow-based index or an individual equity would be 15%.[123] Under current rules, only customer securities accounts held through SEC-regulated broker-dealers could potentially be subject to portfolio margining; however, the SEC is not aware of any broker-dealers offering such accounts. Margin requirements for security futures positions of clearing members (*i.e.,* their accounts at a clearing agency or DCO) are not subject to the aforementioned margin requirements.[124]

[110] Monetary authorities may also rely on regulatory margin requirements as a policy tool. The SEC does not consider such motives here.

[111] The derivative of the theoretical price of a futures contract with respect to the price of the underlying (*i.e.,* the ''delta'') is 1: For a $1 increase (decrease) in the price of an underlying security, the theoretical price of its security future increases (decreases) by $1.

[112] *See supra* note 109.

[113] In these respects, a security future functions like a cleared total return swap.

[114] Section 6(g) of the Exchange Act permits a notice of registration to be filed by an exchange registering as a national securities exchange for the sole purpose of trading security futures products. 15 U.S.C. 78f(g). *See also* Rule 6a–4 (Notice of registration under Section 6(g) of the Act, amendment to such notice, and supplemental materials to be filed by exchanges registered under Section 6(g) of the Act). 17 CFR 240.6a–4.

[115] Security futures data from OCX, *available at https://ftp.onechicago.com/market_data/.*

[116] Options data from OCC, *available at https://www.theocc.com/webapps/historical-volume-query.*

[117] *See* OCX Petition.

[118] If security futures positions were held in accounts eligible for portfolio margining, they would be included in the risk-based portfolio margin calculation and thus effectively subject to a lower (*i.e.,* 15%) margin requirement under the baseline. There are approximately 18 broker-dealers that have been approved by SROs to offer portfolio margining and are members of OCC to clear security futures. However, based on an analysis of FOCUS filings from year-end 2017, no broker-dealers had collected margin for security futures accounts subject to portfolio margining. *See infra* note 138. *See also* Exchange Act Release No. 54919 (Dec. 12, 2006), 71 FR 75781 (Dec. 18, 2006) (SR–CBOE 2006–14, relating to amendments to CBOE's portfolio margin pilot program to include security futures); Exchange Act Release No. 54125 (Jul. 11, 2006), 71 FR 40766 (Jul. 18, 2006) (SR–NYSE–2005–93, relating to amendments to the NYSE's portfolio margin pilot program to include security futures).

[119] *See supra* note 25 and accompanying text.

[120] *See supra* notes 20–23 and accompanying text.

[121] *See supra* note 25 and accompanying text.

[122] *See* CFTC Rule 41.42(c)(2)(i), 17 CFR 41.42(c)(2)(i); SEC Rule 400(c)(2)(i), 17 CFR 242.400(c)(2)(i).

[123] This follows from the methodology of current SRO risk-based portfolio margining rules as applied to delta one securities. *See supra* notes 47 and 111.

[124] *See* SEC Rule 400(c)(2)(i)–(v). 17 CFR 242.400(c)(2)(i)–(v). Clearing members are instead subject to margin rules of the clearing organization as approved by the SEC pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2). *See* notes 42–44 and accompanying text.

3. Analysis of the Proposals

The SEC is proposing to amend SEC Rule 403(b)(1) to reduce the minimum initial and maintenance margin levels for unhedged security futures to 15% from the current requirement of 20%.[125] To the extent that the SROs file proposed rule changes and the SEC approves them, this would have the effect of reducing minimum margin on security futures positions held in customer securities accounts at broker-dealers that are not currently authorized to use a portfolio margining system.[126] As described in the previous section, the vast majority of security futures positions are held in futures accounts at CFTC-regulated entities. Consequently, the proposed changes to the margin requirements are expected to have very limited effects.[127]

i. Benefits

The SEC believes that the proposed amendment to SEC Rule 403(b)(1) [128] would benefit customers currently trading security futures through securities accounts not subject to portfolio margining and whose house margin requirement is set (by the broker-dealer) to the current regulatory minimum. To the extent that customers with security futures accounts held at broker-dealers are currently subject to margin levels reflecting the regulatory minimums,[129] the proposed reductions to margin requirements could reduce these customers' costs of engaging in security futures transactions, increase their liquidity, and provide an opportunity for greater leverage. The SEC believes that these benefits are likely to result in increased position-taking by customers, with attendant benefits to broker-dealers providing security futures trading accounts, and to security futures trading exchanges.[130]

Based on data provided by OCX, at the end of 2017, open interest in the U.S. security futures markets was 476,430 contracts, with a gross notional value of $3 billion.[131] SEC staff understands that approximately 2% of these contracts are believed to involve securities accounts subject to SEC margin requirements. None of these accounts are believed to be subject to portfolio margining.[132] The SEC constructed an estimate of the upper bound of margin collected under SEC margin rules as the sum (across all contracts listed on OCX) of twice [133] the product of: The contract settlement price, 20% (current margin requirement), the contract's open interest, and 2% (the fraction of accounts believed to be subject to SEC customer margin rules). Because some of the contracts held in securities accounts may be subject to strategy offsets (that would result in lower margin requirements), this represents an upper bound. The SEC estimates that the margin requirements on customers' security futures positions held in securities accounts was no more than $24 million. To the extent that the proposed reduction in regulatory minimums is passed on to customers, the SEC estimates that the amount of margin required to secure security futures transactions in securities accounts could be reduced by as much as $6 million. This reduction would benefit affected customers by improving their liquidity.[134]

As part of this rulemaking, the Commissions are proposing to publish a restated table of offsets for hedged security futures positions.[135] This restatement would make the table of offsets conform to the proposed 15% minimum margin requirement on unhedged positions.[136] These revisions to the offset table would provide guidance consistent with the lower general margin levels on unhedged positions that the SEC is proposing. Because the SEC does not have data on specific hedged positions held in broker-dealers' customer accounts subject to SEC margin rules, the SEC is unable to further quantify the reductions in margin that would be attributable specifically to any potential SRO rules that follow the restatement of the offset table.

The reductions to margin requirements the SEC is proposing will have the immediate effect of improving the liquidity of customers trading security futures through broker-dealer accounts. These improvements to liquidity could lead to increased participation in security futures markets with attendant benefits to broker-dealers providing security futures accounts, security futures exchanges, and clearing agencies.[137]

In addition, the SEC believes that the proposed rule amendments may reduce costs for participants in the security futures markets through improved operational efficiency. In particular, the customers of broker-dealers that do not offer portfolio margining may be able to avail themselves of lower margin requirements on security futures transactions without having to maintain separate accounts with broker-dealers that do provide portfolio margining.

It is not possible for the SEC to estimate broker-dealers' customers' sensitivity to margin requirements on security futures due to an absence of historical data. The SEC also does not possess data on current customer margin requirements (broker-dealers may set requirements above regulatory minimums),[138] nor does the SEC possess data on broker-dealers',[139] security futures exchanges',[140] or clearing agencies' [141] profits related to security futures transactions, as this information is not reported to the SEC. Because the SEC lacks these data, the SEC is currently unable to quantify the benefits to broker-dealers, security futures exchanges, and clearing agencies resulting from any reduction to minimum margin requirements.

ii. Costs

Because broker-dealers may set customer margin levels higher than the proposed regulatory minimums, the proposed rule amendments do not

[125] 17 CFR 242.403(b)(1). In addition, the Commissions are proposing to publish a re-stated table of offsets to reflect the proposed reduction in margin. *See* section II.B. above. This table of offsets is not part of the Code of Federal Regulations. *See* 2002 Final Rules, 67 FR at 53159. SROs seeking to permit trading in security futures may modify their rules to parallel the levels identified in the re-stated table of offsets.

[126] Specifically, the SEC expects broker-dealers that become subject to lower regulatory minimum customer margin requirements on security futures to reduce customer margin requirements on security futures positions that are currently set at the regulatory lower bound (*i.e.,* 20%). *See supra* text accompanying note 100.

[127] Concurrently, the CFTC is proposing to similarly amend CFTC Rule 41.45(b), affecting security futures positions held in futures accounts at CFTC-regulated entities. *See supra* section II.A.

[128] Throughout, the analysis of costs and benefits is limited to the effects of the SEC's rule change, and does not reflect costs and benefits resulting from corresponding changes to CFTC rules.

[129] Security futures accounts may be subject to ''house'' margin requirements that exceed the regulatory minimums.

[130] Increased position-taking by customers is expected to increase fees collected related to security futures transactions effected by broker-dealers and security futures exchanges.

[131] *See supra* note 115.

[132] *See supra* note 118.

[133] Both sides of a security futures contract may potentially be subject to SEC customer margin requirements.

[134] *See* Telser, Lester G., ''Why There Are Organized Futures Markets,'' The Journal of Law and Economics 24, no. 1 (Apr. 1, 1981): 1–22.

[135] *See* 2002 Final Rules, 67 FR at 53159.

[136] *See* 17 CFR 242.403(b)(2).

[137] *See supra* note 130.

[138] With respect to security futures, the SEC currently requires broker-dealers to provide only one item on quarterly regulatory filings: The amount of margin collected from accounts subject to portfolio margining rules (FOCUS item 4467). In the fourth quarter of 2017, no broker-dealer reported collecting any such margin; *see also supra* note 118.

[139] *See id.*

[140] OCX does not release financial statements.

[141] OCC's annual financial reports do not provide a breakdown of profits based on the type of product cleared.

impose direct conduct costs on broker-dealers. The SEC believes that broker-dealers will weigh any additional private costs associated with lower margin requirements against the private benefits of lower margin requirements.[142] In so doing they may opt to leave margins at a higher level than the regulatory minimum.[143]

If the reduction to the minimum margin requirement on security futures is—as the SEC expects—passed on to customers, it will lower the costs of customer position taking and provide opportunities for greater leverage. As described above, the SEC believes this will generally benefit investors trading in security futures.[144] However, to the extent that unsophisticated retail investors who trade security futures are not fully aware of the risks,[145] reducing margin requirements would increase the potential for them to suffer unexpected losses.[146] Thus, the proposed reduction in margin requirements could impose indirect costs on unsophisticated retail investors. Under the baseline, retail investors are believed to represent a very small fraction (less than 1%) of open interest in security futures. Thus, the SEC believes that the potential costs borne by unsophisticated retail investors will be low. Moreover, the ability of margin requirements to serve as an efficient instrument of customer protection is questionable.[147]

In addition, to the extent that the proposed reductions in regulatory margin requirements lead broker-dealers to decrease customer margin requirements, they could increase the risk of the broker-dealer defaulting. Such a default may impose costs on the defaulting broker-dealer's customers as well as its counterparties. However, broker-dealers participating in security futures markets are subject to clearing organizations' prudential margin requirements and the SEC believes that such requirements are reasonably designed to mitigate the risk of a broker-dealers' default.[148] In addition, the SEC believes that in the event of such a default, the SEC's customer protection rule would protect customers' assets held in a securities account.[149]

Because broker-dealers affected by the proposed amendments are already subject to a regulatory minimum level for customer margin requirements, and because they would be under no obligation to alter their existing customer margin requirements, the SEC believes that the compliance costs resulting from the proposed reduction to said minimum would be *de minimis.*[150] In addition, the SEC does not believe that the affected entities would bear any additional compliance costs as a result of the proposed rule amendments.

The SEC requests comments, data, and estimates on all aspects of the costs and benefits associated with the proposed calculations for margin on security futures. The SEC requests data to quantify the potential costs and benefits described above. The SEC seeks estimates of these costs and benefits, as well as any costs and benefits that the SEC has not identified that may result from the adoption of these proposed rule amendments. The SEC also requests qualitative feedback on the nature of the potential benefits and costs described above and any benefits and costs the SEC may have overlooked.

iii. Effects on Efficiency, Competition, and Capital Formation

In addition to the specific costs and benefits discussed above, the reductions to margin requirements on security futures that the SEC is proposing may have broader effects on efficiency, competition, and capital formation. The SEC believes that these effects will generally be positive, but unlikely to be significant. The SEC discusses these effects in more detail in the remainder of this section. The SEC requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation.

a. Efficiency

As discussed in the previous section, the SEC believes that broker-dealers will weigh the costs associated with customer defaults against the benefits of lower margin requirements when setting margin requirements for their customers. Although private considerations would render market-determined margin levels optimal from a broker-dealer's perspective, market imperfections could lead broker-dealers to impose margin requirements that are not economically efficient.[151] The relevant market imperfections in the context of margin requirements relate to externalities on financial stability arising from excessive leverage.[152]

Historically, a key aspect of the rationale for regulatory margin requirements on securities transactions was the belief that such requirements could improve economic efficiency by limiting stock market volatility resulting from ''pyramiding credit.'' [153] Leveraged

[142] That is, in weighing the costs and benefits the SEC does not expect broker-dealers to consider externalities resulting from their choices.

[143] Under broker-dealer margin rules, broker-dealers also can establish ''house'' margin requirements as long as they are at least as restrictive as the Federal Reserve and SRO margin rules. *See, e.g.,* FINRA Rule 4210(d).

[144] To the extent that regulatory margin requirements serve a micro-prudential function, these benefits may be reduced or eliminated. However the SEC does not believe that micro-prudential effects are a major consideration here. *See infra* note 152.

[145] *See* FINRA, *Security Futures—Know Your Risks, or Risk Your Future, available at http://www.finra.org/Investors/InvestmentChoices/P005912* and National Futures Association, *Security Futures, An Introduction to Their Uses and Risks* (2002), *available at https://www.nfa.futures.org/members/member-resources/files/security-futures.pdf.*

[146] The judgement of retail investors receives significant criticism in the academic literature. *See e.g.,* Odean, Terrance. ''Do Investors Trade Too Much?'' *The American Economic Review* 89, no. 5 (1999): 1279–98. *See also* Barber, Brad M, and Terrance Odean. ''Trading Is Hazardous to Your Wealth: The Common Stock Investment Performance of Individual Investors.'' *The Journal of Finance* 55, no. 2 (April 1, 2000): 773–806. *See also* Heimer, Rawley Z, and Alp Simsek. ''Should Retail Investors' Leverage Be Limited?'' Working Paper. National Bureau of Economic Research, December 2017.

[147] Fixed margin requirements cannot differentiate between different types of customers (*e.g.,* sophisticated vs. unsophisticated, financially constrained vs. unconstrained) or the risk of the position. *See* Figlewski Stephen, ''Margins and Market Integrity: Margin Setting for Stock Index Futures and Options,'' Journal of Futures Markets 4, no. 3 (1984): 385–416. *See also* FRB, A Review and Evaluation of Federal Margin Regulation: A Study (1984).

[148] *See supra* notes 42–44 and accompanying text.

[149] *See* Rule 15c3–3, 17 CFR 240.15c3–3. *See also Applicability of CFTC and SEC Customer Protection, Recordkeeping, Reporting, and Bankruptcy Rules and the Securities Investor Protection Act of 1970 to Accounts Holding Security Futures Products, Final Rule,* Exchange Act Release No. 46473 (Sept. 9, 2002), 67 FR 58284 (Sept. 13, 2002).

[150] Under the proposed rule, broker-dealers could maintain existing customer margin requirements and avoid incurring any implementation costs.

[151] *See supra* note 142.

[152] The SEC acknowledges that other market imperfections (*e.g.,* asymmetric information, adverse selection) may also play a role, although the SEC believes these to be less relevant to this context. Asymmetric information about market participants' quality can lead privately-negotiated margin levels to be inefficient. For example, competition among broker-dealers may lead to a ''race to the bottom'' in margin requirements when customers' ''quality'' is not perfectly observable. *See e.g.,* Santos, Tano, and Jose A. Scheinkman, ''Competition among Exchanges,'' *The Quarterly Journal of Economics* 116, no. 3 (Aug. 1, 2001): 1027–61. Alternatively, problems of adverse selection (*e.g.,* potential to re-invest customer margin in risky investments) or moral hazard (*e.g.,* expectations of government rescue) may also create incentives for broker-dealers to offer margin requirements that are too low. Asymmetric information about broker-dealer quality may make it impossible for customers to provide sufficient market discipline, leading to a problem similar to that faced by bank depositors. *See* Dewatripont, Mathias, and Jean Tirole, ''Efficient Governance Structure: Implications for Banking Regulation,'' *Capital Markets and Financial Intermediation,* 1993, 12–35.

[153] *See* Moore, Thomas Gale, ''Stock Market Margin Requirements,'' *Journal of Political Economy* 74, no. 2 (April 1, 1966): 158–67.

exposures built up during price run ups could lead to the collapse of prices when a small shock triggers margin calls and a cascade of de-leveraging. The utility of margin requirements in limiting such ''excess'' volatility and the contribution of derivative markets to such volatility have been a perennial topic of debate in the academic literature, rekindled periodically by crisis episodes.[154] Most recently, the 2007–2008 financial crisis saw similar concerns (*i.e.,* procyclical leverage, margin call-induced selling spirals) raised in the securitized debt markets.[155] While the SEC believes that lower margin requirements can increase the risk and severity of market dislocations, the SEC does not believe—given the current limited scale of the security futures markets and the limited role played by SEC registrants in these markets—that the proposed reductions to minimum margin requirements present a material financial stability concern.[156]

b. Competition

Under the baseline, risk-based portfolio margining is not available to customers holding security futures positions in futures accounts, and these positions are thus subject to the 20% margin requirement. The proposed reduction in margin would permit customers holding security futures in futures accounts to receive margin treatment consistent with margin treatment for customers holding security futures positions in a securities account permitted under the current SRO securities portfolio margining rules.[157] This could establish a more level playing field between options exchanges and security futures exchanges, and between broker-dealers/securities accounts and FCMs/futures accounts.

In principle, a more level playing field should enhance competition among broker-dealers and FCMs for security futures business. In practice however, the majority of security futures transactions are already conducted through futures accounts, and of those that are not, none are subject to portfolio margining.[158] It is therefore unlikely that the proposed changes will have an immediate impact on competition among existing intermediaries of security futures transactions (*i.e.,* broker-dealers and FCMs). However, it is likely that the reduction in margin levels will increase participation in the security futures markets. If sufficiently large, such increased participation may spur additional broker-dealers and FCMs to offer security futures trading.

More broadly, by aligning margin requirements applicable to a security futures position (which generally are not portfolio margined) with those applicable to equivalent options positions [159] (which generally are subject to portfolio margining), the proposed amendment could be expected to encourage growth of the security futures market. The security futures market can provide a low-friction means of obtaining delta exposures, and relatively high margin requirements (vis-à-vis comparable options positions) which may have played a role in restraining its development. To the extent that reducing margin requirements leads to significant growth of this market, it may have additional—less direct—competitive implications. For example, increased liquidity in security futures may lead to increased use of this market to obtain short exposures, which could, in turn, adversely affect intermediaries' securities lending business.

c. Capital Formation

The proposed rule changes are not expected to have an immediate material impact on capital formation. To the extent that the proposed reductions in margin requirements encourage significant growth in the security futures markets, it may, in time, improve price discovery for underlying securities. In particular, a more active security futures market can reduce the frictions associated with shorting equity exposures, making it easier for negative information about a firm's fundamentals to be incorporated into security prices. This could promote more efficient capital allocations by facilitating the flow of financial resources to their most productive uses.

The SEC generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation.

iv. Alternatives Considered

The SEC believes that reducing minimum customer margin requirements for security futures to a level between 15% and 20% would maintain inconsistencies in margin requirements across security futures and options, without providing significant benefits as compared to the proposed amendments. Accordingly, in light of the objectives of this particular rulemaking, and in the context of the statutory framework discussed above, the SEC does not believe that there are reasonable alternatives to the proposal to reduce the minimum initial and maintenance margin levels for unhedged security futures to 15%.

V. Regulatory Flexibility Act

A. CFTC

The Regulatory Flexibility Act (''RFA'') requires that federal agencies, in promulgating rules, consider the impact of those rules on small entities.[160] The proposed amendments will affect designated contract markets, FCMs, and customers who trade in security futures. The CFTC has previously established certain definitions of ''small entities'' to be used by the CFTC in evaluating the impact of its rules on small entities in accordance with the RFA.[161]

In its previous determinations, the CFTC has concluded that contract markets are not small entities for purposes of the RFA, based on the vital role contract markets play in the national economy and the significant amount of resources required to operate as SROs.[162] The CFTC also has determined that notice-designated contract markets are not small entities for purposes of the RFA.[163]

The CFTC has previously determined that FCMs are not small entities for purposes of the RFA, based on the fiduciary nature of FCM-customer

[154] *See id. See also* Figlewski, Stephen, ''Futures Trading and Volatility in the GNMA Market,'' *The Journal of Finance* 36, no. 2 (1981): 445–56. *See also* Edwards, Franklin R, ''Does Futures Trading Increase Stock Market Volatility?,'' *Financial Analysts Journal* 44, no. 1 (1988): 63–69. *See also* Kupiec, Paul H, ''Margin Requirements, Volatility, and Market Integrity: What Have We Learned Since the Crash?,'' *Journal of Financial Services Research* 13, no. 3 (June 1, 1998): 231–55.

[155] *See e.g.,* Adrian, Tobias, and Hyun Song Shin, ''Liquidity and Leverage,'' *Journal of Financial Intermediation* 19, no. 3 (2010): 418–437.

[156] If the security futures market were to significantly increase in size as a result of these proposed changes or other factors, the impact of lower margin requirements on overall market stability would be greater than the minimal impact the SEC expects under current market conditions. However, for reasons described in notes 106–108 and accompanying text, above, the SEC does not believe this type of significant growth is likely in the foreseeable future.

[157] *See* OCX Petition.

[158] *See supra* note 118.

[159] A long (short) security future position can be replicated by a portfolio containing one long (short) at-the-money call and one short (long) at-the-money put. The margin requirement applicable to the latter under approved portfolio margin systems is 15%.

[160] 5 U.S.C. 601 *et seq.*

[161] *Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act,* 47 FR 18618, 18618–21 (Apr. 30, 1982).

[162] *Id.* at 18619.

[163] *Designated Contract Markets in Security Futures Products: Notice-Designation Requirements, Continuing Obligations, Applications for Exemptive Orders, and Exempt Provisions,* 66 FR 44960, 44964 (Aug. 27, 2001).

relationships as well as the requirements that FCMs meet certain minimum financial requirements.[164] In addition, the CFTC has determined that notice-registered FCMs,[165] for the reasons applicable to FCMs registered in accordance with Section 4f(a)(1) of the CEA,[166] are not small entities for purposes of the RFA.[167]

Finally, the CFTC notes that according to data from OCX, 99% of all customers transacting in security futures as of March 1, 2016 and March 1, 2017 qualified as ECPs. The CFTC has found that ECPs should not be considered small entities for the purposes of the RFA.[168] An overwhelming majority of the customers transacting in security futures currently are ECPs and are not small entities. Therefore, a change in the margin level for security futures is not anticipated to affect small entities.

Accordingly, the CFTC Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b), that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The CFTC invites public comments on this determination.

B. SEC

The RFA requires that federal agencies, in promulgating rules, consider the impact of those rules on small entities.[169] Section 3(a) [170] of the RFA generally requires the SEC to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on small entities unless the SEC certifies that the rule amendments, if adopted, would not have a significant economic impact on a substantial number of small entities.[171]

For purposes of SEC rulemaking in connection with the RFA,[172] a small entity includes a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to SEC Rule 17a–5(d) (under the Exchange Act),[173] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[174] The proposed rule amendments would reduce the required margin for security futures from 20% to 15%. The proposed rule amendments would affect brokers, dealers, and members of national securities exchanges, including FCMs required to register as broker-dealers under Section 15(b)(11) of the Exchange Act, relating to security futures.[175]

IBs and FCMs may register as broker-dealers by filing Form BD-N.[176] However, because such IBs may not collect customer margin they are not subject to these rules. In addition, the CFTC has concluded that FCMs are not considered small entities for purposes of the RFA.[177] Accordingly, there are no IBs or FCMs that are small entities for purposes of the RFA that would be subject to the proposed rule amendments.

In addition, all members of national securities exchanges registered under Section 6(a) of the Exchange Act are registered broker-dealers.[178] The SEC estimates that as of December 31, 2017, there were approximately 1,060 broker-dealers that were ''small'' for the purposes of SEC Rule 0–10. Of these, the SEC estimates that there are less than ten broker-dealers that are carrying broker-dealers (*i.e.,* can carry customer margin accounts and extend credit). However, based on December 31, 2017 FOCUS Report data, none of these small carrying broker-dealers carried debit balances. This means these ''small'' carrying firms are not extending margin credit to their customers, and therefore, the proposed rules likely would not apply to them. Therefore, while SEC believes that some small broker-dealers could be affected by the proposed amendments, the amendments will not have a significant impact on a substantial number of small broker-dealers.

Accordingly, the SEC certifies that the proposed rule amendments would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The SEC encourages written comments regarding this certification. The SEC solicits comment as to whether the proposed rule amendments could have an effect on small entities that has not been considered. The SEC requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [179] a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. The Commissions request comment on the potential impact of the proposed amendments for margin requirements for security futures on:

- The U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

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[164] *Supra* note 159 at 18619.

[165] A broker or dealer that is registered with the SEC and that limits its futures activities to those involving security futures products may notice register with the CFTC as an FCM in accordance with Section 4f(a)(2) of the CEA (7 U.S.C. 6f(a)(2)).

[166] 7 U.S.C. 6f(a)(1).

[167] 2002 Final Rules, 67 FR at 53171.

[168] *Opting Out of Segregation,* 66 FR 20740, 20743 (Apr. 25, 2001).

[169] 5 U.S.C. 601 *et seq.*

[170] 5 U.S.C. 603.

[171] 5 U.S.C. 605(b). The proposed amendments are discussed in detail in section II. above. The SEC discusses the potential economic consequences of the amendments in section IV. (Economic Analysis) above. As discussed in section III (Paperwork Reduction Act) above, the proposed amendments do not contain a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act.

[172] Although Section 601 of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The SEC has adopted definitions for the term ''small entity'' for the purposes of SEC rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in SEC Rule 0-10 (under the Exchange Act), 17 CFR 240.0–10. *See Statement of Management on Internal Accounting Control,* Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

[173] 17 CFR 240.17a–5(d).

[174] *See* 17 CFR 240.0–10(c).

[175] *See* SEC Rule 400(a), 17 CFR 242.400(a).

[176] These notice-registered broker-dealers are not included in the 1,060 small broker-dealers discussed below, as they are not required to file FOCUS Reports with the SEC. *See* SEC Rule 17a–5(m)(4), 17 CFR 240.17a–5(m)(4).

[177] *See* 47 FR 18618, 18618–21 (Apr. 30, 1982). *See also* 66 FR 14262, 14268 (Mar. 9, 2001).

[178] National securities exchanges registered under Section 6(g) of the Exchange Act—notice registration of security futures product exchanges—may have members who are floor brokers or floor traders who are not registered broker-dealers; however, these entities cannot clear securities transactions or collect customer margin, and, therefore, the proposed rules would not apply to them.

[179] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various Sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

VII. Anti-Trust Considerations

Section 15(b) of the CEA requires the CFTC 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 [CFTC] 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].'' [180] The CFTC believes that the public interest to be protected by the antitrust laws is generally to protect competition. The CFTC requests comment on whether this proposal implicates any other specific public interest to be protected by the antitrust laws.

The CFTC has considered the proposal to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The CFTC requests comment on whether the proposal is anticompetitive and, if it is, what the anticompetitive effects are.

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

VIII. Statutory Basis

The SEC is proposing the amendment to SEC Rule 403(b)(1) pursuant to the Exchange Act, particularly Sections 3(b), 6, 7(c), 15A and 23(a). Further, these amendments are proposed pursuant to the authority delegated jointly to the SEC, together with the CFTC, by the Federal Reserve Board in accordance with Exchange Act Section 7(c)(2)(A).

Text of Rules

List of Subjects

17 CFR Part 41

Brokers, Margin, Reporting and recordkeeping requirements, Security futures products.

17 CFR Part 242

Brokers, Confidential business information, Reporting and recordkeeping requirements, Securities.

[180] 7 U.S.C. 19(b).

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 41

For the reasons discussed in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 41 as set forth below:

PART 41—SECURITY FUTURES PRODUCTS

■ 1. The authority citation for part 41 continues to read as follows:

Authority: Sections 206, 251 and 252, Pub. L. 106–554, 114 Stat. 2763; 7 U.S.C. 1a, 2, 6f, 6j, 7aa–2, 12a; 15 U.S.C. 78g(c)(2).

■ 2. Amend § 41.45 by revising paragraph (b)(1) to read as follows:

§ 41.45 Required margin.

* * * * *

(b) *Required margin.* (1) *General rule.* The required margin for each long or short position in a security future shall be fifteen (15) percent of the current market value of such security future.

* * * * *

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

In accordance with the foregoing Title 17, chapter II, part 242 of the Code of Federal Regulations is proposed to be amended as follows:

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 3. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78ka–1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dda–1, 78mm, 80aa–23, 80aa–29, and 80aa–37.

■ 4. Section 242.403 is amended by revising paragraph (b)(1) to read as follows:

§ 242.403 Required margin.

* * * * *

(b) *Required margin.* (1) *General rule.* The required margin for each long or short position in a security future shall be fifteen (15) percent of the current market value of such security future.

* * * * *

By the Securities and Exchange Commission.

Dated: July 3, 2019.

Vanessa A. Countryman,

Secretary.

Issued in Washington, DC, on July 9, 2019, by the Commodity Futures Trading Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Commodity Futures Trading Commission (CFTC) Appendices to Customer Margin Rules Relating to Security Futures—CFTC Voting Summary and CFTC Commissioner's Statement

Appendix 1—CFTC 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 CFTC Commissioner Dan M. Berkovitz

I support issuing the joint notice of proposed rulemaking (''Proposal'') with the Securities Exchange Commission (''SEC'') (collectively with the CFTC, ''Commissions'') to amend the security futures margin requirements.

In 2000, Congress passed the Commodity Futures Modernization Act (''CFMA'') which permitted security futures trading.[1] The CFMA provides that customer margin requirements for security futures shall be set at levels that:

(1) Require (a) consistency with the margin requirements for comparable exchange-traded options and (b) margin levels not lower than the lowest level of margin, exclusive of premium, required for any comparable exchange-traded options,

(2) preserve the financial integrity of markets trading security futures products,

(3) prevent systemic risk, and

(4) are and remain consistent with certain margin requirements established by the Federal Reserve Board under its Regulation T.[2]

The Proposal would decrease the required minimum margin from 20 percent to 15 percent of the current market value. The Proposal reasons that amending the minimum required margin reflects the current stress level percentage of 15 percent set for unhedged exchange-traded options in self-regulated organization risk-based portfolio margining programs.[3] This action would increase consistency in the markets by bringing the margin requirement for security futures held outside of a securities portfolio margin account into alignment with the margining for security futures under risk-based portfolio margining methodologies.[4]

The 20 percent level was originally set by the Commissions in 2002. Markets have

[1] *See* App. E of Public Law 106–554, 114 Stat. 2,763 (2000).

[2] *See* 15 U.S.C. 78g(c)(2)(B) (2018).

[3] Proposal, section II.A.5.

[4] See 15 U.S.C. 78g(c)(2)(B) (2018).

evolved since that time and it is appropriate to reconsider the margin level in light of the subsequent adoption of the risk-based portfolio margining programs. In doing so, the Proposal has followed the statutory mandate to set the security futures margin requirement at levels consistent with, and not lower than, levels for similar options.

In conclusion, I commend the joint work by the Commissions' respective staffs in preparing the Proposal. The Proposal represents an opportunity for the Commissions to gain more knowledge about the security futures markets, reevaluate the status quo, and establish a more effective regulatory standard. I look forward to public comments in response to the Proposal, particularly comments that provide additional data and analysis regarding the appropriateness of the 15 percent level under each of the statutory factors the Commissions must consider.

[FR Doc. 2019–15400 Filed 7–25–19; 8:45 am]

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