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DEPARTMENT OF AGRICULTURE

2 CFR Part 417

Federal Crop Insurance Corporation

7 CFR Part 400

[0505–AA17]

Nonprocurement Debarment and Suspension

AGENCY: Office of the Chief Financial Officer and Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The USDA issues this final rule to adopt certain provisions of the Office of Management and Budget (OMB) guidelines to agencies on governmentwide debarment and suspension (nonprocurement) not previously adopted, to adopt changes made to the OMB guidance after its initial publication in 2010, and to revise the definition of the term ''disqualified'' to add the statutory disqualification requirements for USDA agencies. Finally, this rule removes a reference to the old USDA suspension and debarment regulations for the Federal Crop Insurance Corporation and replaces it with the current regulations. This regulatory action makes no substantive changes in USDA policy or procedures for nonprocurement debarment and suspension.

DATES: This final rule is effective as of October 4, 2019.

FOR FURTHER INFORMATION CONTACT: Tyson Whitney, Director, Transparency and Accountability Reporting Division, Office of the Chief Financial Officer, Room 3027–S, Stop Code 9011, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250; (202) 720–8978; *Tyson.whitney@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

USDA published a direct final rule on May 25, 2010, to adopt the OMB guidelines to agencies on nonprocurement debarment and suspension as 2 CFR part 417 (75 FR 29183). USDA issues this final rule to adopt subpart E, General Services Administration's System for Award Management (GSA/SAM) (formerly Excluded Parties List System) and subpart F, General Principles Relating to Suspension and Debarment, of 2 CFR part 180. It also revises 2 CFR part 417 to amend subpart I to add the definition of ''disqualified'' in 2 CFR 417.935, as supplemented to include the statutory disqualifications required under USDA programs, and the definition of ''nonprocurement transaction'' in 2 CFR 417.970, and to adopt the Appendix to Part 180—Covered Transactions. Finally, this rule amends 7 CFR part 400 to replace a reference to the old USDA suspension and debarment regulations in 7 CFR 400.454.

Discussion and Analysis

The amendment to part 417 adopts subparts and definitions in the OMB guidelines to agencies on nonprocurement debarment and suspension not previously adopted and captures updates to 2 CFR part 180 that have occurred since 2010. These include Subpart E, General Services Administration's System for Award Management (GSA/SAM) (formerly Excluded Parties List System); Subpart F, General Principles Relating to Suspension and Debarment; definitions added in 2 CFR 180.935, as supplemented to include USDA statutory disqualifications, and 2 CFR 180.970; and Appendix to Part 180—Covered Transactions. This rule also replaces a reference to 7 CFR part 3017 in 7 CFR 400.454 with a reference to 2 CFR part 417. This regulatory action is a technical update of the rule and does not represent a change in current USDA nonprocurement debarment and suspension policy or procedures.

Executive Order 12866 Regulatory Planning and Review

This rule is issued in conformance with Executive Order 12866, ''Regulatory Planning and Review.'' It has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

IV. Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This regulatory action will not have a significant, adverse impact on a substantial number of small entities.

V. Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104–4)

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

VI. Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

VII. Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. This rule does not impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States was not required.

VIII. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

Executive Order 13175, entitled ''Consultation and Coordination With Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175.

List of Subjects

2 CFR Part 417

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

7 CFR Part 400

Acreage allotments, Administrative practice and procedure, Claims, Crop insurance, Drug traffic control, Fraud, Government employees, Income taxes, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Wages.

For the reasons discussed in the preamble, the Department of Agriculture amends 2 CFR part 417 and 7 CFR part 400 as follows:

Title 2—Grants and Agreements

CHAPTER IV—DEPARTMENT OF AGRICULTURE

PART 417—NONPROCUREMENT DEBARMENT AND SUSPENSION

■ 1. The authority citation for part 417 continues to read as follows:

Authority: 5 U.S.C. 301; Pub. L. 101–576, 104 Stat. 2838; Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); 7 U.S.C. 2209j; E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, Comp., p. 235); 7 CFR 2.28.

■ 2. Add subpart E, consisting of §§ 417.500 through 417.530, to read as follows:

Subpart E—System for Award Management Exclusions

Sec.

417.500 What is the purpose of the System for Award Management Exclusions (SAM Exclusions)?
417.505 Who uses SAM Exclusions?
417.510 Who maintains SAM Exclusions?
417.515 What specific information is in SAM Exclusions?
417.520 Who places the information into SAM Exclusions?
417.525 Whom do I ask if I have questions about a person in SAM Exclusions?
417.530 Where can I find SAM Exclusions?

Subpart E—System for Award Management Exclusions

§ 417.500 What is the purpose of the System for Award Management Exclusions (SAM Exclusions)?

SAM Exclusions is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

§ 417.505 Who uses SAM Exclusions?

(a) Federal agency officials use SAM Exclusions to determine whether to enter into a transaction with a person, as required under § 180.430 of this title.

(b) Participants also may, but are not required to, use SAM Exclusions to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under § 180.320 of this title; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) SAM Exclusions are available to the general public.

§ 417.510 Who maintains SAM Exclusions?

The General Services Administration (GSA) maintains SAM Exclusions. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into SAM Exclusions.

§ 417.515 What specific information is in SAM Exclusions?

(a) At a minimum, SAM Exclusions indicates—

(1) The full name (where available) and address of each excluded and disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for the action;

(6) The Federal agency and name and telephone number of the agency point of contact for the action; and

(7) The unique entity identifier approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for SAM Exclusions includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

§ 417.520 Who places the information into SAM Exclusions?

Federal agency officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into SAM Exclusions:

(a) Information required by § 180.515(a) of this title;

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, within three business days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

§ 417.525 Whom do I ask if I have questions about a person in SAM Exclusions?

If you have questions about a listed person in SAM Exclusions, ask the point of contact for the Federal agency that placed the person's name into SAM Exclusions. You may find the agency point of contact from SAM Exclusions.

§ 417.530 Where can I find SAM Exclusions?

You may access SAM Exclusions through the internet, currently at *https://www.sam.gov.*

■ 3. Add subpart F, consisting of §§ 417.600 through 417.660, to read as follows:

Subpart F—General Principles Relating to Suspension and Debarment Actions

Sec.

417.600 How do suspension and debarment actions start?
417.605 How does suspension differ from debarment?
417.610 What procedures does a Federal agency use in suspension and debarment actions?
417.615 How does a Federal agency notify a person of a suspension or debarment action?
417.620 Do Federal agencies coordinate suspension and debarment actions?
417.625 What is the scope of a suspension or debarment?
417.630 May a Federal agency impute the conduct of one person to another?
417.635 May a Federal agency settle a debarment or suspension action?
417.640 May a settlement include a voluntary exclusion?
417.645 Do other Federal agencies know if an agency agrees to a voluntary exclusion?
417.650 May an administrative agreement be the result of a settlement?
417.655 How will other Federal awarding agencies know about an administrative agreement that is the result of a settlement?
417.660 Will administrative agreement information about me in the designated integrity and performance system accessible through SAM be corrected or updated?

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 417.600 How do suspension and debarment actions start?

When Federal agency officials receive information from any source concerning a cause for suspension or debarment, they will promptly report it and the agency will investigate. The officials refer the question of whether to suspend or debar you to their suspending or debarring official for consideration, if appropriate.

§ 417.605 How does suspension differ from debarment?

SUSPENSION DIFFERS FROM DEBARMENT IN THAT—

A suspending official . . .	A debarring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings.	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must—	
(1) Have "adequate evidence" that there may be a cause for debarment of a person; and.	
(2) Conclude that "immediate action" is necessary to protect the Federal interest.	Must conclude, based on a "preponderance of the evidence," that the person has engaged in conduct that warrants debarment.
(c) Usually imposes the suspension "first," and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted.	Imposes debarment "after" giving the respondent notice of the action and an opportunity to contest the proposed debarment.

§ 417.610 What procedures does a Federal agency use in suspension and debarment actions?

In deciding whether to suspend or debar you, a Federal agency handles the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, a Federal agency uses the procedures in this subpart and subpart G of this part.

(b) For debarment actions, a Federal agency uses the procedures in this subpart and subpart H of this part.

§ 417.615 How does a Federal agency notify a person of a suspension or debarment action?

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or email address of—

(1) You or your identified counsel; or

(2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

§ 417.620 Do Federal agencies coordinate suspension and debarment actions?

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

§ 417.625 What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

§ 417.630 May a Federal agency impute the conduct of one person to another?

For purposes of actions taken under this part, a Federal agency may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* A Federal agency may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* A Federal agency may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* A Federal agency may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control, or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

§ 417.635 May a Federal agency settle a debarment or suspension action?

Yes, a Federal agency may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

§ 417.640 May a settlement include a voluntary exclusion?

Yes, if a Federal agency enters into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

§ 417.645 Do other Federal agencies know if an agency agrees to a voluntary exclusion?

(a) Yes, the Federal agency agreeing to the voluntary exclusion enters information about it into SAM Exclusions.

(b) Also, any agency or person may contact the Federal agency that agreed to the voluntary exclusion to find out the details of the voluntary exclusion.

§ 417.650 May an administrative agreement be the result of a settlement?

Yes, a Federal agency may enter into an administrative agreement with you as part of the settlement of a debarment or suspension action.

§ 417.655 How will other Federal awarding agencies know about an administrative agreement that is the result of a settlement?

The suspending or debarring official who enters into an administrative agreement with you must report information about the agreement to the designated integrity and performance system within three business days after entering into the agreement. This information is required by section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (41 U.S.C. 2313).

§ 417.660 Will administrative agreement information about me in the designated integrity and performance system accessible through SAM be corrected or updated?

Yes, the suspending or debarring official who entered information into the designated integrity and performance system about an administrative agreement with you:

(a) Must correct the information within three business days if he or she subsequently learns that any of the information is erroneous.

(b) Must correct in the designated integrity and performance system, within three business days, the ending date of the period during which the agreement is in effect, if the agreement is amended to extend that period.

(c) Must report to the designated integrity and performance system, within three business days, any other modification to the administrative agreement.

(d) Is strongly encouraged to amend the information in the designated integrity and performance system in a timely way to incorporate any update that he or she obtains that could be helpful to Federal awarding agencies who must use the system.

Subpart I—Definitions

■ 4. Add § 417.935 to read as follows:

§ 417.935 Disqualified (USDA supplement to governmentwide definition at 2 CFR 180.935).

''Disqualified'' means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

(a) The Davis-Bacon Act (40 U.S.C. 276(a));

(b) The equal employment opportunity acts and Executive orders; or

(c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799);

(d) 515(h) of the Federal Crop Insurance Act (7 U.S.C. 1515(h));

(e) Section 12 of the Food and Nutrition Act of 2008 (7 U.S.C. 2021).

■ 5. Add § 417.970 to read as follows:

§ 417.970 Nonprocurement transaction.

(a) ''Nonprocurement transaction'' means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

(1) Grants.

(2) Cooperative agreements.

(3) Scholarships.

(4) Fellowships.

(5) Contracts of assistance.

(6) Loans.

(7) Loan guarantees.

(8) Subsidies.

(9) Insurances.

(10) Payments for specified uses.

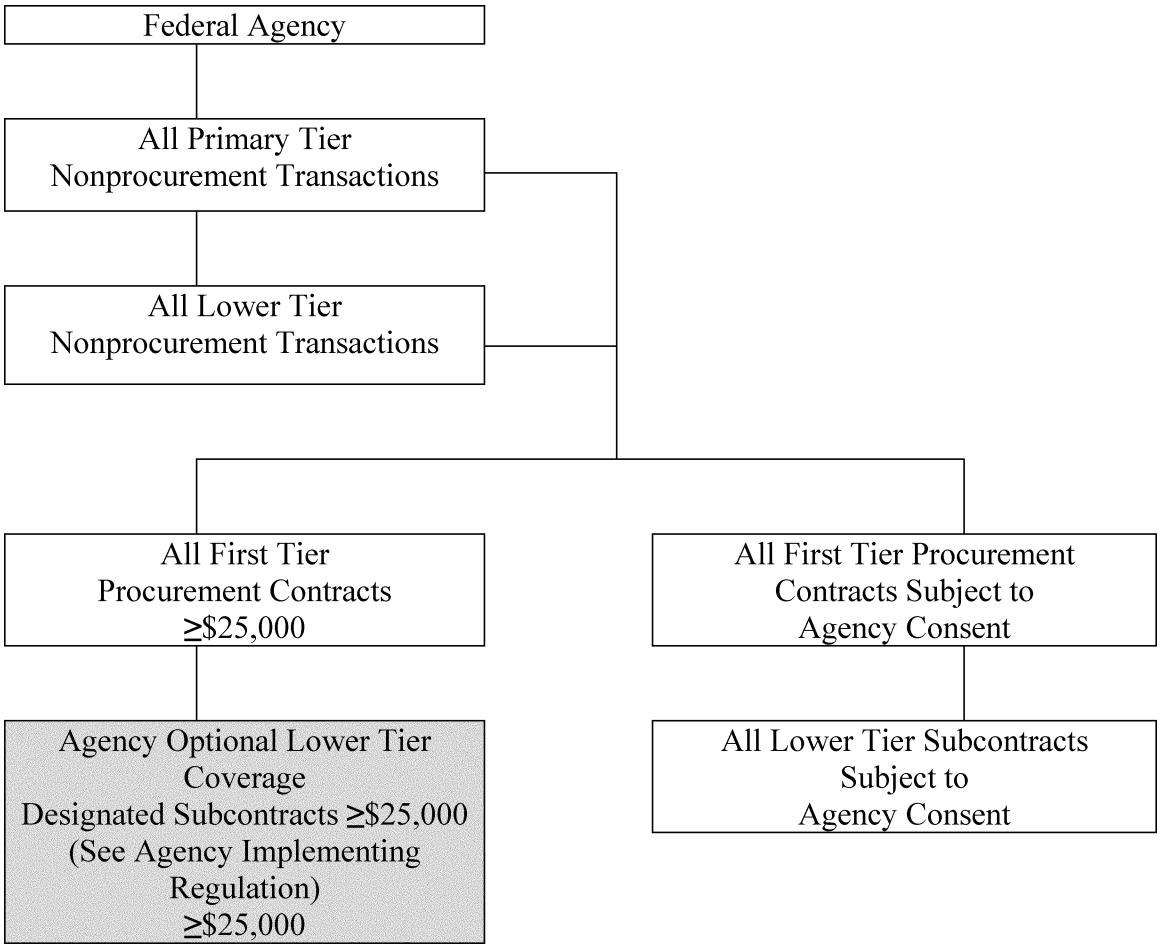
(11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

■ 6. Add Appendix 1 to Part 417 to read as follows:

Appendix 1 to Part 417—Covered Transactions

Covered Transactions



Title 7

Chapter IV—Federal Crop Insurance Corporation

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

Subpart R—Administrative Remedies for Non-compliance

■ 6. The authority citation for 7 CFR part 400, subpart R, continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o), and 7 U.S.C. 1515(h).

§ 400.454 [Amended]

■ 7. In § 400.454(e)(3), remove the phrase ''Excluded Parties List System (EPLS) in accordance with 7 CFR part 3017, subpart E'' and add in its place ''System for Award Management (SAM) in accordance with 2 CFR part 417''.

Stephen L. Censky,

Deputy Secretary.

[FR Doc. 2019–20865 Filed 10–3–19; 8:45 a.m.]

BILLING CODE 3410–KS–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 251

[FNS–2019–0013]

RIN 0584–AE73

The Emergency Food Assistance Program: Implementation of the Agriculture Improvement Act of 2018

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule; request for comments.

SUMMARY: Through this rulemaking, the U.S. Department of Agriculture's (the Department or USDA) Food and Nutrition Service (FNS) is codifying new statutory requirements included in the Agriculture Improvement Act of 2018 (2018 Farm Bill). First, the 2018 Farm Bill requires The Emergency Food Assistance Program (TEFAP) State Plans, at the option of the State agency, to describe a plan of operation for projects to harvest, process, package, or transport donated commodities for use by TEFAP emergency feeding organizations (EFOs), also known as Farm to Food Bank Projects. Second, the Department is requiring TEFAP State agencies to amend their State Plans to describe a plan that provides EFOs or eligible recipient agencies (ERAs) within the State an opportunity to provide input on their commodity preferences and needs. Last, the Department is establishing the requirements for the projects to harvest, process, package, or transport donated commodities as authorized in the 2018 Farm Bill.

DATES:

Effective Date: This rule is effective October 4, 2019.

Comment Date: Written comments on this rule must be received on or before December 3, 2019.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this final rule. Comments may be submitted in writing by one of the following methods:

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

• *Mail:* Send comments to Polly Fairfield, Program Analyst, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 506, Alexandria, Virginia 22302–1592, (703) 305–2680.

• *Email:* Send comments to *TEFAPRuleComments@usda.gov.* Include Docket ID Number [FNS–2019–0013], ''The Emergency Food Assistance Program: Implementation of the Agriculture Act of 2018'' in the subject line of the message.

• All written comments submitted in response to this Final Rule with Request for Comments will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the internet via *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Polly Fairfield, Program Analyst, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 506, Alexandria, Virginia 22302–1592, or by email at *Polly.Fairfield@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background and Discussion of Final Rule With Request for Comments
A. Revisions to TEFAP State Plan Requirements
B. Farm to Food Bank Project Definition
C. Farm to Food Bank Project Allocation of Funds
D. Purpose and Use of Farm to Food Bank Project Funds
E. Federal Share of Farm to Food Bank Projects
F. Farm to Food Bank Project Reallocation of Funds
G. Farm to Food Bank Project Reporting Requirements
H. Cooperative Agreements
III. Procedural Matters

I. Public Comment Procedures

Your written comments on this rule should be specific, should be confined to issues pertinent to the rule, and should explain the reason(s) for any change you recommend or oppose. Where possible, you should reference the specific section or paragraph of the rule you are addressing. This rule is effective upon publication. If the Department determines that comments received change any provisions of this rule, the Department will publish a new final rule in the **Federal Register**. Comments received after the close of the comment period (see **DATES**) will not be included in the Administrative Record for this rule.

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the regulation clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (*e.g.,* grouping and order of sections, use of heading, and paragraphing) make it clearer or less clear?

(4) Would the rule be easier to understand if it was divided into more (but shorter) sections?

(5) Is the description of the rule in the preamble section entitled ''Background and Discussion of Final Rule with Request for Comments'' helpful in understanding the rule? How could this description be more helpful in making the rule easier to understand?

II. Background and Discussion of Final Rule With Request for Comments

The Farm Bill was signed into law on December 20, 2018 (Pub. L. 115–334). Section 4018 of the 2018 Farm Bill included TEFAP-specific provisions and modified the Emergency Food Assistance Act of 1983 (7 U.S.C. 7501–7516) (EFAA). This rule codifies new statutory requirements included in the 2018 Farm Bill by amending TEFAP regulations at 7 CFR part 251. Upon publication, this rulemaking makes the following changes: (1) Revises TEFAP State Plan requirements; and (2) establishes the requirements for projects to harvest, process, package, or transport donated commodities for use by TEFAP EFOs, also known as Farm to Food Bank Projects. The amendments are discussed in detail below.

The Administrative Procedure Act (APA) at 5 U.S.C. 553(a)(2) specifically exempts rules involving grants and benefits from notice-and-comment requirements, giving FNS the authority to issue final rules in grants and benefits programs, like TEFAP.[1] FNS does, however, retain the discretion to issue a final rule with a request for comments, and FNS welcomes comments on the specified sections below. The Department is issuing this final rule with request for comments to ensure that the provisions in this rulemaking are implemented as timely as possible to distribute funds to TEFAP State agencies for fiscal year (FY) 2020. The Department determined that prolonging the implementation of these provisions would negatively impact State agencies that administer TEFAP by delaying their ability to access the funds provided by the 2018 Farm Bill. As previously stated, if the Department, upon consideration of the comments received, decides to amend any provisions of the rule, the Department will publish a new final rule in the **Federal Register** with an explanation of the changes.

A. Revisions to TEFAP State Plan Requirements

Section 4018(a) of the 2018 Farm Bill modified section 202A(b) of the EFAA to require that TEFAP State Plans describe, at the option of the State agency, a plan of operation for one or more projects in partnership with one or more EFOs located in the State to harvest, process, package, or transport donated commodities received under section 203D(d) of the EFAA. Accordingly, this rule amends TEFAP regulations at 7 CFR 251.6(a) to include this new State Plan requirement and to outline what must be included in the State Plan amendment for the plan of operation for such projects. The Department requests comments on the regulatory proposal regarding the plan of operation for a Farm to Food Bank Project.

The 2018 Farm Bill also modified section 202A(b) of the EFAA to require that TEFAP State Plans describe a plan, which may include the use of a State advisory board established under section 202A(c) of the EFAA, that provides EFOs or ERAs within the State an opportunity to provide input on the commodity preferences and needs of the EFO or ERA. The Department does not request comments on the regulatory proposal related to providing input on commodity preferences, as it is a non-discretionary change required by the 2018 Farm Bill.

B. Farm to Food Bank Project Definition

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA and provides a new section 203D(d) that establishes a fund for projects to harvest, process, package, or transport donated commodities for use by TEFAP EFOs. This rule adopts the definition of ''project'' in section 203D(d)(1) of the EFAA as the harvesting, processing, packaging, or transportation of unharvested, unprocessed, or unpackaged commodities donated by agricultural producers, processors, or

[1] Previous USDA practice pursuant to the Statement of Policy published on July 24, 1971 (36 FR 13804) was to utilize APA notice-and-comment rulemaking procedures regardless of the APA's stated exceptions, but that memo was rescinded in 2013. 78 FR 64194.

distributors for use by EFOs. This rule also codifies the common name for these projects as ''Farm to Food Bank Projects'' by adding a new paragraph at 7 CFR 251.10(j)(1). The Department requests comments on this section of the rulemaking.

C. Farm to Food Bank Project Allocation of Funds

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA to include a new section 203D(d)(5) that provides $4 million for each of fiscal years 2019 through 2023, to remain available until the end of the subsequent fiscal year, that the Department must allocate to TEFAP State agencies that have submitted a State plan describing a plan of operation for a Farm to Food Bank Project. Section 4018(b) also amended section 203D of the EFAA to include a new section 203D(d)(2)(C)(i) which directs the Department to determine a formula to allocate these funds each fiscal year.

Thus, the Department is establishing that the Farm to Food Bank Project funds will be allocated to States with an approved State Plan describing a project by using the current TEFAP funding formula found at 7 CFR 251.3(h). The formula in 7 CFR 251.3(h) provides that the amount of funds to be provided to each State will be based on each State's population of low-income and unemployed persons, as compared to national statistics. Each State's share of funds will be based 60 percent on the number of persons in households within the State having incomes below the poverty level and 40 percent on the number of unemployed persons within the State. The Department is also establishing a one-year period of performance for these funds. This rulemaking adds a new paragraph at 7 CFR 251.10(j)(2) to include this allocation formula and period of performance for Farm to Food Bank Project funds. The Department requests comments on this section of the rulemaking.

D. Purpose and Use of Farm to Food Bank Project Funds

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA to include a new section 203D(d)(3) that describes the purpose of Farm to Food Bank Projects as (1) reducing food waste at the agricultural production, processing, or distribution level through the donation of food; (2) providing food to individuals in need; and (3) building relationships between agricultural producers, processors, and distributors and EFOs through the donation of food. This rulemaking adopts this language. It also provides that Farm to Food Bank Project funds may only be used for costs associated with carrying out a Farm to Food Bank Project for the above purpose and cannot be used to purchase foods or for agricultural production activities such as purchasing seeds or planting crops. Thus, this rulemaking adds a new paragraph at 7 CFR 251.10(j)(3) that includes the purpose and use of Farm to Food Bank Project funds. The Department requests comments on this section of the rulemaking.

E. Federal Share of Farm to Food Bank Projects

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA to include a new section 203D(d)(2)(B) that requires that the Federal share of the cost of a Farm to Food Bank Project not exceed 50% of the total cost of the project. Therefore, the Department is requiring that TEFAP State agencies that receive funding for Farm to Food Bank Projects under this Part provide a cash or in-kind contribution equal to the amount of Federal funding received. Allowable contributions for the match must be used for the Farm to Food Bank Project purpose described in § 251.10(j)(3) and meet the requirements in § 251.9(c). These contributions may include, but are not limited to, cash or in-kind contributions from EFOs that partner with the State agency in administering the Farm to Food Bank Project. This rule also codifies that food donations, including foods donated under a Farm to Food Bank Project, cannot count toward the match requirement. Thus, this rulemaking establishes a new paragraph at 7 CFR 251.10(j)(4) to include the match requirement for Farm to Food Bank Projects. The Department requests comments on this section of the rulemaking.

F. Farm to Food Bank Project Reallocation of Funds

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA to include a new section 203D(d)(2)(C)(ii) that requires the Department to reallocate Farm to Food Bank Project funds if the Secretary determines that a State will not expend all of the funds allocated to it for a fiscal year. The Department is further directed to reallocate the unexpended funds to other States that have submitted a State Plan with a Farm to Food Bank Project plan of operation for a project during that fiscal year or the subsequent fiscal year as the Secretary deems appropriate. This rulemaking establishes a new paragraph at 7 CFR 251.10(j)(5) to include reallocation of unexpended Farm to Food Bank Project funds to States with an approved State Plan with a Farm to Food Bank Project plan of operation. The Department requests comments on this section of the rulemaking.

G. Farm to Food Bank Project Reporting Requirements

Section 4018(b) of the 2018 Farm Bill amends section 203D of the EFAA to include a new section 203D(d)(2)(C)(iii) that requires that each State receiving Farm to Food Bank Project funds for a fiscal year submit financial reports to the Department on a regular basis which describe the use of the funds. The Department is requiring that Farm to Food Bank Project financial reports be submitted on a semiannual basis using the SF–425 form. This rulemaking therefore establishes a new paragraph at 7 CFR 251.10(j)(6) to include these reporting requirements. The Department requests comments on this section of the rulemaking.

H. Cooperative Agreements

Section 4018(b) of the 2018 Farm Bill amended section 203D of the EFAA to include a new section 203D(d)(4) which allows the Department to encourage a State agency that carries out a Farm to Food Bank Project to enter into cooperative agreements with State agencies of other States to maximize the use of commodities donated under the project. This rulemaking therefore establishes a new paragraph at 7 CFR 251.10(j)(7) to include this provision. The Department requests comments on this section of the rulemaking.

Procedural Matters

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule with request for comments has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of

Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget; therefore, no Regulatory Impact Analysis is required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This rule adds additional requirements for TEFAP State agencies but does not have a significant impact on TEFAP ERAs.

Executive Order 13771

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that the cost of planned regulations be prudently managed and controlled through a budgeting process.

This rule is not an E.O. 13771 regulatory action because it is not significant under E.O. 12866.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, or tribal governments, in the aggregate, or the private sector, of $146 million or more (when adjusted for inflation; GDP deflator source: Table 1.1.9 at *http://www.bea.gov/iTable*) in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule with request for comments does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $146 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The program addressed in this section is listed in the Catalog of Federal Domestic Assistance under Number 10.568 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

The Department has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

Executive Order 12988, Civil Justice Reform

This final rule with request for comments has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule with request for comments in accordance with USDA Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in TEFAP.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. USDA is unaware of any current Tribal laws that could be in conflict with this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

This rule contains information collections that have been approved by the Office of Management and Budget under OMB# 0584–0293, Food Distribution Programs, expiration date November 30, 2019. In addition, this rule imposes a new requirement to submit a financial report using a form that is approved under OMB# 0584–0594 Food Programs Reporting System (FPRS), expiration date September 30, 2019. FNS has determined that this rule impacts these requirements under OMB# 0584–0293 and OMB# 0584–0594. Due to the timing of this rule and revisions that are being made to the other collections, FNS is including the information requirements that are being impacted by this rule as part of this new information collection. Once this collection has been reviewed and approved by OMB and the revisions to the other collections have been concluded, FNS will merge the requirements into OMB#s 0584–0293 and 0584–0594.

In accordance with the Paperwork Reduction Act of 1995, this final rule with request for comments contains information collections that are subject to review and approval by the Office of Management and Budget; therefore, FNS is submitting for public comment the changes in the information collection burden that would result from this final rule with request for comments.

Comments on this final rule with request for comments must be received

by December 3, 2019. 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 of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notification will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: The Emergency Food Assistance Program Farm to Food Bank Project Forms.

OMB Number: 0584–NEW.

Expiration Date: N/A.

Type of Request: New Collection.

Abstract: On December 20, 2018, the President signed the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) into law. Section 4018 of the 2018 Farm Bill amends section 202A(b) of the EFAA and adds new requirements to the TEFAP State Plan. State plans must now include a plan to provide emergency feeding organizations or eligible recipient agencies within the State an opportunity to provide input on the commodity preferences and needs of the emergency feeding organization or eligible recipient agency. The reporting burden associated with TEFAP State plans is currently approved under OMB# 0584–0293, Food Distribution Programs, expiration date November 30, 2019. This new requirement would require all 54 TEFAP State agencies to submit a revision to their State plan in the first year of the new requirement. In subsequent years, the burden associated with this requirement will be captured under the existing burden approved under OMB# 0584–0293.

Additionally, at the option of the State agency, State plans may also now include a plan of operation for one or more projects in partnership with one or more emergency feeding organizations located in the State to harvest, process, package, or transport donated commodities received under section 203D(d) of the Emergency Food Assistance Act of 1983. We estimate that the same number of revisions will be made to TEFAP State plans as a result of this requirement and the revisions will take the same amount of time as accounted for in OMB# 0584–0293. There will be no change in burden as a result of this requirement.

FNS currently estimates a total of 112 burden hours for completing TEFAP State Plans, with 14 States, each taking 8 hours, to submit such plans. As a result of this rule, FNS estimates that all 54 States will need to submit a TEFAP State Plan containing the additional requirements. FNS estimates that it will take all of the States an additional 4 hours to incorporate the necessary information into these plans. Therefore, FNS estimates a total of 216 burden hours for these State Plans in the first year of the requirement. In subsequent years, FNS estimates that the burden will remain at 112 burden hours.

Section 4018 of the 2018 Farm Bill also amends section 203D of the EFAA to include a new section 203D(d)(2)(C)(iii) that requires that each State receiving Farm to Food Bank Project funds for a fiscal year submit financial reports to the Department on a regular basis which describe the use of the funds. While States participating in the Emergency Food Assistance Program are required to submit financial reports, this Final Rule is imposing a new requirement for states to file financial reports when they participate in the Farm to Food Bank Project. The Department is requiring that the Farm to Food Bank Project financial reports be submitted on a semiannual basis using SF–425 Federal Financial Report. This form, and its associated reporting burden, is currently approved under OMB# 0584–0594 Food Programs Reporting System (FPRS), expiration date September 30, 2019. Currently, the SF–425 Federal Financial Form is approved with 10,355 responses and 15,533 burden hours. FNS estimates that 14 States will need to file a SF–425 to report on their Farm to Food Bank Project funds. As a result of this Final Rule, FNS estimates a total of 15,575 hours for the SF–425.

Section 203D of the EFAA has been amended to allow the Department to encourage a State agency that carries out a new Farm to Food Bank Project to enter into cooperative agreements with State agencies of other States to maximize the use of commodities donated under the project. FNS estimates that 2 State agencies will enter into cooperative agreements. FNS further estimates that it will take 1 hour for each State agency to complete these agreements, for a total of 2 burden hours.

Respondents: State Government.

Estimated Number of Respondents: 54.

Estimated Number of Responses per Respondent: 1.56.

Estimated Total Annual Responses: 84.

Estimated Time per Response: 3.10.

Estimated Total Annual Burden on Respondents: 260.

Sec. of Regs/Authority	Title	Form No.	Estimated number of respondents	Estimated number of responses per respondent	Total annual responses [(d) × (e)]	Estimated total hours per response	Estimated total burden [(f) × (g)]	Currently approved burden	Program change due to rulemaking
251.6(b)(6)	State Agency Distribution Plan.		54	1.00	54.00	4.00	216.00	OMB# 0584–0293 112.00	*104.00
251.10(j)(6)	Reporting Requirements	FNS–425	14	2.00	28.00	1.50	42.00	OMB# 0584–0594 15,533	42 (15,575)
251.10(j)(7)	Cooperative Agreements		2	1.00	2.00	1.00	2.00	0	2
Total Reporting			54	1.56	84.00	3.10	260.00	15,645.00	148.00

*additional burden for first year only.

E-Government Act Compliance

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

List of Subjects in 7 CFR Part 251

Food assistance programs, Grant programs-social programs, Reporting

and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR part 251 is amended as follows:

PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM

■ 1. The authority citation for part 251 is revised to read as follows:

Authority: 7 U.S.C. 7501–7516; 7 U.S.C. 2011–2036.

■ 2. In § 251.6, revise paragraphs (a)(3) and (4) and add paragraphs (a)(5) and (6) to read as follows:

§ 251.6 Distribution plan.

(a) * * *

(3) A description of the standards of eligibility for recipient agencies, including any subpriorities within the two-tier priority system;

(4) A description of the criteria established in accordance with § 251.5(b) which must be used by eligible recipient agencies in determining the eligibility of households to receive the Emergency Food Assistance Program (TEFAP) commodities for home consumption;

(5) At the option of the State agency, a plan of operation for one or more projects in partnership with one or more emergency feeding organizations located in the State to harvest, process, package, or transport donated commodities received under section 203D(d) of the Emergency Food Assistance Act of 1983. The plan must include all items listed in paragraphs (a)(5)(i) through (iv) of this section:

(i) A list of emergency feeding organizations within the State that will operate the project in partnership with the State agency.

(ii) A list of any State agencies that will operate the project as a part of a cooperative agreement.

(iii) A description of the purpose of the Farm to Food Bank Project that includes how the Project will:

(A) Reduce food waste at the agricultural production, processing, or distribution level through the donation of food;

(B) Provide food to individuals in need; and

(C) Build relationships between agricultural producers, processors, and distributors and emergency feeding organizations through the donation of food.

(iv) The fiscal year in which the Project will begin operating; and

(6) A plan, which may include the use of a State advisory board established under § 251.4(h)(4), that provides emergency feeding organizations or eligible recipient agencies within the State an opportunity to provide input on the commodity preferences and needs of the emergency feeding organization or eligible recipient agency.

* * * * *

■ 3. In § 251.10, add paragraph (j) to read as follows:

§ 251.10 Miscellaneous provisions.

* * * * *

(j) *Projects to harvest, process, package, or transport donated commodities*—(1) *Definition of project.* These projects, also known as Farm to Food Bank Projects, are defined as the harvesting, processing, packaging, or transportation of unharvested, unprocessed, or unpackaged commodities donated by agricultural producers, processors, or distributors for use by emergency feeding organizations under section 203D of the Emergency Food Assistance Act of 1983.

(2) *Availability and allocation of funds.* Funds for the costs of carrying out a Farm to Food Bank Project will be allocated to States as follows:

(i) Funds made available to the Department for Farm to Food Bank Projects will be distributed to States that have submitted an approved State plan describing a plan of operation for a Farm to Food Bank Project.

(ii) Funds for Farm to Food Bank Projects will be distributed each fiscal year to State agencies with an approved State plan for a project in that fiscal year using the funding formula defined in § 251.3(h).

(iii) Funds will be available to State agencies for one year from the date of allocation.

(3) *Purpose and use of funds.* State agencies may only use funds made available under this paragraph (j) for the costs of carrying out a Farm to Food Bank Project.

(i) Farm to Food Bank Projects must have a purpose of:

(A) Reducing food waste at the agricultural production, processing, or distribution level through the donation of food;

(B) Providing food to individuals in need; and

(C) Building relationships between agricultural producers, processors, and distributors and emergency feeding organizations through the donation of food.

(ii) Project funds may only be used for costs associated with harvesting, processing, packaging, or transportation of unharvested, unprocessed, or unpackaged commodities donated by agricultural producers, processors, or distributors for use by emergency feeding organizations.

(iii) Project funds cannot be used to purchase foods or for agricultural production activities such as purchasing seeds or planting crops.

(4) *Matching of funds*—(i) *State matching requirement.* The State must provide a cash or in-kind contribution at least equal to the amount of funding received under this paragrpah (j) for a Farm to Food Bank Project.

(ii) *Allowable contributions.* States shall meet the match requirement in paragraph (a)(4) of this section by providing allowable contributions as described at § 251.9(c); contributions must only be for costs which would otherwise be allowable as a Farm to Food Bank Project cost.

(iii) *Emergency feeding organization contributions.* Cash or in-kind contributions from emergency feeding organizations that partner with the State agency to administer the Farm to Food Bank Project are allowable.

(iv) *Food donations.* Donations of foods, including the value of foods donated as a part of a Farm to Food Bank Project, cannot count toward the match requirement in paragraph (j)(4) of this section.

(5) *Reallocation of funds.* If, during the course of the fiscal year, the Department determines that a State will not expend all of the funds allocated to the State for a fiscal year under this paragraph (j), the Department shall reallocate the unexpended funds to other States that have an approved State Plan describing a plan of operation for a Farm to Food Bank Project during that fiscal year or the subsequent fiscal year.

(6) *Reporting requirements.* Each State agency to which Farm to Food Bank Project funds are allocated for a fiscal year must submit a report describing use of the funds. The data must be identified on Form SF–425, Federal Financial Report, and submitted to the appropriate FNS Regional Office on a semiannual basis. The report must be submitted no later than 30 calendar days after the end of the period to which it pertains. The final report must be submitted no later than 90 calendar days after the end of the fiscal year to which it pertains.

(7) *Cooperative agreements.* State agencies that carry out a Farm to Food Bank Project may enter into cooperative agreements with State agencies of other States to maximize the use of commodities donated under the project.

* * * * *

Dated: September 17, 2019.

Pamilyn Miller,

Administrator, Food and Nutrition Service.

[FR Doc. 2019–21665 Filed 10–3–19; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS–SC–18–0083; SC19–930–1 FR]

Tart Cherries Grown in the States of Michigan, et al.; Free and Restricted Percentages for the 2018–19 Crop Year and Revision of Grower Diversion Requirements for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to establish free and restricted percentages for the 2018–19 crop year under the Marketing Order for tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. This action establishes the proportion of tart cherries from the 2018–19 crop which may be handled in commercial outlets. This action also revises the regulations regarding grower diversion. This action should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns.

DATES: Effective November 4, 2019.

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

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

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. Part 930 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order provisions now in effect, free and restricted percentages may be established for tart cherries handled during the crop year. This rule establishes free and restricted percentages for tart cherries for the 2018–19 crop year, beginning July 1, 2018, through June 30, 2019.

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

This final rule establishes the proportion of tart cherries from the 2018–19 crop which may be handled in commercial outlets at 73 percent free and 27 percent restricted. This action also revises the regulations regarding grower diversion to codify the Board's definition of marketable fruit. The Secretary of Agriculture (Secretary) has determined that designating free and restricted percentages of tart cherries for the 2018–2019 crop year effectuates the declared policy of the Act to stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. These recommendations were made by the Board at meetings on September 13, 2018, and October 23, 2018.

Section 930.51(a) provides the Secretary authority to regulate volume by designating free and restricted percentages for any tart cherries acquired by handlers in a given crop year. Section 930.50 prescribes procedures for computing an optimum supply based on sales history and for calculating these free and restricted percentages. Free percentage volume may be shipped to any market, while restricted percentage volume must be held by handlers in a primary or secondary reserve, or be diverted or used for exempt purposes as prescribed in §§ 930.159 and 930.162. Exempt purposes include, in part, the development of new products, sales into new markets, the development of export markets, and charitable contributions. Sections 930.55 through 930.57 prescribe procedures for inventory reserve. For cherries held in reserve, handlers would be responsible for storage and would retain title of the tart cherries.

Under § 930.52, only districts with an annual average production over the prior three years of at least six million pounds are subject to regulation, and any district producing a crop that is less than 50 percent of its annual average of the previous five years is exempt. The regulated districts for the 2018–19 crop year are: District 1—Northern Michigan; District 2—Central Michigan; District 3—Southern Michigan; District 4—New York; District 7—Utah; District 8—Washington; and District 9—Wisconsin. Districts 5 and 6 (Oregon and Pennsylvania, respectively) will not be regulated for the 2018–19 season.

Section 930.58 provides authority for voluntary grower diversion. When volume regulation is in effect, growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would be subject to regulation. This section also authorizes the Board, with the approval of the Secretary, to establish terms and conditions for grower diversion. Section 930.158 prescribes the rules and regulations for grower diversion, including a requirement that diverted cherries be marketable.

Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. Conversely, annual tart cherry production can vary greatly. In addition, tart cherries are processed and can be stored and carried over from crop year to crop year, further impacting supply. As a result, supply and demand for tart cherries are rarely in balance.

Because demand for tart cherries is inelastic, total sales volume is not very responsive to changes in price. However, prices are very sensitive to changes in supply. As such, an oversupply of cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control provisions in the marketing order to balance supply and demand to stabilize industry returns.

Pursuant to § 930.50, the Board meets on or about July 1 to review sales data, inventory data, current crop forecasts, and market conditions for the upcoming season and, if necessary, to recommend preliminary free and restricted percentages if anticipated supply would exceed demand. After harvest is complete, but no later than September 15, the Board meets again to update its calculations using actual production data, consider any necessary adjustments to the preliminary percentages, and determine if final free and restricted percentages should be recommended to the Secretary.

The Board uses sales history, inventory, and production data to determine whether there is a surplus and, if so, how much volume should be restricted to maintain optimum supply. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year. Optimum supply is defined as the average free sales of the prior three years plus desirable carry-out inventory. Desirable carry-out is the amount of fruit needed by the industry to be carried into the succeeding crop year to meet market demand until the new crop is available. Desirable carry-out is set by the Board after considering market circumstances and needs. Section 930.151(b) specifies that desirable carry-out can range from zero to a maximum of 100 million pounds.

In addition, USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This requirement is codified in § 930.50(g), which specifies that in years when restricted percentages are established, the Board shall make available tonnage equivalent to an additional 10 percent of the average sales of the prior three years for market expansion (market growth factor).

After the Board determines optimum supply, desirable carry-out, and market growth factor, it must examine the current year's available volume to determine whether there is an oversupply situation. Available volume includes carry-in inventory (any inventory available at the beginning of the season) along with that season's production. If production is greater than the optimum supply minus carry-in, the difference is considered surplus. This surplus tonnage is divided by the sum of production in the regulated districts to reach a restricted percentage. This percentage must be held in reserve or used for approved diversion activities, such as exports.

The Board met on July 6, 2018, and computed an optimum supply of 303 million pounds for the 2018–19 crop year using the average of free sales for the three previous seasons and desirable carry-out. To determine the carry-out figure, the Board discussed and considered a range of alternatives. One member suggested a carry-out value of 100 million pounds to maximize the amount of fruit on the market and to compete with imports. Another member indicated both free and restricted product could be used to compete with imports and proposed a 50 million pound carry-out. Another attendee noted excessive carryout puts downward pressure on prices. After the consideration of the alternatives, the Board determined a carry-out of 80 million pounds would supply the industry's needs at the beginning of the next season.

The Board subtracted the estimated carry-in of 125.1 million pounds from the optimum supply to calculate the production quantity needed from the 2018–19 crop to meet optimum supply. This number, 177.9 million pounds, was subtracted from the Board's estimated 2018–19 total production (from regulated and unregulated districts) of 344.5 million pounds to calculate a surplus of 166.6 million pounds of tart cherries. The Board also complied with the market growth factor requirement by removing 22.3 million pounds (average sales for prior three years of 223 million times 10 percent) from the surplus. The adjusted surplus of 144.3 million pounds was then divided by the expected production in the regulated districts (338.5 million pounds) to reach a preliminary restricted percentage of 43 percent for the 2018–19 crop year.

The Board then discussed whether this calculation would provide sufficient supply to grow sales and fulfil orders that have not yet shipped. Some members and attendees expressed concern that some existing inventory is old enough that it is difficult to sell and thus more of the current season's fruit should be made available. Some also reported there may be poor fruit yield in Michigan, which would require more tonnage to supply the same amount of product. Others added the Board's demand calculations were not considering growth in the juice and dried fruit markets that are being served by imported product. As a result, the Board recommended an additional economic adjustment of 48 million pounds (18 million due to fruit quality concerns and 30 million for expected deliveries). With this adjustment, and anticipated orchard diversion (25 million pounds) the Board's preliminary restricted percentage was 31 percent (96 million pounds divided by 313.5 million pounds).

The Board met again on September 13, 2018, to consider final volume regulation percentages for the 2018–19 season. The final percentages are based on the Board's reported production figures and the supply and demand information available in September.

The total production for the 2018–19 season was 299.2 million pounds, 45.3 million pounds below the Board's July estimate. In addition, growers diverted 12.4 million pounds in the orchard, about half of what had been anticipated. As a result 286.8 million pounds would be available to market, 282.3 million pounds of which are in the restricted districts. Using the actual production numbers, and accounting for the recommended desirable carry-out and economic adjustment, as well as the market growth factor, the restricted percentage was recalculated.

The Board subtracted the carry-in figure used in July of 125.1 million pounds, from the optimum supply of 303 million pounds to determine 177.9 million pounds of 2018–19 production would be necessary to reach optimum supply. The Board subtracted the 177.9 million pounds from the actual production of 299.2 million pounds, resulting in a surplus of 121.3 million pounds of tart cherries.

The Board also revisited its earlier decision regarding an economic adjustment. Many in attendance expressed that the previously recommended economic adjustment should be revisited to avoid placing

excess fruit on the market. One member indicated the fruit quality in Michigan was better than anticipated in July. Other attendees indicated the adjustment for additional sales had been overstated. As a result, the Board recommended lowering the economic adjustment to 24 million pounds.

The recalculated surplus was reduced by subtracting the revised economic adjustment of 24 million pounds and the market growth factor of 22.3 million pounds, resulting in an adjusted surplus of 75 million pounds. The Board then divided this final surplus by the available production of 282.3 million pounds in the regulated districts (294.7 million pounds minus 12.4 million pounds of in-orchard diversion) to calculate a restricted percentage of 27 percent with a corresponding free percentage of 73 percent for the 2018–19 crop year, as outlined in the following table:

	Millions of pounds
Final Calculations:	
(1) Average sales of the prior three years	223
(2) Plus desirable carry-out	80
(3) Optimum supply calculated by the Board	303
(4) Carry-in as of July 1, 2018	125.1
(5) Adjusted optimum supply (item 3 minus item 4)	177.9
(6) Board reported production	299.2
(7) Surplus (item 6 minus item 5)	121.3
(8) Total economic adjustments	24
(9) Market growth factor	22.3
(10) Adjusted Surplus (item 7 minus items 8 and 9)	75
(11) Supply in regulated districts	294.7
(12) In-Orchard Diversion	12.4
(13) Production minus in orchard diversion	282.3
Final Percentages:	Percent
Restricted (item 10 divided by item 13 × 100)	27
Free (100 minus restricted percentage)	73

The final restriction of 27 percent is lower than the preliminary restriction percentage of 31 percent. The largest factor affecting this change was the final production numbers that came in below the Board's July estimate. Additionally, less fruit was diverted in orchard than anticipated and the Board revised its economic adjustment to 24 million pounds. The desired carry-out remained the same at 80 million pounds.

In discussing the calculation, several members indicated they believed the recommendation was too restrictive. They supported maintaining the economic adjustment at the original level, which would have resulted in a lower calculated restriction. Other members stated that reducing the economic adjustment was reflective of industry conditions and expressed concern about putting too much fruit into the market.

Establishing free and restricted percentages is an attempt to bring supply and demand into balance. If the primary market is oversupplied with cherries, grower prices decline substantially. Restricted percentages have benefited grower returns and helped stabilize the market as compared to those seasons prior to the implementation of the marketing order. The Board, based on its discussion of this issue and the result of the above calculations, believes the available information indicates a restricted percentage should be established for the 2018–19 crop year to avoid oversupplying the market with tart cherries.

Consequently, the Board recommended final percentages of 73 percent free and 27 percent restricted by a vote of 13 in favor, 4 opposed, and 1 abstention. The Board could meet and recommend the release of additional volume during the crop year if conditions so warranted. The Secretary finds, from the recommendation and supporting information supplied by the Board, that designating final percentages of 73 percent free and 27 percent restricted tends to effectuate the declared policy of the Act, and so designates these percentages.

Additionally, the Board reviewed its rules regarding grower diversion, as this diversion option has become more of a common practice over the past few seasons. To receive grower diversion credit, the marketing order requires that the fruit left in the orchard must be marketable. With no definition of marketable in the marketing order, the Board had defined fruit as unmarketable if insects were found in any of the fruit sampled from the acreage marked for diversion.

In 2016, the Board formed a committee to investigate updating this policy based on recent infestations of Spotted Wing Drosophila. The industry was concerned growers would not qualify for diversion if a zero-tolerance policy remained in effect, but also wanted to ensure orchards were properly maintained to prevent the spread of infestation. The Board modified its working definition of marketable to reflect aspects of the tolerances in an FDA Compliance Policy Guide (CPG Sec. 550.225 Cherries—Brined, Fresh, Canned and Frozen—Adulteration Involving Rot and Insect). Specifically, the Board recommended using a 5 percent tolerance for insects and a 7 percent tolerance for rot when sampling cherries for diversion. After applying the two tolerances for insects and rot over two harvests, the Board found these levels were effective. The Board discussed this issue at its meetings on September 13, 2018, and October 23, 2018, and unanimously recommended incorporating this change into the Order's rules and regulations.

Final Regulatory Flexibility Analysis

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

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

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than $750,000, and small agricultural service firms have been defined as those whose annual receipts are less than $7,500,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries utilized for processing during the 2017–18 season was approximately $0.224 per pound. With total utilization at approximately 254 million pounds for the 2017–18 season, the total 2017–18 value of the crop utilized for processing is estimated at $56.9 million. Dividing the crop value by the estimated number of producers (600) yields an estimated average receipt per producer of $94,833. This is well below the SBA threshold for small producers.

A free on board (FOB) price of $0.82 per pound for frozen tart cherries was reported by the Food Institute during the 2017–2018 season. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this FOB price by total utilization of 254.1 million pounds results in an estimated handler-level tart

cherry value of $208 million. Dividing this figure by the number of handlers (40) yields estimated average annual handler receipts of $5.2 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

The tart cherry industry in the United States is characterized by wide annual fluctuations in production. According to NASS, the pounds of tart cherry production for the years 2012 through 2017 were 85 million, 294 million, 304 million, 253 million, 329 million, and 260 million, respectively. Because of these fluctuations, supply and demand for tart cherries are rarely in balance.

Demand for tart cherries is inelastic, meaning changes in price have a minimal effect on total sales volume. However, prices are very sensitive to changes in supply, and grower prices vary widely in response to the large swings in annual supply. Grower prices per pound for processed utilization have ranged from a low of $0.073 in 1987 to a high of $0.588 per pound in 2012.

Because of this relationship between supply and price, oversupplying the market with tart cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control authority in the Order to align supply with demand and stabilize industry returns. This authority allows the industry to set free and restricted percentages as a way to bring supply and demand into balance. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage volume must be held by handlers in reserve, diverted, or used for exempted purposes.

This rule controls the supply of tart cherries by establishing percentages of 73 percent free and 27 percent restricted for the 2018–19 crop year. These percentages should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. This action regulates tart cherries growing in Michigan, New York, Utah, Washington, and Wisconsin. This action also revises the regulations regarding grower diversion to codify the Board's definition of marketable fruit. The authority for this action is provided in §§ 930.50, 930.51(a), 930.52, and 930.58. The Board recommended this action at meetings on September 13, 2018, and October 23, 2018.

This rule will result in some fruit being diverted from the primary domestic markets. However, as mentioned earlier, the USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*http://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity that is available under this regulation is more than 150 percent of the average sales for the last three years.

In addition, there are secondary uses available for restricted fruit, including the development of new products, sales into new markets, the development of export markets, and being placed in reserve. While these alternatives may provide different levels of return than the sales to primary markets, they play an important role for the industry. The areas of new products, new markets, and the development of export markets utilize restricted fruit to develop and expand the markets for tart cherries. In 2017–18, these activities accounted for over 82 million pounds in sales, 27 million of which were exports. These numbers represent increases of 45 million pounds and 11.4 million pounds respectively.

Placing tart cherries into reserves is also a key part of balancing supply and demand. Although handlers bear the handling and storage costs for fruit in reserve, reserves stored in large crop years are used to supplement supplies in short crop years. The reserves help the industry to mitigate the impact of oversupply in large crop years, while allowing the industry to supply markets in years when production falls below demand. Further, storage and handling costs are more than offset by the increase in price when moving from a large crop to a short crop year.

The Board recommended a carry-out of 80 million pounds and made a demand adjustment of 24 million pounds in order to make the regulation less restrictive. With 125.1 million pounds of carry-in, 4.5 million pounds of production in the unregulated districts, and 207.3 million pounds of free tonnage from the regulated districts, 336.9 million pounds of fruit will be available for the domestic market. This is nearly 50 million pounds greater than the tonnage made available in the previous season. Even with the recommended restriction, the domestic market will have an ample supply of tart cherries. Further, should marketing conditions change, and market demand exceed existing supplies, the Board could meet and recommend the release of an additional volume of cherries. Consequently, it is not anticipated that this regulation will unduly burden growers or handlers.

While this action could result in some additional costs to the industry, these costs are outweighed by the benefits. The purpose of setting restricted percentages is to attempt to bring supply and demand into balance. If the primary market (domestic) is oversupplied with cherries, grower prices decline substantially. Without volume control, the primary market would likely be oversupplied, resulting in lower grower prices. In addition, the industry could start to build large amounts of unwanted inventories, which would also have a depressing effect on grower returns.

An econometric model has been developed to assess the impact volume control has on the price growers receive for their product. Based on the model, the use of volume control would have a positive impact on grower returns for this crop year. With volume control, grower prices are estimated to be approximately $0.04 per pound higher than without restrictions. In addition, absent volume control, the industry could start to build large amounts of unwanted inventories. These inventories would have a depressing effect on grower prices.

Retail demand is assumed to be highly inelastic, which indicates changes in price do not result in significant changes in the quantity demanded. Consumer prices largely do not reflect fluctuations in cherry supplies. Therefore, this action should have little or no effect on consumer prices and should not result in a reduction in retail sales.

The incorporation of a tolerance for insects and rot in diverted fruit aligns the Order's grower diversion rules and regulations with current industry practices. The tolerances should make it possible for more growers to participate in diversion during periods of oversupply, while encouraging proper pest management. Proper pest management helps reduce costs by decreasing incidences of infestation. Further, the use of grower diversion removes excess supply from the market without incurring the costs of harvesting, processing, and storage.

The established tolerance for insects and rot for cherries diverted in the orchard will provide clear guidance for compliance with marketing order provisions, encourage proper pest management, and align the Order's rules with industry standards. Growers, regardless of size, should benefit from the addition of these tolerances.

The free and restricted percentages established by this action will provide the market with optimum supply and

will apply uniformly to all regulated handlers in the industry, regardless of size. As the restriction represents a percentage of a handler's volume, the costs, when applicable, are proportionate and should not place an extra burden on small entities as compared to large entities.

The stabilizing effects of this action benefit all handlers by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all growers and handlers by allowing them to better anticipate the revenues their tart cherries would generate. Growers and handlers, regardless of size benefit from the stabilizing effects of the volume restriction.

The Board had extensive discussions on carry-out inventory alternatives. The alternatives included five motions that failed to pass, ranging from 50 million pounds to 100 million pounds. The Board determined that if the carry-out number was too large, it could have a negative impact on grower returns. Some attendees indicated excess carry-in over the past few seasons has had a negative effect on returns and that growers are seeking relief. After consideration of the alternatives, the Board recommended a carry-out of 80 million pounds.

The Board also weighed alternatives when discussing the economic adjustment. At its July meeting, the Board recommended a 48 million pound adjustment to account for fruit quality concerns and expected sales. One member proposed an additional 40-million-pound adjustment to counter imports of dried and frozen cherries, while other members favored a lower amount.

When the final production numbers were reviewed in September, the Board revisited the economic adjustment. Members indicated fruit quality was still an issue, but yields were better than initially anticipated. Members also stated that with tough international markets, the additional sales may have been overstated. Members from the Western states in particular were concerned that a large shift in the restriction percentage following harvest would disrupt the overall market and petitioned the Board to reconsider the adjustment. After discussion, the Board adopted an adjustment of 24 million pounds determining this amount would best meet the industry's sales needs. Thus, the alternatives were rejected.

Regarding grower diversion requirements, the Board initially proposed a broader set of requirements including spray protocols and destruction of diverted fruit in order to better control infestation. The original proposal called for annual determination of which steps would be required in each district. As research is still evolving on how best to deal with spotted wing drosophila infestations, preferred methods of dealing with the diverted fruit were also subject to change. Thus, the Board voted to codify only the tolerance for marketability.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes to those requirements are necessary as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

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

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

The Board's meetings were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the July 6, 2018, September 13, 2018, and October 23, 2018, meetings were public meetings, and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on May 8, 2019 (84 FR 20043). Copies of the proposed rule were sent via email to all Board members and tart cherry handlers. Finally, the proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period was provided to allow interested persons to respond to the proposal.

Two comments were received in opposition to the proposal. Both commenters were concerned by adjustments made between the Board's preliminary and final recommendations, indicating the changes reduced the amount of free volume available. The Order requires that the Board make a preliminary recommendation on or around July 1 and then make a final recommendation before September 15. The preliminary numbers are based on forecasts and are announced to give the industry an initial indication of the conditions for the upcoming season. The preliminary percentages or the numbers used in the calculation are not binding.

One commenter stated changes from the June estimates interrupt the flow of business. However, there are often changes between the two recommendations, as actual production, diversion numbers, or industry conditions do not always align with forecasts. When the Board meets in September to make a final recommendation, harvest is complete, and the fruit has moved into processing channels. The Board can discuss volume regulation using actual numbers and current information regarding market conditions. Therefore, the final recommendation to the Secretary is made in September. Further, should conditions warrant, the Order gives the Board the authority to recommend a release of reserves if it is determined there is demand for additional fruit.

One commenter objected to the reduction in the economic adjustment from the 48 million pounds used during the preliminary discussion in June to the 24 million pounds included in the final recommendation. The Board had incorporated an adjustment of 48 million pounds in its preliminary recommendation based in part on the expectations of poor fruit quality and additional sales needs. At the meeting in September, many in attendance expressed that the Board needed to revisit the economic adjustment to avoid placing excess fruit on the market. During the discussion, one member indicated the fruit quality in Michigan was better than was anticipated in July. Other attendees indicated the adjustment for additional sales had been overstated. As a result, the Board recommended lowering the economic adjustment to 24 million pounds.

The commenter expressed that the statement regarding improved fruit quality was erroneous and using this as a reason to change the economic adjustment from 48 to 24 million pounds was improper. The commenter noted that yields for 2018 fell below 2015 and 2016 levels as grounds to support the claim that the original economic adjustment should have been

maintained. However, the final recommendation provided by the Board indicated yields were better than anticipated in July, but still an issue. The other major factor in this adjustment was a consideration of expected sales. As noted earlier, the Board's discussions indicated the adjustment for additional sales may have been overstated in its preliminary calculations. Therefore, the economic adjustment was not eliminated but reduced to 24 million pounds. Further, all members had an opportunity to express their opinions. The concerns regarding the change in the economic adjustment raised by these commenters were part of the Board's discussions and in the end the recommended adjustment was supported by a supermajority of the Board.

The comments also referred to old or poor quality inventory being favored by the regulation. With the exception of an age limitation on inventory held in reserve, the Order makes no distinctions among products in inventory. There are no regulations on the age or quality of fruit held as free inventory, nor is there any specific data collected regarding the age of the product in inventory. The comments also provide no specifics regarding the volume or age of the inventory they cite as problematic. Without this information, there can be no objective determination regarding how the age or quality of current inventory is impacting the market.

Both comments also mentioned concerns with the volume of imports, which were also part of the Board's preliminary and final discussions. While the Order cannot regulate imports, the Board has sought to use its available tools to remain competitive. In recent years, the Board has recommended, and USDA implemented, changes to the Order to allow processors to use restricted fruit under the market expansion provisions of the Order. This has included allowing new market diversion credits when supplying a customer formerly supplied by imports. As stated previously, these activities accounted for 55 million pounds of sales in 2017, up from 21.4 million pounds in the previous season. In 2018, the Order's rules and regulations were modified to expand the number of years products are eligible for these diversion credits from three to five years. That change allows handlers to receive credits for two additional years, making it more likely handlers will invest in these diversion activities and reestablish domestic markets using restricted fruit.

One commenter also indicated the regulation results in quality fruit being destroyed. There is no requirement under the Order to destroy fruit. Those choosing to participate in grower diversion as a means of complying with the regulation do leave fruit unharvested in order to receive diversion credits that are then sold to processors. This is just one of many options processors have in order comply with the regulation. Board data indicate only 12.5 million pounds were diverted in the orchard, half of what had been projected in July. This indicates more handlers chose to meet their restricted percentage using reserves, new product and new market diversion, and exports.

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

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

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

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 930.158 by revising paragraph (a) to read as follows:

§ 930.158 Grower diversion and grower diversion certificates.

(a) *Grower diversion certificates.* The Board may issue diversion certificates to growers in districts subject to volume regulation who have voluntarily elected to divert in the orchard all or a portion of their tart cherry production which otherwise, upon delivery to handlers, would become restricted percentage cherries. Growers may offer the diversion certificate to handlers in lieu of delivering cherries. Handlers may redeem diversion certificates with the Board through June 30 of each crop year. After June 30 of the crop year that crop year's grower diversion certificates are no longer valid. Cherries that have reached a harvestable, marketable condition will be eligible for diversion. Diversion will not be granted to growers whose fruit was destroyed before it set and/or matured on the tree, or whose fruit is unmarketable. If marketable fruit were to be damaged or destroyed by acts of nature such as storms or hail diversion credit could be granted. To be considered marketable for the purposes of this section, sampled fruit may not exceed a 5 percent tolerance for insects or a 7 percent tolerance for rot.

* * * * *

■ 3. Revise § 930.256 to read as follows:

§ 930.256 Free and restricted percentages for the 2018–19 crop year.

The percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2018, which shall be free and restricted, respectively, are designated as follows: Free percentage, 73 percent and restricted percentage, 27 percent.

Dated: September 26, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–21360 Filed 10–3–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0389; Product Identifier 2018–SW–035–AD; Amendment 39–19748; AD 2019–19–12]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–10–07 for Sikorsky Aircraft Corporation (Sikorsky) Model S–76C helicopters. AD 2018–10–07 required inspecting the engine collective position transducer (CPT). This new AD retains the requirements of AD 2018–10–07 and expands the applicability. This AD is prompted by the determination that an additional part-numbered engine CPT is affected by the same unsafe condition.

The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 8, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 8, 2019.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of June 25, 2018 (83 FR 23355, May 21, 2018).

ADDRESSES: For service information identified in this final rule, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *https://www.sikorsky360.com.* You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0389.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0389; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is Document Operations, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Nick Rediess, Aviation Safety Engineer, Boston ACO Branch, Compliance & Airworthiness Division, 1200 District Avenue, Burlington, MA 01803; telephone (781) 238–7159; email *nicholas.rediess@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2018–10–07, Amendment 39–19282 (83 FR 23355, May 21, 2018) (''AD 2018–10–07''). AD 2018–10–07 applied to Sikorsky Model S–76C helicopters with a Turbomeca, S.A., Arriel 2S1 or Arriel 2S2 engine with an engine CPT part number (P/N) 76900–01821–104 installed. The NPRM published in the **Federal Register** on May 23, 2019 (84 FR 23740). The NPRM was prompted by the determination that an additional part-numbered CPT is affected by the same unsafe condition identified in AD 2018–10–07. The NPRM proposed to retain all of the requirements of AD 2018–10–07, which required initial and recurring inspections of each CPT by measuring resistance, linearity resistance movement, and differential voltage, and depending on the outcome of the inspections, replacing the CPT. The NPRM also proposed to add engine CPT P/N 76900–01821–105 to the applicability. The FAA is issuing this AD to address the unsafe condition on these products.

Comments

The FAA gave the public the opportunity to participate in developing this AD. The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed; however, since issuance of the NPRM, Sikorsky issued Maintenance Manual, SA 4047–76C–2, Temporary Revision 73–10, dated June 25, 2019 (TR 73–10), to update Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–08, dated September 20, 2017 (TR 73–08). The NPRM proposed to require completing certain corrective actions with TR 73–08. This final rule includes the option to use TR 73–10 for those corrective actions instead.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Sikorsky S–76 Helicopter Alert Service Bulletin 76–73–8, Revision A, dated December 4, 2015 (ASB 76–73–8A), which specifies a one-time inspection of total resistance, linearity resistant movement, excitation voltage, and differential voltage of the CPTs using CPT Text Box P/N 76700–40009–042. The FAA also reviewed Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–07, dated August 17, 2016 (TR 73–07), which specifies procedures for removing, installing, and adjusting the CPTs, and inspections of total resistance, linearity resistant movement, excitation voltage, and differential voltage of the CPTs. TR 73–07 also divides the procedures by CPT Test Box P/N by providing separate procedures for test boxes modified by Sikorsky Special Service Instructions (SSI) No. 76–96, dated August 19, 2016, which is not incorporated by reference in this AD.

Additionally, the FAA reviewed TR 73–08, which updates procedures in TR 73–07. TR 73–08 does not divide the procedures by CPT Test Box P/N as it eliminates the procedures for CPT Text Box P/N 76700–40009–042. TR 73–08 omits obsolete figures and it provides inspection results as pass or fail.

Finally, the FAA reviewed TR 73–10, which updates procedural steps and graphics in TR 73–08.

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

Other Related Service Information

The FAA reviewed Sikorsky S–76 Helicopter ASB 76–73–8, Basic Issue, dated August 21, 2015 (ASB 76–73–8). ASB 76–73–8 contains the same procedures as ASB 76–73–8A; however, ASB 76–73–8A updates Sikorsky's contact information for submitting a purchase order.

The FAA also reviewed Sikorsky SA 4047–76C–2–1, Temporary Revision No. 5–181, dated August 21, 2015 (TR 5–181); Task 5–20–00 of Sikorsky Airworthiness Limitations and Inspection Requirements, Publication No. SA 4047–76C–2–1, Revision 24, dated December 15, 2015 (Task 5–20–00); and Section 73–22–04 of Chapter 73 Engine Fuel and Control, of Sikorsky Maintenance Manual, SA 4047–76C–2, Revision 31, dated December 15, 2015 (Section 73–22–04). TR 5–181 specifies adding CPT inspections referenced in Section 73–22–04 to the 300-hour inspection checklist contained in Task 5–20–00.

The FAA also reviewed Sikorsky Safety Advisory No. SSA–S76–11–0002, dated May 17, 2011. This service information provides precautionary instructions to minimize hazardous situations that might result from an unreliable CPT.

The FAA also reviewed Sikorsky SSI No. 76–96, dated August 19, 2016, which specifies procedures to modify CPT Test Box P/N 76700–40009–042 and re-identify it as P/N 76700–40009–043. This one-time modification reduces the instructions to inspect the CPT and improves the inspection accuracy.

The FAA also reviewed Sikorsky SSI No. 76–87, dated July 24, 2015, and SSI No. 76–87A, Revision A, dated August 21, 2015. These SSIs specify a one-time

inspection of total resistance, linearity resistant movement, excitation voltage, and differential voltage of the CPTs using CPT Text Box P/N 76700–40009–042.

Interim Action

The FAA considers this AD interim action. The design approval holder is currently developing a terminating action that will address the unsafe condition identified in this AD. Once this action is developed, approved, and available, the FAA might consider additional rulemaking.

Costs of Compliance

The FAA estimates that this AD affects 115 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor costs are estimated at $85 per work-hour.

The inspections take about 3.75 work-hours for an estimated cost of $319 per helicopter and $36,685 for the U.S. fleet per inspection cycle. Replacing a CPT takes about 6 work-hours and parts cost $3,072 for an estimated replacement cost of $3,582.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–10–07, Amendment 39–19282 (83 FR 23355, May 21, 2018), and adding the following new AD:

2019–19–12 Sikorsky Aircraft Corporation: Amendment 39–19748; Docket No. FAA–2019–0389; Product Identifier 2018–SW–035–AD.

(a) Effective Date

This AD is effective November 8, 2019.

(b) Affected ADs

This AD replaces AD 2018–10–07, Amendment 39–19282 (83 FR 23355, May 21, 2018).

(c) Applicability

This AD applies to Sikorsky Aircraft Corporation Model S–76C helicopters, certificated in any category, with a Turbomeca, S.A., Arriel 2S1 or Arriel 2S2 engine with an engine collective position transducer (CPT) part number (P/N) 76900–01821–104 or 76900–01821–105 installed.

(d) Subject

Joint Aircraft System Component (JASC): 7300, Engine Fuel and Control.

(e) Unsafe Condition

This AD was prompted by reports of wear of the CPT that has resulted in several One Engine Inoperative (OEI) incidents. The FAA is issuing this AD to prevent failure of a CPT. The unsafe condition, if not addressed, could result in a reduction in power to one engine resulting in an annunciated momentary OEI condition and subsequent emergency landing.

(f) Compliance

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

(g) Required Actions

(1) Within 130 hours time-in-service (TIS):

(i) Measure resistance of each engine CPT and replace the CPT if the measured resistance is not within tolerance by following the Accomplishment Instructions, paragraphs 3.C.(1) through 3.C.(8)(b), of Sikorsky S–76 Helicopter Alert Service Bulletin ASB 76–73–8, Revision A, dated December 4, 2015 (ASB 76–73–8A), if using Test Box P/N 76700–40009–042 or by following paragraph 3.B.(11) of Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–08, dated September 20, 2017 (TR 73–08) or paragraph 3.B.(11) of Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–10, dated June 25, 2019 (TR 73–10), if using Test Box P/N 76700–40009–043. You are not required to use Sikorsky's CPT data sheet or submit a data sheet to Sikorsky.

(ii) Measure the linearity resistance movement of each engine CPT and replace the CPT if there is a linear abnormality or change in resistance that is not within tolerance by following the Accomplishment Instructions, paragraphs 3.D.(1) through 3.D.(14)(b), of ASB 76–73–8A, if using Test Box P/N 76700–40009–042 or by following paragraph 3.B.(12) of TR 73–08 or paragraph 3.B.(12) of TR 73–10, if using Test Box P/N 76700–40009–043. You are not required to use Sikorsky's CPT data sheet or submit a data sheet to Sikorsky.

(iii) Measure the differential voltage of each engine CPT and replace the CPT if the measured voltage is not within tolerance by following the Accomplishment Instructions, paragraphs 3.E. through 3.G.(1) of ASB 76–73–8A, if using Test Box P/N 76700–40009–042 or by following paragraph 3.B.(13) of TR 73–08 or paragraph 3.B.(13) of TR 73–10, if using Test Box P/N 76700–40009–043. You are not required to use Sikorsky's CPT data sheet or submit a data sheet to Sikorsky.

(2) Thereafter, at intervals not to exceed 300 hours TIS:

(i) If using Test Box P/N 76700–40009–042:

(A) Measure resistance of each engine CPT and replace the CPT if the resistance is not within tolerance by following paragraph 4.B.(11) of Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–07, dated August 17, 2016 (TR 73–07), except you are not required to use Sikorsky's CPT data sheet or return a failed CPT to Sikorsky.

(B) Measure the linearity resistance movement of each engine CPT and replace the CPT if the movement exceeds tolerance by following paragraphs 4.B.(12)(a) through 4.B.(13)(f) of TR 73–07, except you are not required to use Sikorsky's CPT data sheet or return a failed CPT to Sikorsky.

(C) Measure the differential voltage of each CPT by following paragraphs 4.B.(14) through 4.B.(15)(h) of TR 73–07, except you are not required to use Sikorsky's CPT data sheet. If the maximum voltage is greater than 100 millivolts or the minimum voltage is less than −100 millivolts, replace the CPT.

(ii) For helicopters using Test Box P/N 76700–40009–043:

(A) Measure resistance of each engine CPT and replace the CPT if the resistance is not within tolerance by following paragraph 5.B.(11) of TR 73–07, paragraph 3.B.(11) of TR 73–08, or paragraph 3.B.(11) of TR 73–10, except you are not required to use Sikorsky's CPT data sheet or return a failed CPT to Sikorsky.

(B) Measure the resistance linearity of each engine CPT and replace the CPT if the resistance is not within tolerance by following paragraph 5.B.(12) of TR 73–07, paragraph 3.B.(12) of TR 73–08, or paragraph 3.B.(12) of TR 73–10, except you are not required to use Sikorsky's CPT data sheet or return a failed CPT to Sikorsky.

(C) Measure the differential voltage of each engine CPT and replace the CPT if the resistance is not within tolerance by following paragraphs 5.B.(13)(a) through 5.B.(13)(k) of TR 73–07, paragraph 3.B.(13) of TR 73–08, or paragraph 3.B.(13) of TR 73–10, except you are not required to use Sikorsky's CPT data sheet or return a failed CPT to Sikorsky.

(h) Credit for Previous Actions

Actions accomplished before the effective date of this AD in accordance with the procedures specified in Sikorsky S–76 Helicopter Alert Service Bulletin ASB 76–73–8, Basic Issue, dated August 21, 2015; Sikorsky Special Service Instruction SSI No. 76–87, dated July 24, 2015; or Sikorsky Special Service Instruction SSI No. 76–87, Revision A, dated August 21, 2015, are considered acceptable for compliance with the corresponding actions specified in paragraph (g)(1) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD.

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

(j) Related Information

(1) For more information about this AD, contact Nick Rediess, Aviation Safety Engineer, Boston ACO Branch, Compliance & Airworthiness Division, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7159; email: *nicholas.rediess@faa.gov.*

(2) For service information identified in this AD, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *https://www.sikorsky360.com.* You may view this referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(k) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on November 8, 2019.

(i) Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–10, dated June 25, 2019.

(ii) [Reserved]

(4) The following service information was approved for IBR on June 25, 2018 (83 FR 23355, May 21, 2018).

(i) Sikorsky S–76 Helicopter Alert Service Bulletin ASB 76–73–8, Revision A, dated December 4, 2015.

(ii) Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–07, dated August 17, 2016.

(iii) Sikorsky Maintenance Manual, SA 4047–76C–2, Temporary Revision No. 73–08, dated September 20, 2017.

(5) For Sikorsky service information identified in this AD, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *https://www.sikorsky360.com.* Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *wcs_cust_service_eng.gr-sik@lmco.com.*

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

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

Issued in Fort Worth, Texas, on September 20, 2019.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2019–21564 Filed 10–3–19; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–10699, File No. S7–01–19]

RIN 3235–AM23

Solicitations of Interest Prior to a Registered Public Offering

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting a new communications rule under the Securities Act of 1933 that permits issuers to engage in oral or written communications with certain potential investors, either prior to or following the filing of a registration statement, to determine whether such investors might have an interest in a contemplated registered securities offering.

DATES: Effective December 3, 2019.

FOR FURTHER INFORMATION CONTACT: Maryse Mills-Apenteng, Special Counsel, at (202) 551–3430, Office of Rulemaking, Division of Corporation Finance; Angela Mokodean, Senior Counsel, or Amanda Hollander Wagner, Branch Chief, at (202) 551–6921, Investment Company Regulation Office, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 230.163B (new ''Rule 163B'') under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] (''Securities Act'') and amendments to 17 CFR 230.405 (''Rule 405'') under the Securities Act.

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I. Introduction

The Commission proposed Rule 163B [1] under the Securities Act to permit issuers to engage in oral or written communications with potential investors that are, or are reasonably believed to be, qualified institutional buyers (''QIBs''), as that term is defined in paragraph (a) of 17 CFR 230.144A (''Rule 144A''), or institutional accredited investors (''IAIs'').[2] The proposed rule would allow these communications, either prior to or following the filing of a registration statement, to determine whether such potential investors might have an interest in a contemplated registered securities offering.[3] The proposed rule would extend the accommodations currently available to emerging growth companies (''EGCs'') [4] under Securities Act Section 5(d) [5] to all issuers, including fund issuers.

We received approximately 20 comment letters in response to the Proposing Release.[6] We have reviewed and considered the comments that we received on the Proposing Release. Commenters broadly supported the proposal to allow all issuers to test the waters with QIBs and IAIs before and after filing a registration statement to gauge interest in a contemplated registered offering. After taking into consideration the public comments, we are adopting the amendments largely as proposed. For the reasons set forth below, in certain cases we are adopting modifications to the proposal. The changes we are adopting are designed to address aspects of the proposal, such as the proposed anti-evasion provision, that could raise uncertainty for issuers seeking to rely on the rule. Below we discuss, in turn, the general exemption for test-the-waters communications; the scope of issuers eligible to rely on the rule; the types of investors issuers may communicate with under the rule; non-exclusivity of the rule; and considerations for investment companies' use of the rule.

II. Discussion of the Amendments

A. Exemption Allowing Test-the-Waters Communications

1. Proposed Amendments

Proposed Rule 163B would permit any issuer or person authorized to act on behalf of an issuer,[7] including an underwriter, either prior to or following the filing of a registration statement, to engage in oral or written communications with potential investors that are, or that the issuer reasonably believes are, QIBs or IAIs, to determine whether such investors might have an interest in the contemplated offering.

As discussed in the Proposing Release, Section 5(c) prohibits any written or oral offers prior to the filing of a registration statement.[8] Once an issuer has filed a registration statement, Section 5(b)(1) limits written offers to a ''statutory prospectus'' that conforms to the information requirements of Securities Act Section 10.[9] As proposed, Rule 163B communications would be exempt from Section 5(b)(1) and Section 5(c) [10] but, as described below, would be subject to Section 12(a)(2) liability in addition to the anti-fraud provisions of the federal securities laws.[11]

Further, as proposed, Rule 163B communications would not need to be filed with the Commission, including pursuant to 17 CFR 230.424(a) (''Rule 424(a)'') or 17 CFR 230.497(a) (''Rule 497(a)'') of Regulation C [12] under the Securities Act, or pursuant to Section 24(b) of the Investment Company Act of 1940 [13] (the ''Investment Company Act'') and the rules and regulations thereunder.[14] Nor would such communications be required to include any specified legends. Additionally, the Commission proposed to amend Rule 405 to clarify that a written communication used in reliance on Rule

[1] *See Solicitations of Interest Prior to a Registered Public Offering,* Release No. 33–10607 (Feb. 19, 2019) [84 FR 6713 (Feb. 28, 2019)] (''Proposing Release'').

[2] An institutional accredited investor refers to any institutional investor that is also an accredited investor, as defined in 17 CFR 230.501 (''Rule 501'') of Regulation D.

[3] Communications between an issuer and potential investors for the purpose of assessing investor interest before having to commit the time and expense necessary to carry out a contemplated securities offering are often referred to as ''testing the waters,'' and we use this term and its derivations throughout this release to refer to such communications.

[4] The Section 5(d) exemption is available to ''emerging growth companies.'' An emerging growth company refers to an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year and, as of December 8, 2011, had not sold common equity securities under a registration statement. That issuer continues to be an emerging growth company for the first five fiscal years after the date of the first sale of its common equity securities pursuant to an effective registration statement, unless one of the following occurs: its total annual gross revenues are $1.07 billion or more; it has issued more than $1 billion in non-convertible debt in the past three years; or it becomes a ''large accelerated filer,'' as defined in 17 CFR 240.12b–2 (''Rule 12b–2'') under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] (the ''Exchange Act''). *See* Rule 405 and Rule 12b–2 (defining ''emerging growth company'').

[5] 15 U.S.C. 77e(d).

[6] See letters from: S. Lara Ameri (''S. Ameri''); Clint Anderson (''C. Anderson''); American Securities Association (''ASA''); Better Markets (''Better Markets''); Center for Capital Markets Competitiveness (''CCMC''); Bayley Clark (''B. Clark''); Cleary Gottlieb Steen & Hamilton LLP (''Cleary''); Cravath, Swaine & Moore LLP (''Cravath''); The Credit Roundtable (''CRT''); Davis Polk & Wardwell LLP (''Davis Polk''); Dechert LLP (''Dechert''); Federated Investors, Inc. (''Federated''); Hamilton & Associates Law Group, P.A. (''Hamilton''); Investment Company Institute (''ICI''); Nasdaq, Inc. (''Nasdaq''); Raymond Kenneth Petry (''R. Petry''); Austin J. Rahskopf (''A. Rahskopf''); Securities Industry and Financial Markets Association (''SIFMA''); Monica Stuchlik (''M. Stuchlik''); and Sullivan & Cromwell LLP (''Sullivan''). Comment letters related to the Proposing Release are available at *https://www.sec.gov/comments/s7–01–19/s70119.htm.*

[7] Under the proposed rule, an issuer or a person authorized to act on its behalf may rely on the rule. In this release, for ease of discussion, we sometimes refer only to an issuer's reliance on the rule, though these statements apply equally to an issuer or any person authorized and acting on its behalf.

[8] *See* Section II.A of the Proposing Release.

[9] After effectiveness of a registration statement, a written offer, other than a statutory prospectus, may be made only if a final prospectus meeting the requirements of Securities Act Section 10(a) is sent or given prior to or at the same time as the written offer. *See* Securities Act Section 2(a)(10) [15 U.S.C. 77b(a)(10)]. A free writing prospectus, as defined in Securities Act Rule 405, which is a Section 10(b) prospectus, may also be used after effectiveness of a registration statement subject to the conditions of Securities Act Rules 164 and 433. The proposed rule would not affect these requirements.

[10] Section 5(b)(1) does not include a limitation on oral offers after the filing of a registration statement, and therefore, Rule 163B does not concern such offers.

[11] Section 12(a)(2) of the Securities Act provides purchasers of an issuer's securities in a registered offering private rights of action for materially deficient disclosure in oral communications and prospectuses and imposes liability on sellers for offers or sales by means of an oral communication or prospectus that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, in light of the circumstances under which they were made, not misleading.

[12] 17 CFR 230.401 through 230.498.

[13] 15 U.S.C. 80a–24.

[14] *See* proposed Rule 163B(b)(3).

163B would not constitute a free writing prospectus.

The Commission also clarified in the Proposing Release [15] that Rule 163B communications, while exempt from Section 5(b)(1) and Section 5(c) as described above, would be considered ''offers'' as defined in Section 2(a)(3) of the Securities Act [16] and would therefore be subject to Section 12(a)(2) liability in addition to the anti-fraud provisions of the federal securities laws. Additionally, the Commission stated that information provided in a test-the-waters communication under the proposed rule must not conflict with material information in the related registration statement. It also noted that, as is currently the practice of Commission staff when reviewing offerings conducted by EGCs, the Commission or its staff could request that an issuer furnish any test-the-waters communication used in connection with an offering.[17]

Finally, the Commission cautioned that issuers subject to Regulation FD [18] would need to consider whether any information in the test-the-waters communication would trigger any obligations under Regulation FD, or whether an exception to Regulation FD would apply.[19] Regulation FD requires public disclosure of any material nonpublic information that has been selectively disclosed to certain securities market professionals or shareholders [20] if the issuer has a class of securities registered under Section 12 of the Exchange Act or is required to file reports under Section 15(d) of the Exchange Act.[21] Thus, communications made under the proposed rule that also include material nonpublic information could be subject to 17 CFR 243.100(a) of Regulation FD unless an exclusion under 17 CFR 243.100(b)(2) of Regulation FD applies.

2. Comments on the Proposed Amendments Generally

Commenters broadly supported the proposed exemption for test-the-waters communications.[22] Commenters generally concurred that the proposed exemption would allow issuers adequate flexibility to gauge market interest,[23] tailor the size and other terms of the offering,[24] reduce the costs of going public [25] as well as the risk of disclosing sensitive financial and competitive information when choosing not to proceed with an IPO,[26] and ''level the playing field'' among issuers.[27] Some commenters asserted that proposed Rule 163B may motivate more companies to conduct registered offerings.[28] One commenter, however, questioned whether and how the proposed exemption would increase the number of public offerings.[29]

Commenters also broadly supported the view that the proposal does not raise significant investor protection concerns.[30] Several commenters noted that investor protection concerns are mitigated by: (1) The limitation on offerees to QIBs and IAIs; [31] (2) the application of the anti-fraud provisions of the federal securities laws, as well as potential liability under Section 12(a)(2) of the Securities Act, to proposed Rule 163B communications; [32] (3) the need for test-the-waters communications generally to be consistent with the disclosure in any filed registration statement; [33] (4) the application of Regulation FD to communications made by issuers subject to those rules; [34] and (5) the fact that, where an issuer proceeds with a registered offering, offerees will be able to compare the information in the test-the-waters materials against the information in the registration statement and purchasers will ultimately receive a prospectus subject to Section 11 and Section 12(a)(2) liability.[35] One commenter expressed concerns that the proposed reasonable belief standard regarding investor status would create the risk of solicitations to retail and other investors lacking sophistication by permitting issuers to rely on a ''check-the-box'' or other self-certification method of determining investor status, as discussed in more detail in Section II.C below.[36]

Most commenters indicated that Rule 163B should not require issuers to file test-the-waters communications or include legends or disclaimers.[37] Commenters noted, among other reasons, that: (1) Such a requirement would be inconsistent with test-the-waters communications under Section 5(d) [38] and other rules; [39] (2) Section 12(a)(2) and Section 10(b) liability would provide adequate safeguards for QIBs and IAIs; [40] and (3) the staff could continue its practice of reviewing written test-the-waters materials used in connection with a registered offering.[41] On the other hand, one commenter asserted that the Commission should require issuers to file test-the-waters materials in those instances when an issuer files a related registration statement since filing of these already-prepared and disseminated communications would add no additional burden on the issuers, would provide the Commission with information to monitor the market, and would allow investors to compare the

[15] *See* Section II.A of the Proposing Release.

[16] Securities Act Section 2(a)(3) [15 U.S.C. 77b(a)(3)] defines ''offer'' as any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The term ''offer'' has been interpreted broadly and goes beyond the common law concept of an offer. *See Diskin* v. *Lomasney & Co.,* 452 F.2d 871 (2d. Cir. 1971); *SEC* v. *Cavanagh,* 1 F. Supp. 2d 337 (S.D.N.Y. 1998).

[17] *See* 17 CFR 230.418 under the Securities Act.

[18] *See* 17 CFR 243.100 *et seq.* under the Securities Act.

[19] *See* Section II.A of the Proposing Release.

[20] *See* 17 CFR 243.100(b)(1) of Regulation FD. Many QIBs and IAIs are the types of securities market professionals or shareholders covered by Regulation FD.

[21] *See* 17 CFR 243.101(b) of Regulation FD. Regulation FD applies to closed-end companies as defined in Section 5(a)(2) of the Investment Company Act [15 U.S.C. 80a–5(a)(2)] but not other investment companies. Regulation FD also does not apply to any foreign government or foreign private issuer, as those terms are defined in Securities Act Rule 405.

[22] *See* letters from S. Ameri, C. Anderson, ASA, CCMC, B. Clark, Cleary, Cravath, CRT, Davis Polk, Dechert, Federated, Hamilton, ICI, Nasdaq, R. Petry, A. Rahskopf, SIFMA, M. Stuchlik, and Sullivan. Comments on the scope of eligible issuers that could rely on the proposed rule, the types of investors that issuers could communicate with under the proposed rule, the proposed non-exclusivity provision, and investment company-specific considerations are discussed in separate sections below.

[23] *See* letters from CCMC, Cravath, Davis Polk, Hamilton, ICI, Nasdaq, and Sullivan.

[24] *See* letters from CCMC, Cravath, ICI, and Nasdaq.

[25] *See* letters from CCMC, Cleary, Cravath, Davis Polk, ICI, Nasdaq, M. Stuchlik, and Sullivan.

[26] *See* letters from CCMC, Cravath, and Nasdaq.

[27] *See* letters from CCMC, Cravath, CRT, Davis Polk, ICI, Nasdaq, M. Stuchlik, and Sullivan. *But see* letters from ICI and Federated (stating that the proposed rule was unlikely to benefit certain fund issuers); *infra* Section II.E.

[28] *See* letters from S. Ameri, CCMC, Cleary, Cravath, Hamilton, and Sullivan.

[29] *See* letter from Better Markets. This commenter also questioned whether the Commission has the requisite authority to expand by rule the exemption available to EGCs under Section 5(d) to all issuers. *See infra* Section II.A.3.

[30] *See* letters from ASA, CCMC, Cravath, Hamilton, and Nasdaq.

[31] *See* letters from CCMC, Cravath, Davis Polk, Hamilton, ICI, Nasdaq, A. Rahskopf, SIFMA, and Sullivan.

[32] *See* letters from CCMC, Cravath, Davis Polk, and ICI.

[33] *See* letters from ASA, CCMC, Cravath, ICI, SIFMA, and Sullivan.

[34] *See* letters from ASA and Davis Polk.

[35] *See, e.g.,* letters from Cravath, Davis Polk, and SIFMA.

[36] *See* letter from Better Markets.

[37] *See* letters from CCMC, Cleary, Cravath, Davis Polk, Federated, ICI, SIFMA, and Sullivan. *See also infra* Section II.E (discussing comments on investment company-specific considerations regarding filing, legending, and content requirements in test-the-waters communications).

[38] *See, e.g.,* letter from Davis Polk.

[39] *See* letter from Sullivan (suggesting this approach is consistent with Rule 144A and Regulation D, which do not require filing of offering materials).

[40] *See* letter from Cravath.

[41] *See* letters from CCMC, SIFMA, and Sullivan.

claims in those communications with the prospectus and with the performance of the securities themselves.[42]

One commenter recommended that the Commission also exclude Section 5(d) written communications from the definition of ''free writing prospectus'' in Rule 405 and from the prospectus filing requirement in Rule 424(b) to avoid implying that communications under Section 5(d) and proposed Rule 163B would be treated differently.[43] Another commenter recommended that a clear, brief disclaimer should accompany any forward-looking information in the context of an offering of corporate credit securities, but noted that written material provided during market soundings that is broadly available should not be subject to additional filing requirements.[44]

Of the commenters that expressed a view on whether the communications under the rule would be ''offers'' as defined in Securities Act Section 2(a)(3) subject to Section 12(a)(2) liability,[45] only one commenter argued that test-the-waters communications should not be treated as ''offers'' subject to Section 12(a)(2) liability based on the preliminary nature of test-the-waters communications, the sophistication of their recipients, the applicability of the general anti-fraud provisions, and the availability of a final disclosure document.[46]

Commenters generally agreed that Regulation FD should continue to apply to material statements made in a Rule 163B communication, unless an existing exception from that rule applies, and that a separate exception to Regulation FD for proposed Rule 163B communications is not necessary.[47] One commenter stated that Regulation FD currently provides sufficient flexibility to allow issuers to engage in meaningful communications with investors, while still providing the appropriate protections against selective disclosures.[48] Another commenter expressed the view that ''test-the-waters flexibility or specifically market soundings prior to a new credit issue should have reasonable exceptions to Regulation FD for some communications such as open ended dialogues on investor and issuer needs and wants.''[49]

Three commenters[50] took exception to the statement in the Proposing Release that ''information provided in a test-the-waters communication under the proposed rule must not conflict with material information in the related registration statement.''[51] One commenter recommended that the Commission specify that the statement is guidance and not a condition for the availability of the exemption.[52] Another commenter asserted that, because test-the-waters communications may be used before a registration statement is filed, requiring consistency between those communications and a yet-to-be-filed registration statement could be problematic.[53] Failure to comply, this commenter noted, would trigger a violation of Section 5 with its attendant consequences, which could have a chilling effect on the use of these communications. The commenter also noted that Section 5(d) has no such proviso.[54] Yet another commenter noted that, while it generally agreed that communications made after a registration statement has been filed should be consistent with material information in the registration statement, the expectation that communications made before the filing of a registration statement should also be consistent could create compliance difficulties.[55] This commenter observed that an issuer could change its messaging in response to investor feedback, which could result in a situation where the information provided while testing the waters conflicts with material information in the related registration statement.[56]

Three commenters recommended eliminating the ''anti-evasion'' language from paragraph (a)(2) of the proposed rule.[57] Two of these commenters asserted that it is unclear how anti-evasion language could apply to test-the-waters communications since it is unclear how permissible communications could be part of a scheme to evade Section 5 of the Securities Act, and that including such language could give rise to confusion or uncertainty, and thereby limit the utility of the proposed rule.[58] One of these commenters asserted that such language is not necessary since it is ''typically included in exemptions that are intended to serve as safe harbors from the registration or gun-jumping provisions of Section 5.''[59]

Two commenters expressed concern regarding the effect of the proposed rule on private placements following test-the-waters communications.[60] One commenter disagreed that the integration guidance referenced in the Proposing Release[61] should continue to apply in the context of testing the waters under either Section 5(d) or proposed Rule 163B.[62] Another commenter stated that the Commission should clarify through interpretive guidance or amendment to Rule 155 that issuers may immediately conduct a private placement or Regulation A offering after abandoning the proposed public offering to which the Rule 163B communications relate because, in the commenter's view, the act of testing the waters could be viewed as a general solicitation that disqualifies the issuer from immediately completing a subsequent private placement.[63]

3. Final Amendments

We are adopting the exemption and related amendments as proposed, except as noted below with respect to removing

[42] *See* letter from Better Markets.

[43] *See* letter from Cleary (noting that an amendment to Rule 405 ''is arguably unnecessary, since an issuer relying on new Rule 163B would not rely on Rule 164 and consequently would not be subject to Rule 433, but it is a helpful clarification'').

[44] *See* letter from CRT.

[45] *See* letters from Cravath, Davis Polk, and SIFMA.

[46] *See* letter from SIFMA.

[47] *See, e.g.,* letters from Cravath, Davis Polk, and SIFMA.

[48] *See* letter from SIFMA.

[49] *See* letter from CRT.

[50] *See* letters from CCMC, Cleary, and SIFMA.

[51] *See* Section II.A of the Proposing Release.

[52] *See* letter from Cleary.

[53] *See* letter from SIFMA.

[54] *Id.*

[55] *See* letter from CCMC.

[56] *Id.*

[57] *See* letters from Cravath, SIFMA, and Sullivan. Proposed Rule 163B(a)(2) read: ''This rule is not available for any communication that, although in technical compliance with this rule, is part of a plan or scheme to evade the requirements of section 5 of the Act.''

[58] *See* letters from Cravath and Sullivan.

[59] *See* letter from SIFMA. The SIFMA letter provides examples of the types of rules with anti-evasion language, which include the private placement provision of Regulation D, the resale provisions of Rules 144, 144A and 145(d), the communication provisions in Rules 168 and 169, and the offshore offering provisions in Regulation S.

[60] *See* letters from CCMC and Cleary.

[61] *See* Proposing Release at note 105 (stating that ''similar to Section 5(d), the proposed rule would not modify existing rules on solicitation in conjunction with private placements. The Commission's 2007 framework for analyzing how an issuer can conduct simultaneous registered and private offerings would continue to apply.''). *See also* Revisions of Limited Offering Exemptions in Regulation D, Release No. 33–8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)] (the ''2007 Integration Guidance'').

[62] *See* letter from Cleary (asserting that ''[just] as [sophisticated] institutional investors have been judged to be able to fend for themselves in handling the potential for market conditioning otherwise prohibited by Section 5, so too should they be able to evaluate a possible private placement even if that is the first time the prospective investor was solicited by this issuer or its agents'' and suggesting that the Commission take the position that ''conducting test-the-waters communications in reliance on Rule 163B or Section 5(d) would not itself constitute general solicitation, whether or not there is a substantive, pre-existing relationship with the prospective investor'').

[63] *See* letter from CCMC.

the anti-evasion language in proposed Rule 163B(a)(2) and revising the definition of ''free writing prospectus'' in Rule 405.

As a preliminary matter, the Commission has the requisite authority to extend the accommodations currently available under Section 5(d) to all issuers.[64] Section 28 of the Securities Act gives the Commission broad authority to ''conditionally or unconditionally exempt any person . . . or any class or classes of persons . . . from any provision or provisions of'' the Securities Act and rules or regulations issued thereunder ''to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.'' [65] Rule 163B will exempt from certain requirements the class of persons who are issuers contemplating a registered securities offering and who meet the conditions set forth in the rule. As explained here and in the Proposing Release, we believe that the final rule furthers the public interest and includes appropriate investor protections.

Nothing in the Jumpstart Our Business Startups Act (the ''JOBS Act'') [66] indicates that Congress sought to limit the Commission's ability to extend the accommodations currently available to EGCs to other issuers, nor does Section 28 include any such limitation. The final rule's use of exemptive authority is thus consistent with the plain language of Section 28.

We agree with commenters that the final rule generally will allow issuers to consult effectively with investors as they evaluate market interest in a contemplated registered securities offering before incurring the costs associated with such an offering, while maintaining adequate investor protections.[67] As commenters noted, several aspects of the rule will mitigate investor protection concerns, notably:

- The limitation of Rule 163B communications to investors that are financially sophisticated, and, as one commenter said, ''are unlikely to ignore the statutory prospectus and rely exclusively on information provided to them during the [test-the-waters] process'';[68]
- The application of the anti-fraud provisions of the federal securities laws and exposure to Section 12(a)(2) liability;[69]
- The continued application of Regulation FD to certain issuers; and
- The fact that, should the issuer move forward with the offering, all investors would ultimately receive a Section 10(a) prospectus subject to Section 11 and Section 12(a)(2) liability.[70]

However, we are not adopting proposed Rule 163B(a)(2), which stated that the rule would be unavailable for any communication that, while in technical compliance with the rule, is part of a plan or scheme to evade the requirements of Section 5 of the Act. We are persuaded by the commenters who expressed concerns that such language may raise uncertainty and would risk limiting the utility of the rule.[71] Communications made under the rule will be deemed offers under Section 2(a)(10) and will still be subject to the anti-fraud and other applicable provisions of the federal securities laws, and an issuer that proceeds with the contemplated public offering after testing-the-waters will be required to file a registration statement. We therefore believe eliminating the anti-evasion language will avoid any confusion or chilling effect such language may introduce without introducing significant risk to investors.

As noted above, one commenter recommended that we exclude both Section 5(d) and Rule 163B written communications from the definition of ''free writing prospectus'' in Rule 405 and from the prospectus filing requirement in Rule 424(b) to avoid any confusion that the communications should be treated differently.[72] The Commission historically has not treated Section 5(d) communications as free writing prospectuses that are required to be filed. To the extent the proposed amendment creates any implication that they would be treated differently than Rule 163B communications for this purpose, we are amending Rule 405 to clarify this point, consistent with existing practice.

We are not requiring, as suggested by one commenter, that test-the-waters communications be filed.[73] While ''the investing public, analysts and entities that serve investors, journalists, and other interested parties'' may gain some ''benefits and insights . . . from seeing and evaluating these [test-the-waters] communication materials,'' [74] as this commenter asserted, we believe those benefits are likely to be limited [75] and are concerned that imposing a filing requirement, which would be inconsistent with the requirement under Section 5(d) for EGCs, may have a chilling effect on the usefulness of the rule. In addition, as noted by one commenter, ''much of the interaction in [test-the-waters] meetings is oral in nature . . . so a filing requirement would not cover what is often the most substantive component of the meeting.'' [76] Accordingly, consistent with the proposal, we are not adopting a filing requirement.[77] We note that Commission staff in the Division of Corporation Finance anticipates requesting, in connection with its review of a registration statement, that any test-the-waters communication used in connection with the offering be furnished to the staff for review, as is currently its practice when reviewing offerings conducted by EGCs.[78]

In the Proposing Release, the Commission observed that information in a Rule 163B communication must not conflict with material information in the related registration statement.[79] This statement was intended to remind issuers that, although such communications would be exempt from Section 5 of the Securities Act, issuers nevertheless must take care to ensure that they are made in compliance with other provisions of the federal securities laws.[80] We acknowledge the concerns expressed by certain commenters regarding the possibility that circumstances or messaging may change between the time the pre-filing Rule 163B communications are made and the

[64] *See* letter from Better Markets (expressing concern that the Commission lacks the authority to extend the accommodations currently available under Section 5(d) to all issuers).

[65] 15 U.S.C. 77z–3.

[66] Public Law 112–106, 126 Stat. 306 (2012).

[67] We recognize that Rule 163B may be less beneficial to certain fund issuers. *See infra* Section II.E.

[68] *See* letter from Davis Polk.

[69] Liability under Section 12(a)(2) will attach to test-the-waters oral and written communications under the rule both before and after a registration statement has been filed. Communications under the final rule will also be subject to the anti-fraud provisions of Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder.

[70] For the reasons set forth in this paragraph and as discussed in more detail throughout this release, we find that the final rule is necessary or appropriate in the public interest and is consistent with the protection of investors. *See* 15 U.S.C. 77z–3.

[71] *See, e.g.,* letters from Cravath and SIFMA.

[72] *See* letter from Cleary.

[73] *See* letter from Better Markets.

[74] *Id.*

[75] *See* Section IV.D below for further discussion of the limited benefits of filing test-the-waters materials.

[76] *See* letter from Davis Polk. *See also* Section IV.D below for further discussion of the potential costs that a filing requirement could have on issuers that elect to test the waters under Rule 163B.

[77] *See* Rule 163B(b)(3).

[78] *See* 17 CFR 230.418 under the Securities Act.

[79] *See* Section II.A of the Proposing Release.

[80] Because Rule 163B communications are subject to Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, there may be liability concerns if a Rule 163B communication materially conflicts with the information in a registration statement.

time of filing, causing the information in the test-the-waters materials to differ from information in the related registration statement.[81] At the same time, it is important to keep in mind that statements made in the test-the-waters materials and in the related registration statement, if filed, must not contain material misstatements or omissions at the time the statements are made.

Based on Commission staff's experience in reviewing test-the-waters materials used by EGCs and provided at the Commission staff's request in connection with a registered offering, material information regarding financial condition and performance, business operations and strategy, information about management, and other operational information is generally consistent with information presented in the filed registration statement.[82] Even if an issuer changes its capital raising strategy or modifies offering terms based on investor input during the pre-filing test-the-waters phase, or where an issuer changes its ''messaging due to investor demand,'' [83] material information about the issuer itself usually remains consistent, other than updates to reflect continuing operations and material changes that may develop during the time between the communication and filing. As noted above, information in the Rule 163B communication should not contain material misstatements or omissions at the time the communication is made and we note that it is especially important to be mindful of this obligation when discussing material information about the issuer itself. Nevertheless, we recognize that between the time of the Rule 163B communication and the time a registration statement is filed, disclosures may be changed in order to reflect a change in circumstances or offering terms. We also clarify, as one commenter suggested, that this statement is intended to provide guidance to issuers on their obligations under the federal securities laws and is not a condition to the availability of Rule 163B.

As noted above, one commenter asserted that the preliminary nature of Rule 163B communications, the liability that can attach to such communications, and the nature of the potential investors to whom the communications would be directed do not support the communications being deemed ''offers'' under Securities Act Section 2(a)(3).[84] As stated in the Proposing Release, the term ''offer'' has been interpreted broadly,[85] and would encompass communications that are intended to gauge interest in a contemplated registered offering.[86] In general, the factors described by the commenter are not germane in determining whether a particular communication would be deemed an ''offer'' as defined in Section 2(a)(3). As noted by another commenter, ''since one of the primary goals of using test-the-waters communications is to provide prospective investors additional time to evaluate, understand, and ask questions about potential investment opportunities, the conclusion that they should be deemed 'offers' is, in our view, inescapable.'' [87] We agree, and are adopting Rule 163B(b)(2) as proposed, which states that communications under the rule constitute offers as defined in Section 2(a)(3), and are thereby subject to Section 12(a)(2) liability.

As noted above, one commenter expressed concern that a test-the-waters communication could be viewed as a general solicitation that could disqualify an issuer from immediately completing a private placement in lieu of a registered offering,[88] and another commenter suggested that the Commission should take the position that a test-the-waters communication made in reliance on Rule 163B would not itself constitute a general solicitation.[89]

In our view, whether a test-the-waters communication would constitute a general solicitation depends on the facts and circumstances regarding the manner in which the communication is conducted.[90] If an issuer chooses to engage in test-the-waters communications under Rule 163B concurrently with communications related to a private offering, it can conduct such communications in a manner that preserves the availability of both Rule 163B and any offering exemption upon which it might otherwise rely.

Where an issuer wishes to pursue a private placement in lieu of a registered offering immediately after engaging in test-the-waters communications, the issuer should consider whether the test-the-waters communication was conducted in such a way as to constitute a general solicitation. If the communication constitutes a general solicitation, the issuer should consider whether the private offering exemption upon which the issuer is relying allows for general solicitation and, if it does not, whether the investors in the private placement were solicited by means of such a test-the-waters communication, or through some other means that would otherwise not foreclose the availability of the exemption.

Another commenter raised a concern about the implications of a QIB or IAI passing test-the-waters information on to nonqualified parties in violation of a confidentiality agreement or otherwise in a manner inconsistent with the reasonable steps undertaken by the issuer to prevent such redistribution.[91] In our view, where an issuer has taken reasonable steps to prevent test-the-waters communications from being shared with non-QIBs and non-IAIs and such information is nonetheless shared, such circumstances, in themselves, would not give rise to Section 5 liability for the issuer or the need for any cooling-off period.

B. Scope of Eligible Issuers

Under the proposed rule, any issuer, or person authorized to act on behalf of the issuer, would be able to engage in exempt oral or written communications with potential investors that are, or that the issuer or persons authorized to act on behalf of the issuer reasonably believes are, QIBs or IAIs. All issuers—including non-reporting issuers, EGCs, non-EGCs, well-known seasoned issuers (''WKSIs''), and investment companies (including registered investment

[81] *See* letters from SIFMA and CCMC.

[82] As one commenter noted, ''We have also seen market participants developing robust policies and procedures for test-the-waters communications in order to ensure that information communicated in test-the-waters materials does not conflict with the information ultimately presented in the registration statement.'' *See* letter from Sullivan. *See also supra* note 17 and accompanying text (discussing the ability of the Commission or its staff to request that an issuer furnish the staff any test-the-waters communication used in connection with an offering).

[83] *See* letter from CCMC.

[84] *See* letter from SIFMA.

[85] *See* Proposing Release at note 23.

[86] The Commission has explained that ''the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer . . . .'' *Guidelines for the Release of Information by Issuers Whose Securities are in Registration,* Release No. 33–5180 (Aug. 16, 1971) [36 FR 16506 (Aug. 21, 1971)].

[87] *See* letter from Cravath.

[88] *See* letter from CCMC.

[89] *See* letter from Cleary.

[90] As stated in the Proposing Release, the Commission's 2007 framework for analyzing how an issuer can conduct simultaneous registered and private offerings continues to apply. *See* Proposing Release at note 105. This guidance can be applied to address circumstances that may arise with respect to pre-filing test-the-waters communications and concurrent or immediately subsequent private offerings.

[91] *See* letter from CCMC.

companies and business development companies (''BDCs'')—would be eligible to rely on the rule.[92] In the Proposing Release, the Commission expressed its belief that, in light of its experience with test-the-waters communications for EGCs under Section 5(d), and given the sophisticated nature of the institutional investors to which communications under the proposed rule could be directed, it is appropriate to expand the accommodation to all issuers.[93]

All but one of the commenters that expressed a view on eligibility supported extending the test-the-waters accommodation currently available to EGCs to all issuers, as proposed.[94] Commenters observed that the size or reporting status of an issuer is not generally correlated with its desire to gauge investor interest prior to a registered public offering[95] and that QIBs and IAIs have the sophistication to evaluate investment opportunities regardless of the type of issuer.[96] One commenter stated that permitting all issuers to test the waters would harmonize U.S. practice with that of other jurisdictions that permit similar kinds of communications.[97] Another commenter stated that the proposed rule would facilitate initial public offerings as well as secondary offerings by companies that have already gone public, particularly those companies that do not qualify as either EGCs or WKSIs.[98] This commenter also observed that, unlike the current accommodation for WKSIs under Rule 163, which does not extend to WKSIs' underwriters, the proposed rule would enable underwriters to participate in test-the-waters communications.[99] Some commenters expressly supported allowing fund issuers to rely on the proposed rule (and no commenters stated that the rule's scope should not include fund issuers), but some stated that fund issuers may be less likely to benefit from the rule, as proposed.[100]

Accordingly, and for the reasons set forth in this release and in the Proposing Release, we are adopting Rule 163B as proposed with respect to eligibility.

C. Investor Status

As proposed, Rule 163B would permit an issuer to engage in pre- and post-filing solicitations of interest with potential investors that are, or that the issuer reasonably believes to be, QIBs or IAIs. A QIB generally is a specified institution that, acting for its own account or the accounts of other QIBs, in the aggregate, owns and invests on a discretionary basis at least $100 million in securities of unaffiliated issuers.[101] An IAI is any institutional investor that is also an accredited investor, as defined in paragraph (a) of Rule 501 of Regulation D.[102] Under the proposed rule, any potential investor solicited must meet, or issuers must reasonably believe that the potential investor meets, the requirements of the rule. We did not propose to specify the steps an issuer could or must take to establish a reasonable belief that the intended recipients of test-the-waters communications are QIBs or IAIs.[103] As noted in the Proposing Release, the limitation of the exemption to these institutional investors, consistent with Section 5(d), is intended to ensure that test-the-waters communications are directed to investors that are financially sophisticated and therefore do not require the same level of protections provided by the Securities Act's registration process as other types of investors.[104]

We received several comments on two issues raised in the Proposing Release with respect to investor status: (1) Whether the proposed exemption should limit communications to QIBs and IAIs; and (2) whether issuers should be required to establish a reasonable belief that the potential investors involved in a Rule 163B communication are QIBs and IAIs and, if so, whether existing guidance and practice is sufficient to enable issuers to establish such reasonable belief or whether the rule should include a non-exclusive list of methods that could be used to establish such reasonable belief.

1. Limiting Communications to QIBs and IAIs

Commenters generally agreed with the proposed rule's requirement that solicitations of interest be limited to QIBs and IAIs.[105] Several commenters recommended, however, that the Commission consider expanding the class of eligible investors.[106]

One commenter suggested that the Commission consider expanding the applicability of test-the-waters communications to individual accredited investors.[107] Another commenter recommended, as a way to facilitate global offerings made on a registered basis, expanding the class of eligible investors to include parties that are not ''U.S. Persons'' (as defined in Rule 902(k)) who may purchase outside of the U.S. in a non-U.S. tranche of a registered offering.[108] This commenter also recommended, in the case of an offshore tranche offered and sold under Regulation S in tandem with a domestic registered offering, that the Commission confirm that communications made under Rule 163B would not be deemed ''Directed Selling Efforts'' under 17 CFR 230.902(c) (''Rule 902(c)'') for purposes of Regulation S.[109]

Two commenters suggested that the Commission expand Rule 163B to permit fund issuers to test the waters

[92] *See infra* Section II.E (discussing considerations for investment companies' use of Rule 163B).

[93] *See* Section I of the Proposing Release.

[94] *See* letters from CCMC, B. Clark, Cravath, ICI, Nasdaq, and Sullivan. As discussed above, Better Markets questioned the Commission's authority to extend the accommodation to all issuers. Such authority exists in our view, *see supra* Section II.A.3, and we agree with the other commenters that the accommodation should be extended to all issuers.

[95] *See* letter from Sullivan.

[96] *See* letter from Cravath.

[97] *See* letter from CCMC.

[98] *See* letter from Nasdaq.

[99] *See id.*

[100] *See infra* Section II.E.

[101] 17 CFR 230.144A(a)(1)(i). Banks and other specified financial institutions must also have a net worth of at least $25 million. 17 CFR 230.144A(a)(1)(vi). Unlike other institutions, a registered broker-dealer qualifies as a QIB if, in the aggregate, it owns and invests on a discretionary basis at least $10 million in securities of issuers that are not affiliated with the broker-dealer. 17 CFR 230.144A(a)(1)(ii).

[102] Specifically, for the purposes of the proposed rule, an IAI would be an institution that meets the criteria of Rule 501(a)(1), (a)(2), (a)(3), (a)(7), or (a)(8).

[103] Although Securities Act Rule 501(a) does not provide specific details as to the actions an issuer can take to form a reasonable belief that an entity meets the definition of an institutional accredited investor, Rule 144A(d)(1) sets forth non-exclusive means to determine whether a prospective purchaser is a QIB. The rule provides that a seller and any person acting on its behalf are entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investment of securities: (i) The prospective purchaser's most recent publicly available financial statements; (ii) the most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another U.S. federal, state, or local government agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization; (iii) the most recent publicly available information appearing in a recognized securities manual; or (iv) a certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year.

[104] *See* Section II.C of the Proposing Release.

[105] *See, e.g.,* letters from Better Markets, CCMC, Cravath, Nasdaq, SIFMA, and Sullivan.

[106] *See* letters from L. Ameri, C. Anderson, Federated, and ICI.

[107] *See* letter from SIFMA (suggesting that the Commission address this possible expansion in a separate rulemaking given that the definition of accredited investors is presently under Commission review).

[108] *See* letter from CCMC.

[109] *Id.*

with any SEC-registered investment adviser, which could help issuers gauge the potential viability of a fund offering. These commenters suggested that all SEC-registered investment advisers should be considered sophisticated enough to receive these communications.[110]

One commenter disagreed with limiting investors eligible to receive test-the-waters communications, arguing instead that the rule should be expanded to include all accredited investors and, eventually, all investors.[111]

In our view, because the exemption will be available to all issuers, we think it is appropriate, as an initial matter, to limit the communications, consistent with Section 5(d), to those institutional investors that the Commission has long recognized as having the ability to fend for themselves. Also, the intent of the exemption is to help issuers gauge market interest in a potential offering, and limiting the communications to institutional investors will allow issuers to accomplish this goal while mitigating any potential adverse effects on investors.

We recognize that, as two commenters noted, some but not all SEC-registered investment advisers would currently qualify as QIBs or IAIs.[112] We are not, however, expanding the class of eligible investors under Rule 163B to include all SEC-registered investment advisers at this time. In connection with our ongoing review of the definition of ''accredited investor'' under Rule 501(a) of Regulation D, we are considering whether a broader range of SEC-registered investment advisers should qualify as IAIs, beyond those that currently qualify as IAIs under Rule 501(a)(3).[113] We believe a more holistic review of the treatment of SEC-registered investment advisers under Rule 501 of Regulation D will help ensure appropriate consistency throughout our regulations.

At this time we believe it is appropriate to limit Rule 163B communications to QIBs and IAIs, consistent with communications made under Section 5(d), for the reasons set forth in this release and in the Proposing Release.[114]

2. Reasonable Belief Standard

Commenters broadly supported a ''reasonable belief'' standard for proposed Rule 163B, but objected to creating a non-exclusive list of methods to establish a reasonable belief.[115] In expressing this view, several commenters noted that, unlike in the context of offerings made in reliance on 17 CFR 230.506(c) of Regulation D, all investors who would receive ''Rule 163B communications and who in turn proceed to make an investment in the issuer will ultimately have the benefit of a registration statement.'' [116] One commenter stated that the standard for proposed Rule 163B should ''be no more burdensome for issuers and their underwriters than current practice in Rule 144A and Section 4(a)(2) private placements.'' [117]

One commenter opposed the proposed reasonable belief standard, arguing that by not requiring issuers—and persons authorized to act on their behalf, including underwriters—to validate the status of the investor as a QIB or IAI before a solicitation is made, the proposed rule would permit solicitations to retail and other unsophisticated investors.[118] This commenter urged that, at a minimum, the Commission should establish specific criteria that must be used to evaluate the status of the investor and ensure the investor is in fact a QIB or IAI.[119]

We are adopting the reasonable belief standard as proposed. Accordingly, Rule 163B does not specify the steps that an issuer could or must take to establish a reasonable belief regarding investor status or require the issuer to verify investor status. As the Commission noted in the Proposing Release, by not specifying the steps an issuer could or must take to establish a reasonable belief as to investor status, this approach is intended to provide issuers with the flexibility to use methods that are cost-effective but appropriate in light of the facts and circumstances of each contemplated offering and each potential investor.[120]

In addition, we disagree with the commenter's assertion that, absent a requirement that issuers take reasonable steps to verify investor status, the rule would permit solicitations to non-qualifying investors, and that the Commission should therefore ''establish specific criteria that an issuer and all those acting on an issuer's behalf must use to evaluate the status of the investor to ensure that the investor is indeed a QIB or an IAI.'' [121] While issuers will not be required to take specific steps to verify investor status, the rule limits solicitations to potential investors that are, or that the issuer reasonably believes to be, QIBs or IAIs. The issuer could not, for example, form such reasonable belief if it has knowledge that the investor is not a QIB or IAI. As noted in the Proposing Release, we believe that issuers should continue to rely on the methods that they currently use to establish a reasonable belief with respect to an investor's status as a QIB or IAI pursuant to Rule 144A and Rule 501(a).[122] Furthermore, in response to this commenter's concern regarding issuers relying on a ''check-the-box'' or other self-certification method of determining investor status, we reiterate that the steps necessary to establish a reasonable belief as to investor status will be dependent on the facts and circumstances of the contemplated offering and each potential issuer.

For these reasons, we are not adopting specific steps or methods to establish a reasonable belief, or requiring issuers to take reasonable steps to verify, that the intended recipients of test-the-waters communications are QIBs or IAIs. Instead, issuers may continue to rely on methods they currently use to establish

[110] *See* letters from Federated and ICI (stating that ''only registered investment advisers that in the aggregate own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the adviser [under the QIB definition] would be eligible to receive test-the-waters communications''). One commenter suggested that, for purposes of proposed Rule 163B, SEC-registered investment advisers should be treated similarly to registered broker-dealers, which qualify as IAIs. This commenter also stated that its recommended approach would be consistent with FINRA Rule 2210, which classifies all SEC-registered investment advisers as institutional investors. *See* letter from ICI.

[111] *See* letter from L. Ameri.

[112] An SEC-registered investment adviser would generally qualify as an IAI if it has total assets in excess of $5 million. *See* Rule 501(a)(3) of Regulation D. An SEC-registered investment adviser would generally qualify as a QIB if it owns and invests on a discretionary basis at least $100 million in securities of unaffiliated issuers. *See* Rule 144A(a)(1)(i)(I).

[113] *See* Concept Release on Harmonization of Securities Offering Exemptions, Release No. 33–10649 (June 18, 2019) [84 FR 30460 (June 26, 2019)].

[114] We do, however, confirm that communications made under Rule 163B generally would not be deemed ''Directed Selling Efforts'' under Rule 902(c) for purposes of Regulation S. Further, we confirm that issuers may engage in communications under Rule 163B to non-U.S persons who are also QIBs or IAIs.

[115] *See* letters from CCMC, Cleary, Cravath, Davis Polk, Hamilton, and SIFMA.

[116] *See* letter from Cravath. *See also* letters from Hamilton and Davis Polk.

[117] *See* letter from Davis Polk.

[118] *See* letter from Better Markets.

[119] *Id.*

[120] *See* Section II.C of the Proposing Release. *See also Interpretive Release on Regulation D,* Release No. 33–6455 (Mar. 3, 1983) [48 FR 10045 (Mar. 10, 1983)] (explaining, in the context of the definition of ''accredited investor,'' ''[w]hat constitutes 'reasonable' belief will depend on the facts of each particular case'').

[121] *See* letter from Better Markets.

[122] *See* note 103, *supra.*

a reasonable belief regarding an investor's status in other contexts.[123]

D. Non-Exclusivity

As proposed, Rule 163B explicitly stated that it would be non-exclusive. In other words, an issuer would be able to rely concurrently on other Securities Act communications rules or exemptions when determining how, when, and what to communicate related to a contemplated securities offering. The Commission cautioned in the Proposing Release,[124] however, that while an issuer contemplating a registered securities offering may solicit interest from QIBs and IAIs without legending or filing those materials in compliance with Rule 163B, should it decide to claim the availability of another exemption or communication rule with respect to those communications, the issuer must also comply with the conditions of any other exemption or rule relied upon.

All commenters that discussed non-exclusivity of the rule supported the rule as proposed, and none opposed the non-exclusivity provision.[125] Accordingly, and for the reasons discussed in the Proposing Release, we are adopting the non-exclusivity provision of Rule 163B as proposed.

E. Considerations for Use by Investment Companies

Consistent with the proposal, issuers that are, or that are considering becoming, registered investment companies or BDCs (collectively, ''funds'') would be eligible to engage in test-the-waters communications under Rule 163B. Commenters generally supported allowing all issuers, including fund issuers, to rely on Rule 163B, and we continue to believe it is appropriate for funds to have the option to engage in these communications to help assess market demand for a fund offering.[126]

1. Use of Rule 163B in the Fund Context

We received three comment letters that discussed fund-specific issues.[127] Commenters generally agreed with the Commission's assessment in the Proposing Release that funds are less likely to use Rule 163B than other issuers, due in part to certain considerations under the Investment Company Act and associated market practices.[128] One commenter discussed private funds' potential use of proposed Rule 163B.[129] This commenter expressed the view that private funds relying on Sections 3(c)(1) or 3(c)(7) of the Investment Company Act generally offer their securities pursuant to Section 4(a)(2) of the Securities Act (which separately provides for an exemption from Section 5), and therefore these funds would not have a direct use for proposed Rule 163B.[130] We recognize that an issuer that solely conducts offerings that qualify for an exemption from Section 5 of the Securities Act would not specifically benefit from Rule 163B, since the rule only relates to communications about contemplated registered securities offerings that Sections 5(c) or 5(b)(1) of the Securities Act would otherwise restrict.

Two commenters requested that we allow funds to rely on Rule 163B prior to registering under the Investment Company Act so funds can more effectively use the rule to engage in pre-filing communications.[131] These comments were in response to the industry practice discussed in the Proposing Release, whereby funds commonly file a single registration statement under both the Investment Company Act and the Securities Act to take advantage of certain efficiencies.[132] One of these commenters stated that, absent an exemption from Investment Company Act registration requirements, most funds would likely continue to file a single registration statement under both Acts, and therefore would not take advantage of the pre-filing benefits of proposed Rule 163B.[133] We recognize that this consideration will likely limit many funds' use of Rule 163B.[134] At this time, however, we decline to provide a new exemption under the Investment Company Act to allow a fund that would otherwise be required to register under Section 8 of the Investment Company Act to avoid this registration requirement while it engages in communications under Rule 163B. We are concerned that an exemption from registration and from the substantive requirements of the Investment Company Act could allow funds potentially to engage in activities that are contrary to the substantive requirements of the Investment Company Act that protect investors and apply outside of a registered fund's offering. For example, such a new exemption could allow a fund to engage in certain self-dealing transactions—which the Act prohibits for registered funds—that benefit its investment adviser or other affiliated persons while the fund is actively considering and soliciting interest in a public offering.[135] Commenters who suggested that funds should be permitted to rely on Rule 163B prior to registering under the Investment Company Act did not address how such an Investment Company Act registration exemption could address concerns unique to funds that the Act is meant to address. For instance, commenters did not discuss the contours of any conditions associated with any such exemption or

[123] One commenter recommended that the Commission consider specifying that this reasonable belief approach is also sufficient under Section 5(d). *See* letter from Cleary. Given that Rule 163B is available to all issuers, an EGC may rely on Rule 163B in addition to Section 5(d).

[124] *See* Section II.D of the Proposing Release.

[125] *See, e.g.,* letters from CCMC, Dechert, Federated, and ICI.

[126] *See supra* note 94 and accompanying text. *See also* Proposing Release at Section II.E (stating that funds and their advisers may have an interest in using the proposed rule to, for example, assess demand for a particular investment strategy or fee structure, and discussing the existing communications framework for funds that would otherwise only permit post-filing communications, subject to certain filing, legending, and content requirements).

[127] *See* letters from Dechert, Federated, and ICI.

[128] *See* letters from Federated and ICI. *See also* Proposing Release at notes 54–57 and accompanying text.

[129] *See* letter from Dechert.

[130] This commenter also represented that funds often rely on Sections 3(c)(1) or 3(c)(7) during their seeding periods before conducting a registered offering. *See* letter from Dechert. As discussed in the Proposing Release, and based on staff experience and information we have received in other contexts, we continue to believe this is not the typical practice. *See* Proposing Release at note 55. Among other considerations that may contribute to the common practice of funds registering during their seeding periods, a fund generally may only include performance information in its prospectus and sales materials for periods subsequent to the effective date of its registration statement. *See, e.g., infra* note 150. Moreover, if a fund is planning to conduct a registered public offering, the Sections 3(c)(1) and 3(c)(7) exemptions generally would become unavailable if the fund makes, or proposes to make, a public offering. *See* Section 3(c)(1) of the Investment Company Act [15 U.S.C. 80a–3(c)(1)] (requiring that an issuer ''is not making and does not presently propose to make a public offering of its securities''); Section 3(c)(7) of the Investment Company Act [15 U.S.C. 80a–3(c)(7)] (requiring that an issuer ''is not making and does not at [the time of acquisition of its securities by qualified purchasers] propose to make a public offering of its securities'').

[131] *See* letters from Federated and ICI. *See also supra* Section II.C.1 (discussing these commenters' request that fund issuers be permitted to test the waters with any SEC-registered investment adviser to help them better gauge interest in a potential registered offering).

[132] *See* Proposing Release at notes 56–57 and accompanying text.

[133] *See* letter from ICI. To register as an investment company, a fund files a relatively brief notification of registration on Form N–8A and generally must file a more detailed registration statement under the Investment Company Act within three months after filing the notification of registration. *See* Sections 8(a) and 8(b) of the Investment Company Act [15 U.S.C. 80a–8(a), 8(b)]; Investment Company Act Rule 8b–5 [17 CFR 270.8b–5].

[134] *See supra* note 132.

[135] *See, e.g.,* Section 17 and Section 10(f) of the Investment Company Act [15 U.S.C. 80a–17 and 15 U.S.C. 80a–10(f)].

how they would address these concerns. Given the need to consider these matters further, we are not adopting an exemption under the Investment Company Act at this time.

We continue to believe that certain funds may be able to rely on Rule 163B to engage in pre-filing communications to gauge interest in a potential registered offering. For example, because BDCs are not required to register under the Investment Company Act, they may be more likely to engage in pre-filing communications under Rule 163B when contemplating a registered offering close-in-time to the fund's inception.[136] Further, funds that initially conduct exempt offerings—including certain registered closed-end funds and BDCs—may use Rule 163B to communicate with QIBs and IAIs before filing a Securities Act registration statement if they are contemplating a subsequent registered offering.[137] One commenter agreed that the rule would provide these funds with greater flexibility in their communications.[138] This commenter also suggested that Rule 163B may provide registered closed-end funds and BDCs with more comfort regarding discussions about underwriting and offering terms with entities involved in the offering process.

In addition to pre-filing communications, Rule 163B will allow a fund to engage in test-the-waters communications with QIBs and IAIs after filing a Securities Act registration statement while it continues to contemplate a registered offering before the registration statement becomes effective. As discussed in more detail below, while funds may already engage in these types of communications under other Commission rules and associated FINRA rules, these communications currently may be subject to certain filing, legending, or content requirements that Rule 163B would not entail.[139]

2. Rule 163B Filing, Legending, and Content Requirements in the Fund Context

The Commission did not propose to require any different filing, legending, or content requirements for funds' test-the-waters communications under proposed Rule 163B, and we are not adopting any such requirements for funds.[140] While commenters supported the ability for funds to rely on proposed Rule 163B without the need to file test-the-waters communications, one commenter expressed doubt that this would result in significant cost savings for funds.[141] This commenter noted that, for example, post-filing communications under proposed Rule 163B are very similar to institutional communications under FINRA Rule 2210 and stated that these existing communications are not required to be filed with FINRA. The commenter expressed doubt that funds would rely on Rule 163B for these communications when they already use, and are familiar with, institutional communications under FINRA rules.[142] While there may be some minor differences between the scope of institutional investors under FINRA Rule 2210 and the QIB and IAI entities that funds may communicate with under Rule 163B,[143] we recognize that funds may choose to rely on other available communications rules to test the waters instead of Rule 163B.[144]

One commenter suggested that the Commission require funds to include performance information in a standardized manner in their test-the-waters communications.[145] This commenter represented that this requirement would facilitate comparisons of fund performance and level the playing field among funds. This commenter also stated that it would not be burdensome for funds to provide standardized performance information because they already present their performance in this manner. As an alternative, this commenter suggested that we require clear and prominent disclosure when a fund's test-the-waters communication includes nonstandardized fund performance.

We do not believe a standardized performance requirement, or a specific requirement to identify nonstandardized performance, is necessary for funds' test-the-waters communications given that: (1) Current standardized performance requirements generally would not be relevant at the time a fund tests the waters; (2) any performance presentation in a test-the-waters communication will be subject to anti-fraud provisions; and (3) these communications are limited to QIBs and IAIs, which are financially sophisticated investors that we believe, in the context of receiving test-the-waters communications, would have the bargaining power to request the information they need to assess fund performance.[146] We do not believe the current standardized performance requirements for registered funds would generally be meaningful for purposes of Rule 163B. These current provisions require performance information for certain periods *after* a registered fund has an effective Securities Act registration statement, while test-the-waters communications would generally occur *before* a fund has an effective Securities Act registration statement.[147] Further, any performance information included in test-the-waters communications will be subject to the anti-fraud provisions and cannot be materially misleading.[148] For example, if a fund provides performance information in a Rule 163B communication, additional statements regarding its performance—such as explanations, qualifications, or

[136] *See* Sections 6(f) and 54 of the Investment Company Act [15 U.S.C. 80a–6(f) and 80a–53]; Form N–6F and Form N–54A [17 CFR 274.15 and 274.54]. However, like registered investment companies, many BDCs have relatively high levels of retail investor ownership, which may reduce the likelihood that these BDCs will rely on Rule 163B to test the waters with QIBs and IAIs. *See infra* note 227.

[137] *See* Proposing Release at note 58 and accompanying text (recognizing that registered open-end funds may be less likely to use Rule 163B in this way because they typically offer their shares to retail investors in registered offerings).

[138] *See* letter from ICI.

[139] *See* 17 CFR 230.482 (''Rule 482'' under the Securities Act); 15 U.S.C. 80a–24(g) (Section 24(g) of the Investment Company Act); 17 CFR 270.34b–1 (Investment Company Act Rule 34b–1); FINRA Rule 2210.

[140] *See* Rule 163B(b)(3); Proposing Release at note 59 and accompanying text.

[141] *See* letter from ICI. *See also infra* Section IV.C.5.

[142] In addition to FINRA rules, funds must comply with relevant Commission rules with respect to these institutional communications. *See, e.g., supra* note 139.

[143] For example, certain investors that qualify as IAIs under Rule 501(a) of Regulation D may not necessarily be treated as institutional investors under FINRA Rule 2210.

[144] *See, e.g., supra* note 139. *See also* Rule 163B(a).

[145] *See* letter from ICI. This commenter pointed to performance presentation requirements under Rule 482 for registered open-end funds and requirements in Form N–2 for registered closed-end funds.

[146] *See infra* note 151 and accompanying text.

[147] *See, e.g.,* Advertising by Investment Companies, Release No. IC–16245 (Feb. 2, 1988) [53 FR 3868, 3876 (Feb. 10, 1988)] (excluding pre-effective performance from Rule 482 advertisements because funds are likely to be managed differently before they are offered to the public). The Commission has not promulgated standardized performance requirements for private funds. *See, e.g.,* Amendments to Regulation D, Form D and Rule 156, Release No. IC–30595 (July 10, 2013) [78 FR 44806, 44827 (July 24, 2013)] (declining to propose standardized calculation methodologies for private fund performance in connection with general solicitations under rule 506(c) of Regulation D and noting that methodologies for calculating private fund performance can vary for a number of reasons, such as the type of fund, assumptions underlying the calculations, and investor preferences).

[148] *See* Securities Act Section 17(a); Exchange Act Section 10(b); Exchange Act Rule 10b–5; 17 CFR 230.156 (''Rule 156'' under the Securities Act) (applying to investment company sales literature, which includes any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company).

limitations—may be necessary or appropriate to make the performance information not misleading.[149] A fund also may need to consider whether these types of statements would be necessary for any performance information in a test-the-waters communication not to conflict with material information in the fund's registration statement.[150] The fact that funds would be able to rely on Rule 163B only for test-the-waters communications to QIBs and IAIs is also important to our consideration of whether to require standardized performance in these communications. We believe that, in the context of test-the-waters communications, these financially sophisticated institutional investors will have sufficient bargaining power to ask questions about any performance information the fund presents and to request the types of performance information they would find most meaningful when considering their interest in a fund's potential registered offering.[151] Thus, we believe it is appropriate—within the confines of the anti-fraud provisions—to provide flexibility with respect to whether and, if so, how funds provide performance information when testing the waters with QIBs and IAIs.

III. Other Matters

If any of the provisions of these rules, or the application of these provisions to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[152] the Office of Information and Regulatory Affairs has designated these rules a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Introduction and Broad Economic Considerations

We are mindful of the costs imposed by and the benefits obtained from our rules. Securities Act Section 2(b)[153] and Investment Company Act Section 2(c)[154] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As noted above, Securities Act Section 5(d) was enacted under the JOBS Act and permits EGCs to engage in communications with QIBs or IAIs to determine their interest in an offering before or after the filing of a registration statement. However, companies that do not presently qualify as EGCs (including companies that previously qualified as EGCs but that have lost EGC status, larger companies, companies that first issued common equity pursuant to a Securities Act registration statement before December 8, 2011, asset-backed issuers, and registered investment companies) cannot avail themselves of Section 5(d) when considering raising capital through registered offerings, resulting in potential competitive impacts. The inability to test the waters may contribute to reduced willingness of non-EGCs to conduct registered offerings, compared to EGCs. The Commission proposed Rule 163B to expand the permissibility of test-the-waters communications to all issuers that are contemplating registered securities offerings, regardless of whether such issuers qualify as EGCs. As discussed above, after considering public comment, the Commission is adopting the final rule generally as proposed.

Under the final rule, test-the-waters communications will provide issuers, particularly non-EGC issuers that are unable to rely on Section 5(d), with additional tools to gather valuable information about investor interest before a potential registered offering. By allowing issuers to gauge market interest[155] in a contemplated registered securities offering, these communications could result in a more efficient and potentially lower-cost and lower-risk capital raising process for issuers. By extending the flexibility presently afforded to EGCs to all issuers, the final rule will result in greater harmonization of offering process requirements between EGC and non-EGC issuers (including issuers that previously had EGC status but no longer qualify as EGCs).

As the use of test-the-waters communications will remain voluntary, we anticipate that the issuers most likely to engage in these communications will be those issuers that expect the benefits of this strategy to outweigh the costs. Specifically, we expect that the issuers that are most likely to use the final rule will be those that seek to better assess the demand for, and valuation of, their securities, as well as those that seek more information from prospective large institutional investors regarding the attractiveness of various terms or structural elements of the offering.[156] Commenters generally concurred that the proposed rule would allow issuers adequate flexibility to gauge market interest prior to filing a registration statement and tailor the size and other terms of the offering accordingly, reduce the costs of going public as well as the risk of disclosing sensitive financial and competitive information when choosing not to proceed with a public offering, and ''level the playing field'' among EGC and non-EGC issuers.[157] We continue to

[149] *See, e.g.,* Rule 156(b)(2).

[150] *See supra* Section II.A.3. Applicable registration forms generally identify the types of performance information registered funds must include, as relevant. This performance information covers periods subsequent to the fund having an effective registration statement. *See, e.g.,* Item 4(b)(2) of Form N–1A; Instruction 3 to Item 4.1 of Form N–2. In certain limited circumstances, the staff has stated that it would not recommend enforcement action if a registered fund included certain performance information in its registration statement relating to other funds or accounts that are either materially equivalent, or substantially similar, to the registered fund. *See, e.g.,* MassMutual Institutional Funds, SEC Staff No-Action Letter (Sept. 28, 1995); Nicholas-Applegate Mutual Funds, SEC Staff No-Action Letter (Aug. 6, 1996); Bramwell Growth Fund, SEC Staff No-Action Letter (Aug. 7, 1996).

Funds also may want to consider positions of FINRA and its staff regarding performance information that may be included in fund sales materials under FINRA Rule 2210. *See, e.g.,* FINRA Rule 2210(d); FINRA Interpretive Letter to Edward P. Macdonald, Hartford Funds Distributors, LLC (May 12, 2015).

[151] For example, as the Commission discussed in the Proposing Release, we anticipate that test-the-waters communications may help fund issuers better assess market demand for a particular investment strategy, as well as appropriate fee structures, prior to incurring the full costs of a registered offering. *See* Proposing Release at Section II.E. To the extent that a fund relies on Rule 163B for these purposes (taking into account certain features of investment companies that may make their use of the rule more limited than other issuers, *see infra* Section IV.C.5), we believe that QIB and IAI recipients of test-the-waters communications (for example, broker-dealers and certain registered investment advisers) as well as fund issuers would each have respective incentives to request and provide relevant fund performance information.

[152] 5 U.S.C. 801 *et seq.*

[153] 15 U.S.C. 77b(b).

[154] 15 U.S.C. 80a–2(c).

[155] Test-the-waters communications with institutional investors can help issuers gauge market interest in an offering because institutions account for a key part of the pool of investors in many public offerings, particularly for larger companies. *See, e.g.,* Lowry, M., R. Michaely, and E. Volkova, 2017. Initial public offerings: a synthesis of the literature and directions for future research. Foundations and Trends in Finance 11(3–4), 154–320.

[156] We also recognize that the benefits of the final rule may be more limited for certain issuers in practice, which may make them less likely to use the final rule regardless of these factors. *See supra* Section II.E and *infra* Section IV.C.5.

[157] *See, e.g.,* letters from CCMC, Cravath, Davis Polk, Nasdaq, M. Stuchlik, and Sullivan.

believe, after considering these comments, that the benefits of Rule 163B should enhance the ability of issuers to conduct successful registered offerings and potentially lower their cost of capital.

In addition to the benefits discussed above, by reducing the potential costs and risks associated with a registered securities offering, the final rule might make registered securities offerings more attractive to certain issuers, particularly non-EGC issuers, that otherwise might have relied on private placements or not undertaken a securities offering.[158] Because a public offering can be costly and time consuming, particularly for first-time issuers, potential issuers may be reluctant to proceed along that path if the outcome is uncertain.[159] By mitigating some of the uncertainty, the rule could motivate more companies to consider the public offering route.[160] To the extent that this channel results in an increased number of registered offerings and reporting companies, the rule may improve capital formation and efficiency of allocation of investor capital. However, because some of the issuers undertaking registered offerings as a result of Rule 163B might have otherwise sought to raise capital in the private market or in a registered offering outside the U.S., we are unable to quantify the net impact of the final rule on aggregate capital formation and efficiency of capital allocation.

By providing certain preliminary information about contemplated registered offerings at an earlier stage, the final rule also might provide solicited investors with marginal informational benefits that may help some of those investors to formulate a more informed investment strategy. On the other hand, the final rule also might have marginal adverse effects on some solicited investors if the test-the-waters communications contain incomplete or misleading information and if solicited investors rely on such communications when making an investment decision, rather than on the filed offering materials against which they may compare the information in the test-the-waters materials. We expect such potential adverse effects on solicited investors to be mitigated by several factors. These factors include the general applicability of anti-fraud provisions of the federal securities laws and liability under Section 12(a)(2)[161] and the limitation of permissible test-the-waters communications under the final rule to QIBs and IAIs, which, relative to retail investors, have more experience processing investment information, and a more sophisticated ability to do so. Commenters generally agreed that the proposal did not raise significant investor protection concerns, particularly in consideration of the fact that the proposed rule was limited to certain institutional investors.[162]

By extending to all issuers the flexibility to test the waters currently available only to EGCs, we expect the final rule will benefit non-EGC issuers by making them comparable to EGC issuers in this respect. This difference in the ability to use test-the-waters communications in gauging investor demand for a public offering is particularly pronounced today for non-EGCs that are close to meeting—but marginally fail to meet—EGC eligibility criteria. In turn, to the extent that EGCs compete with non-EGCs for investor capital and in the product market, the incremental benefits that accrue to non-EGCs under the final rule (the ability to pursue a more efficient capital raising strategy while limiting the risk of early disclosure of proprietary information) might have an adverse competitive effect on comparable EGCs.

On a market-wide basis, providing the option to test the waters to all issuers is expected to improve the efficiency and lower the cost of implementing capital raising strategies for issuers contemplating a registered securities offering.[163]

While EGC issuers will also be permitted to rely on Rule 163B, non-EGC issuers are expected to be most

[158] *See, e.g.,* letters from ASA (stating its belief that ''[the proposed rule] will ultimately help more companies complete a successful IPO . . . . When fewer companies go public, long-term economic growth is inhibited and Main Street investors have fewer opportunities to invest their hard-earned money in growing businesses''); CCMC (stating that ''we believe all issuers contemplating an IPO, regardless of size, would benefit from the ability to test the waters, and expect that it would likewise motivate more companies to consider the public offering route''); Cravath (stating that ''[b]y gathering information from investors before publicly filing a registration statement, issuers should increase their likelihood of conducting successful public offerings, which in turn we believe should result in a greater number of registered offerings in the United States''); Davis Polk (stating its belief that the rule ''will greatly ease access to capital''); and Sullivan (stating its belief that the rule would ''potentially result[] in additional registered offerings in the United States and more investment opportunities for U.S. investors, including retail investors''). However, one commenter questioned whether and how the proposed exemption would increase the number of public offerings. *See* letter from Better Markets (stating that ''[t]he Proposal, in this instance, is intended to function as a cost-avoidance mechanism for the prospective issuer but how it will increase public offerings remains unclear to us'').

One study found a significant increase in IPO activity, particularly among pharmaceutical and biotechnology companies, in the two years after the JOBS Act enactment. *See* Michael Dambra, Laura Field, & Matthew Gustafson, The JOBS Act and IPO Volume: *Evidence That Disclosure Costs Affect the IPO Decision,* 116 J. Fin. Econ. 121, 121–143 (2015) (''DFG Study''), at 121 (''[c]ontrolling for market conditions, we estimate that the JOBS Act has led to 21 additional IPOs annually, a 25% increase over pre-JOBS levels''). The study notes several caveats related to the interpretation of the finding, including that ''the recent sustained bull market makes it impossible to investigate the interaction between the JOBS Act provisions and market conditions'' and that the estimated increase in the annual IPO volume outside biotechnology and pharmaceutical industries is ''small relative to the intertemporal volatility of IPO volume.'' As a result, the authors caution that ''our results should be viewed as preliminary, warranting future research on the topic.'' *See* DFG Study, at 123.

In addition, we note that the confounding effects of other provisions commonly used by EGCs along with testing the waters, such as the ability to confidentially submit a draft registration statement for nonpublic review by the staff of the Commission prior to public filing, makes it difficult to isolate the incremental effect of the availability of testing the waters on IPO activity among issuers eligible for EGC status. *See* DFG Study, at 124 (''In practice, issuers usually combine [testing the waters] with a second de-risking provision, allowing EGCs to file their IPO draft registration statement confidentially.''); and Congressional Research Service (2018) Capital Markets, Securities Offerings, and Related Policy Issues (July 26, 2018), *https://crsreports.congress.gov/product/pdf/R/R45221* (''CRS Report''), at 18. Further, as a general caveat, we recognize that inferences from studies of EGC issuers may not be directly applicable to non-EGC issuers because non-EGC issuers are different from EGC issuers. *See infra* notes 182–184.

[159] *See* letter from CCMC.

[160] *Id.* Further, some other issuers that would have attempted a public offering without testing the waters might see somewhat increased odds of successful completion of the offering as a result of testing the waters under the final rule (because they can more effectively tailor offering terms to market demand based on the information gathered during testing the waters), resulting in an incrementally greater number of completed public offerings.

While it is indeed possible that some issuers may abandon plans for a registered offering after inferring in the course of testing the waters under the final rule that there is insufficient market interest in the offering, in the absence of testing the waters, those same issuers might have publicly filed and subsequently withdrawn the offering. This could result in the same number of completed public offerings but at a higher cost for those issuers (due to filing and legal fees, as well as reputational costs and potential costs due to the disclosure of proprietary information through a public filing).

[161] *See supra* note 69.

[162] *See* letters from ASA, CCMC, Cravath, Hamilton, and Nasdaq. *But see* letter from Better Markets (expressing concern that the proposed reasonable belief standard regarding investor status would create an ''anti-investor protection loophole'').

[163] *See A Financial System That Creates Economic Opportunities: Capital Markets,* U.S. Dep't of the Treasury (2017), *https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-CapitalMarkets-FINAL-FINAL.pdf,* at 30 (stating that ''[w]hen combined with the ability to file a registration statement confidentially with the SEC, testing the waters reduces the company's risk associated with an IPO. The company has a better gauge of investor interest prior to undertaking significant expense and, in the event the company elects not to proceed with an IPO, information has been disclosed only to potential investors and not to the company's competitors.''). *See also* SIFMA Report, at 10–11.

affected by the final rule because they cannot rely on Section 5(d). Potential users of the final rule include, for example, issuers contemplating an IPO as well as reporting issuers that are interested in conducting follow-on and other registered offerings. We recognize that Regulation FD may limit the attractiveness of relying on the final rule for some issuers in the second group. In particular, reporting issuers that selectively disclose material nonpublic information while testing-the-waters with QIBs and IAIs may be required under Regulation FD to disclose such information publicly, which may reduce those issuers' willingness to rely on Rule 163B. However, some issuers are not subject to Regulation FD and those that are may avail themselves of one of the exceptions under Regulation FD, such as the exception involving confidentiality agreements, thereby mitigating the limiting effect that the application of Regulation FD may have on users of Rule 163B.[164]

Where possible, we have attempted to quantify the economic effects of the final rule. However, in some cases we are unable to do so. For example, confounding factors (other than testing the waters) that affect the decision to go public and the cost of capital in registered offerings, economic differences between non-EGCs (which are more likely to rely on the final rule) and EGCs (which have been eligible to test the waters under Section 5(d)), and limitations of historical data on test-the-waters communications under Section 5(d) make it difficult to quantitatively predict the extent to which issuers will elect to test the waters in connection with a contemplated registered securities offering under the final rule; the extent to which the option to engage in test-the-waters communications will affect the willingness of potential issuers newly eligible for testing the waters under the final rule to conduct registered securities offerings; the effects of test-the-waters communications on the amount and cost of capital raised; and the effect of expanding permissible test-the waters communications on the ability of QIBs and IAIs to form informed assessments of issuer quality and the securities offered for the purposes of determining interest in a contemplated offering.

We have been able to gain some insight into the potential economic effects of the final rule based on the experience of EGC issuers that have been permitted to test the waters pursuant to Securities Act Section 5(d) since April 2012. However, these insights are potentially limited because of the differences between EGC and non-EGC issuers (including non-EGC issuers that are investment companies) and the offerings they undertake;[165] the voluntary nature of reliance on Section 5(d) among EGC issuers;[166] the potential confounding effects resulting from reliance on other JOBS Act provisions by EGC issuers simultaneously with reliance on test-the-waters accommodations; and the generally favorable market conditions observed in the post-JOBS Act period.[167] Moreover, while the flexibility to not pursue a registered offering after gauging investor interest can be valuable to issuers, we do not have data on EGC issuers that tested the waters under Section 5(d) but subsequently chose not to proceed with a registered offering.

Below we discuss the potential effects of the final rule relative to the economic baseline, which includes existing requirements regarding solicitation of investor interest in connection with registered securities offerings; current practices of EGC issuers related to testing the waters; and information about filers and other parties that are likely to be affected by solicitation requirements.

B. Baseline and Affected Parties

1. Baseline

Section 5(c) of the Securities Act generally prohibits issuers or other persons from offering securities prior to the filing of a registration statement. Once a registration statement has been filed, Section 5(b)(1) generally requires issuers to use a prospectus that complies with Securities Act Section 10 for any written offers of securities. As noted above, Securities Act Section 5(d) nonetheless allows EGCs to engage in test-the-waters communications with QIBs and IAIs both before and after filing the registration statement. Currently, only issuers that qualify for EGC status can rely on the Section 5(d) test-the-waters provision in advance of a contemplated registered offering. Certain issuers, such as registered investment companies and issuers of asset-based securities (''ABS issuers''), are ineligible for EGC status.[168] Permissible test-the-waters solicitations, in oral or written form, may be used before or after the filing of a Securities Act registration statement for an initial or follow-on registered offering.

There is some evidence related to the use of test-the-waters communications by EGC issuers in IPOs. Because disclosure of whether the issuer has tested the waters is not required in the registration statement, studies have used various alternative sources of information to estimate the incidence of test-the-waters communications. Thus, estimates have varied depending on the sources used, the interpretation of references to testing the waters in those sources, and sample construction.[169] Some studies have estimated the incidence of test-the-waters communications by IPO issuers based on issuer responses to staff comment letters associated with IPO registration statement filings.[170] Using this method, recent industry studies found that in 2015 and 2016, respectively, 38 percent and 23 percent of EGC IPOs referenced testing the waters in comment letter responses.[171] Based on the analysis of comment letter responses, staff has

[164] *See supra* note 21 and accompanying text. For instance, some capital raising methods involve sharing material nonpublic information about a contemplated registered securities offering with outsiders who expressly agree to maintain the information in confidence until the deal is publicly disclosed. However, there is an inherent risk that a deal may not be consummated. If the deal fails to go forward, the outside investors will typically remain bound by the confidentiality agreements until the material nonpublic information is either no longer material or publicly disclosed by the issuer.

[165] *See infra* notes 182–184 and accompanying text.

[166] *See infra* note 176.

[167] *See, e.g.,* Susan Chaplinsky, Kathleen W. Hanley, & S. Katie Moon, *The JOBS Act and the Costs of Going Public,* 55 J. Acct. Res. 795, 795–836 (2017) (''CHM Study''), at 828 (using a three-year period post-JOBS Act and finding that ''with few exceptions, the equity-market conditions of our post-Act sample period have been generally favorable to IPO issuance. We leave to future work how issuers' disclosure decisions and investors' reaction to them may change under less favorable equity market conditions.'') and DFG Study, at 123 (using a two-year period post-JOBS Act and finding that ''the recent sustained bull market makes it impossible to investigate the interaction between the JOBS Act provisions and market conditions. Thus, the effects of the JOBS Act we find could differ in a bear market.'').

[168] However, BDCs, which are closed-end funds exempt from registration under the Investment Company Act, are eligible for EGC status.

[169] The estimates in the reviewed studies have focused on priced exchange-listed IPOs. As a caveat, information about the use of the test-the-waters provision by issuers that decide not to file a registration statement is not available.

[170] Because not all issuers in follow-on offerings receive staff comment letters, this estimate applies only to IPOs. We note that estimates based on the analysis of issuer responses to staff comment letters on IPO registration statements will likely be incomplete for purposes of capturing oral test-the-waters communications not involving written materials.

[171] *See, e.g.,* Tom Zanki, Testing The Waters' Expansion Could Make IPOs Easier, Law360 (April 30, 2018), *https://www.law360.com/articles/1038641* (citing IPO studies by Proskauer Rose LLP, which showed that 38% and 23% of EGCs used the test-the-waters accommodation in 2015 and 2016, respectively, with heavy concentration in the health care and technology-telecommunications-media sectors). The studies covered a subset of EGC IPOs.

estimated that approximately 37 percent of EGC IPOs during 2012–2018 used the test-the-waters provision.[172] Other studies have estimated the use of the test-the-waters provision based on whether the underwriting agreement mentions allowing the underwriter to test the waters. One academic study found that, based on an analysis of underwriting agreements filed as exhibits to registration statements, approximately 71 percent of EGC IPOs authorized underwriters to test the waters.[173] Another academic study found that approximately 68 percent of EGC IPOs authorized underwriters to test the waters or, where information was not available in the underwriting agreement, mentioned testing the waters in comment letter responses.[174] Because underwriting agreement data does not indicate whether the underwriter actually engaged in test-the-waters communications, these estimates are considerably higher than the estimates based solely on staff comment letters. Conversely, estimates based on staff comment letters referencing the actual use of test-the-waters materials may not be capturing all instances where testing the waters was conducted. Nevertheless, we believe estimates based on staff comment letters referencing actual use of test-the-waters materials are more relevant for the purposes of this baseline analysis.

The practice of testing the waters is voluntary. Various commenters stated that testing the waters has proven to be a valuable tool for EGCs.[175] Evidence suggests that the provision has been used more often by EGCs facing uncertainty about potential investor demand for their securities offering, which may find testing the waters to be more valuable.[176] The estimated rate of use of the test-the-waters provision has varied by sector, with heavy concentration of EGC IPOs that engaged in testing the waters in the biotechnology, pharmaceutical, technology, media, and telecommunications industries.[177]

We are not aware of significant investor protection concerns that have arisen to date based on test-the-waters communications by EGCs. We lack data to perform a comprehensive retrospective analysis of the content of EGC test-the-waters communications for three reasons: (i) Such communications are frequently in oral format and thus data on their content is not available; (ii) where written test-the-waters materials are submitted by the filer in response to a comment from staff reviewing the registration statement, upon filer request those materials generally are returned to the filer or destroyed after the registration statement review is completed; and (iii) we do not have data on issuers that engaged in test-the-waters communications but have elected not to proceed with a contemplated registered offering after testing the waters.

2. Affected Parties

We anticipate that the final rule will affect issuers, investors, and intermediaries.

i. Issuers

The final rule will affect issuers that are contemplating registered securities offerings. While the final rule will be available to all issuers, including EGCs, it will particularly affect non-EGC issuers that are not allowed to test the waters under Section 5(d). EGC issuers will remain eligible to rely on Section 5(d). The final rule will directly affect EGC issuers to the extent that such issuers rely on the final rule. Issuers that do not rely on the final rule may also be indirectly affected to the extent that they compete with issuers that rely on the final rule for investor capital or in the product market.

We estimate that there were approximately 1,931 EGCs and 7,551 non-EGCs that filed Securities Act registration statements or periodic reports during 2018,[178] excluding ABS issuers and registered investment companies. We estimate that in 2018 there were approximately 1,852 ABS issuers [179] and approximately 12,990 registered investment companies,[180]

[172] EGC IPOs are identified based on Ives Group's Audit Analytics data on priced offerings. Staff comment letters and responses containing ''Section 5(d)'' and ''testing the waters'' keywords were retrieved from Intelligize and manually classified. Missing or ambiguous responses were supplemented with staff analysis of cover letters submitted by issuers in response to staff reviews of registration statements, where available.

[173] *See* CHM Study, at 820 (Table 6). The statistic is based on 313 EGC IPOs conducted between April 2012 and April 2015.

[174] *See* DFG Study, at 136 (Table 8). The statistic is based on 155 EGC IPOs conducted between April 2012 and March 2014.

[175] *See, e.g.,* letter from CCMC (stating that ''[t]he ability to test the waters is frequently relied upon by EGCs, and that the practice has served to encourage many companies considering an IPO to continue along that that [*sic*] course''); Cleary (stating that ''[e]xperience with EGC issuers has proven the Section 5(d) accommodation to be a valuable tool in securities offerings, particularly in the IPO context''); letter from Davis Polk (stating that ''[p]re-marketing an offering on a confidential basis to a handful of investors prior to making a final decision to launch has become a common and useful marketing tool for registered offerings for EGCs, and we believe the clear ability to engage in these sorts of investor communications is one of the most beneficial innovations of the JOBS Act of 2012''); and letter from Nasdaq (stating that ''Nasdaq frequently hears from our listed companies on issues relating to the capital markets, and based on this feedback, we believe the current 'test the waters' accommodation for EGCs has been a resounding success'').

[176] Issuers may elect to test the waters if they have high costs of proprietary information disclosure or significant uncertainty about the interest of potential investors in the offering.

According to one law firm study, companies using test-the-waters communications were heavily concentrated in the health care and technology-telecommunications-media sectors. *See supra* note 171.

Another report similarly concluded, based on the experience during the first two years after the JOBS Act was enacted, that the test-the-waters provision may be especially valuable for companies in industries where valuation is uncertain and the timing of the IPO depends on regulatory or other approval (*e.g.,* the biotech and pharmaceutical industries). *See* CRS Report, at 6.

According to one academic study, ''smaller firms, biotech[nology]/pharma[ceutical] firms, and research-intensive firms are more likely to elect the testing-the-waters provision, which is consistent with the JOBS Act lowering the cost of proprietary disclosure.'' *See* DFG Study, at 122. *See also* CHM Study, at 823 for a more general discussion of how the characteristics of EGCs affect their choice to avail themselves of the accommodations available under Title I of the JOBS Act (stating, for example, that ''issuers that disclose less information are those that are more likely to have higher proprietary information costs and characteristics that may make them difficult for investors to value''). As a caveat, the cited academic studies generally exclude self-underwritten IPOs, penny stocks, and IPOs that are not listed on an exchange. Therefore, it is unclear if the conclusions would apply to these types of issuers.

[177] *See* studies discussed in note 176 *supra. See also* letter from CCMC (stating that ''[a]mong EGCs, use of test-the-waters communications during the IPO is not uniform, and varies considerably by industry. Industries that most frequently use the accommodation are those that desire to explain complex issues about their business models to investors. These include life sciences and biotechnology, telecommunications, and other technology-intensive businesses.'').

[178] The estimate is based on the number of unique filers of registration statements on Form S–1, S–3, S–4, S–11, F–1, F–3, F–4, or F–10, or periodic reports on Form 10–K, 10–Q, 20–F, or 40–F, or amendments to them, during calendar year 2018, as well as any BDCs included in the SEC's July 2018 BDC report at *https://www.sec.gov/open/datasets-bdc.html.* The BDC report does not exclude filers that have not yet begun selling shares to the public or filers that have ceased operations but have not yet withdrawn their registration statement or election to be regulated as a BDC. EGCs are identified as of the end of 2018 based on Ives Group's Audit Analytics data. We include filers of periodic reports because the final rule is available to seasoned issuers that have already become reporting companies.

[179] The estimate is based on the number of unique CIKs with ABS-related filings during calendar year 2018 (ABS–15G, ABS–EE, SF–1, SF–3, 10–D, or amendments to them). The estimate is not limited to ABS issuers that filed annual reports.

[180] We estimate that there were 9,599 mutual fund series (including funds of funds); 1,978 exchange-traded funds (''ETFs''); 692 registered closed-end funds; five variable annuity separate accounts registered as management investment companies on Form N–3; 670 variable annuity separate accounts registered as UITs on Form N–4 and Form N–6; and 46 non-insurance UITs registered on Form S–6. Taking into account the 4,917 non-insurance UIT series registered on Form S–6 yields an estimate of approximately 17,861 registered investment

which were ineligible for EGC status. While EGCs made up a minority of all filers with registration statements declared effective, they accounted for a majority of new issuers in traditional IPOs.[181]

The final rule also could affect issuers that are not yet reporting companies but that elect to test the waters as part of exploring the possibility of a future registered securities offering. In addition, because there is no requirement to disclose the use of testing the waters under Section 5(d), we do not have data on EGCs that have tested the waters but have elected not to file a registration statement for the contemplated offering.

In drawing inferences from the experience of EGCs with the use of test-the-waters communications, we recognize that there are differences between a typical EGC and non-EGC issuer. For example, non-EGC IPO issuers tend to have significantly higher revenues than EGCs due to the size-based eligibility criteria for EGC status.[182] Further, non-EGC issuers include older companies that first issued common equity pursuant to a Securities Act registration statement before December 8, 2011,[183] or that lost their EGC status because more than five fiscal years have elapsed since their first registered common equity sale. Non-EGC issuers also include ABS issuers and registered investment companies, which have unique operational and regulatory characteristics.[184]

ii. Investors

The final rule will affect QIBs and IAIs that might be solicited in conjunction with contemplated registered securities offerings. Due to their portfolio size and/or investment expertise, we expect that such investors have considerable ability to assess investment opportunities and acquire and analyze information about securities and their issuers. Such investors are generally viewed as sophisticated for purposes of private placements, which are often associated with considerably higher information asymmetry than registered offerings. Under Title I of the JOBS Act, EGCs were provided the flexibility to test the waters with these relatively sophisticated QIB and IAI investors.

We lack information necessary to estimate the aggregate number of QIBs and IAIs that will be solicited in connection with registered offerings under the final rule. Because it is not an item of disclosure required of issuers, we do not have information on the number of QIBs and IAIs that were solicited through test-the-waters communications in connection with EGC offerings in reliance on Section 5(d). We also lack data to generate a comprehensive estimate of the overall number of QIBs and IAIs that may be potentially solicited under the final rule because disclosure of investor status across all such investors is not required, and we lack comprehensive data that, in particular, covers all categories of potential QIBs and IAIs.

For instance, we can gather limited information about certain investors that may be QIBs from EDGAR filings. Based on staff analysis of these filings, we estimate that for calendar year 2018, 6,501 unique filers filed Form 13F on behalf of 6,739 institutional investment managers. However, a number of QIBs, including large institutions that primarily invest in securities other than Section 13(f) securities (*e.g.,* unregistered equity securities; nontraded registered equity securities; or registered non-equity securities),[185] as well as certain types of dealers as specified in Rule 144A will not be captured by this estimate. We similarly lack information for a comprehensive estimate of the overall number of IAIs because disclosure of accredited investor status across all institutional investors is not required. In addition, while we have information to estimate the number of some categories of IAIs (some of which may also be included in the Form 13F estimate), we lack comprehensive data that will allow us to estimate the unique number of investors across all categories of IAIs under Rule 501.[186]

In addition to QIBs and IAIs, other investors may be indirectly affected by the final rule, as discussed in Section IV.C below. For example, the final rule could increase the shareholder value of affected issuers by lowering the cost of raising capital or enabling issuers to pursue a more efficient capital raising strategy, which will benefit existing investors in these issuers. Furthermore, the final rule could encourage additional registered securities offerings. Due to data availability, we cannot estimate the number of investors that might be affected by such indirect economic effects. According to a recent study based on the 2016 Survey of Consumer Finances, approximately 65 million households owned stocks directly or indirectly (through other investment instruments).[187]

iii. Intermediaries

Similar to Section 5(d), Rule 163B will permit the issuer, or any person authorized to act on behalf of an issuer, to engage in test-the-waters communications. EGC issuers commonly authorize underwriters to engage in test-the-waters communications on their behalf with prospective investors.[188] Thus, the final rule will potentially affect such underwriters or other third parties engaged in a similar role.

We estimate that there were approximately 975 registered broker-dealers that reported being underwriters or selling group participants for

company issuers. These estimates are based on data from 2019 ICI Factbook, Bloomberg, and staff analysis of EDGAR filings. These estimates include funds of funds and are not limited to registered investment companies that filed annual reports.

[181] Based on Ives Group's Audit Analytics data, during the period from April 5, 2012 through December 31, 2018, EGC issuers accounted for approximately 1,267 out of 1,440, or approximately 88%, of priced exchange-listed IPOs (excluding deals identified as mergers, spin-offs, or fund offerings).

[182] For example, one study comparing a subset of exchange-listed EGC IPOs to exchange-listed non-EGC IPOs noted that ''[a] high percentage of EGCs are unprofitable and substantially younger than the control sample and the majority of these IPOs occur in only two industries—biotech[nology] and pharmaceuticals—that have limited near-term prospects and little revenue to recognize.'' *See* CHM Study, at 828. *See also* DFG Study, at 127 and 129 (Table 3).

[183] An ''issuer shall not be an emerging growth company for purposes of [the Securities Act and the Exchange Act] . . . if the first sale of common equity securities of such issuer pursuant to an effective registration statement under the Securities Act of 1933 occurred on or before December 8, 2011.'' *See* JOBS Act Title I FAQs.

[184] *See id.*

[185] Form 13–F must be filed only by institutional investment managers that exercised investment discretion over $100 million in Section 13(f) securities. ''Section 13(f) securities'' are equity securities of a class described in Section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. *See* Form 13F and Rule 13f–1(c) under the Exchange Act.

[186] In addition, Form ADV filers report information about the number of clients of different types, such as pooled investment vehicles, banking institutions, corporations, charities, pension plans, *etc.,* some of which are potential IAIs. However, the data available to us does not allow identification of unique clients (to account for cases where a client has multiple advisers) or IAIs that do not retain services of a Form ADV filer.

[187] *See* Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Sarah Pack, John Sabelhaus, Jeffrey Thompson, & Richard A. Windle, *Changes in U.S. Family Finances from 2013 to 2016: Evidence From the Survey of Consumer Finances,* 103 Fed. Res. Bull. 1, 1–42 (2017), at 20, *https://www.federalreserve.gov/publications/files/scf17.pdf.* This is a triennial survey, and the latest data available as of this time is from the 2016 survey. The test-the-waters provision of the final rule could be used irrespective of security type, so the overall set of potentially indirectly affected investors is likely to be larger.

[188] *See supra* notes 173–174 and accompanying text.

corporate securities in 2018.[189] We do not have data on how many underwriters actually engaged in test-the-waters communications in connection with offerings on behalf of EGCs. Further, we lack data on other persons that have engaged in test-the-waters communications on behalf of EGCs. With respect to persons who could be authorized to act on behalf of fund issuers, we estimate that approximately 283 registered broker-dealers reported being mutual fund underwriters or sponsors in 2018 (of which approximately a quarter also reported being underwriters for corporate securities).[190] We anticipate that fund advisers also might engage in test-the-waters communications on behalf of the funds they advise. We estimate that there are approximately 1,850 investment advisers to registered investment companies and approximately 119 investment advisers to BDCs.[191] For the reasons noted above, we do not have data to predict how many of these fund intermediaries will actually engage in test-the-waters communications, or how many additional persons authorized to act on behalf of a fund issuer might participate in test-the-waters communications related to fund offerings under the final rule.

C. Anticipated Economic Effects

Below we evaluate the anticipated costs and benefits of the final rule and the anticipated effects of the final rule on efficiency, competition, and capital formation.

1. Potential Benefits to Issuers and Intermediaries

Expanding the availability of test-the-waters communications could facilitate a more efficient and effective process for raising capital in a registered offering (involving, potentially, a lower risk of withdrawal, a lower cost of capital raising, and/or a higher amount of capital raised). Specifically, testing the waters could help issuers to gauge market interest in a potential offering, determine the categories of investors with the most favorable assessment of the issuer, as well as identify the potential concerns and questions that prospective investors may have regarding the offering and its terms. By gathering this information, issuers may reduce the risk of having to withdraw a publicly filed registration statement and can also tailor offering size and other terms included in the initial filing more closely to market interest.[192] Because the use of the final rule is voluntary, issuers that expect to derive the greatest benefits are the most likely to rely on it.

We expect the greatest benefit of testing the waters to be realized by issuers that solicit investors before a public filing. As discussed below, testing the waters before public filing enables issuers to lower the risk of proprietary information disclosure and possibly to avoid incurring the cost of preparing a registration statement. However, testing the waters after a public filing may also benefit some issuers.[193] Specifically, the option to test the waters can benefit the issuers affected by the final rule in several ways:

- In the case of issuers that decide after testing the waters not to proceed with a registered securities offering, testing the waters before a public registration statement filing decreases the risk of premature public disclosure of sensitive or proprietary information about the issuer to competitors (to the extent that the communications are not subject to Regulation FD).[194]
- In the case of issuers that decide after testing the waters not to proceed with a registered securities offering, testing the waters before the registration statement filing can save such issuers some or all of the cost of preparing and publicly filing a registration statement.
- Testing the waters, particularly before the registration statement filing, can reduce the risk of miscalculating

[189] This estimate is based on Form BD filings as of December 2018.

[190] *See id.* Form BD does not separately elicit underwriting activity for other types of funds, so more detailed information about the number of broker-dealers that underwrite those funds' offerings is not available to us.

[191] These estimates are based on Form ADV data as of December 2018, for filings received through March 31, 2019.

[192] *See, e.g.,* letter from L. Ameri (stating that testing the waters ''allowed EGCs to assess market demand and valuation and determine what elements of their business were important to investors''); ASA (stating ''this will ultimately help more companies complete a successful IPO''); letter from CCMC (stating that ''[t]his approach is also endorsed by the Treasury Department, which in its own recent report on improving the U.S. financial system noted that testing the waters gives companies 'a better gauge of investor interest prior to undertaking significant expense and, in the event the company elects not to proceed with an IPO, information has been disclosed only to potential investors and not to the company's competitors.' ''); letter from Cleary (stating that ''[e]xperience with EGC issuers has proven the Section 5(d) accommodation to be a valuable tool in securities offerings, particularly in the IPO context, and that experience does not suggest any reason to hesitate in extending the same accommodation to other issuers''); letter from Cravath (stating that testing the waters will give issuers ''the same cost-effective means currently enjoyed by EGCs for evaluating market interest before incurring the costs associated with a potential public offering'' and identifying the following reasons for companies to engage in testing-the-waters communications: ''(1) to better gauge the demand for and valuation of their securities; (2) to settle on offering terms and size to align with market interest; (3) to reduce the risk of having to withdraw a publicly filed registration statement, thus mitigating potential reputational damage; (4) to decrease the risk of public disclosure of sensitive or proprietary information to competitors if the issuer decides not to proceed with a public filing of a registration statement due to insufficient investor interest or adverse market conditions; and (5) to save some or all of the cost of preparing and publicly filing a registration statement in the event of disappointing investor feedback.''); letter from Davis Polk (stating that the proposed rule ''would allow companies to gauge investor interest in a registered offering prior to committing significant resources to prepare for one''); letter from Hamilton (stating that ''[t]he issuer will be able to form an idea about the level of the potential investors' interest, which will help it avoid a failed offering''); letter from Nasdaq (stating that ''the proposal would benefit issuers by enabling more of them to discuss IPO plans privately with potential investors in advance of announcing an IPO''); letter from M. Stuchlik (stating that testing the waters will ''refine the valuation process for businesses''); letter from Sullivan (stating that ''the Proposed Rule would significantly improve the capital-raising process for non-EGC issuers, allowing them to gauge institutional investor interest before a potential registered offering, saving time and costs as issuers would be able to focus on offerings that are more likely to attract investor demand'').

[193] In the context of Regulation A, the Commission determined that issuers may benefit from broad flexibility to test the waters both before and after a public filing. For example, in the 2015 adopting release amending Regulation A, the Commission stated: ''Allowing test-the-waters communications at any time prior to qualification of the offering statement, rather than only prior to filing of the offering statement with the Commission, may increase the likelihood that the issuer will raise the desired amount of capital. This option may be useful for smaller issuers, especially early-stage issuers, first-time issuers, issuers in lines of business characterized by a considerable degree of uncertainty, and other issuers with a high degree of information asymmetry.'' *See Amendments to Regulation A,* Release No. 33–9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)], at 21882.

[194] Several factors may serve to limit this benefit for some issuers. First, communications under the final rule could be subject to Regulation FD. *See supra* note 20 and accompanying text.

Second, issuers may already request confidential treatment for proprietary information they file with registration statements, subject to the provisions of 17 CFR 230.406 (''Rule 406'').

Third, the extension of the option to confidentially submit a draft registration statement to non-EGC issuers has reduced the risk of proprietary information disclosure to competitors prior to an issuer deciding to proceed with the public filing of a registration statement for an IPO or a registered Securities Act offering, or registration of a class of securities pursuant to Exchange Act Section 12(b), within one year after an IPO. Beginning July 10, 2017, staff extended the option of confidential submission of a draft registration statement to most non-EGC issuers. *See* Draft Registration Statement Processing Procedures Expanded, June 29, 2017, *https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded,* and Voluntary Submission of Draft Registration Statements—FAQs, *https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs.* Separately, draft registration statement procedures were expanded to non-EGC BDCs in 2018. *See* Expanded Use of Draft Registration Statement Review Procedures for Business Development Companies, ADI 2018–01, *https://www.sec.gov/investment/adi-2018-01-expanded-use-draft-registration-statement-review-procedures-business.*

market interest in the offering and having to withdraw the offering, thus reducing potential reputational costs associated with a failed offering.

• Testing the waters, particularly before the registration statement filing, can help issuers gauge investor demand for purposes of determining offering size and other terms, potentially resulting in a more efficient offering process and a higher likelihood of selling the offered amount more quickly.[195]

According to one academic study of EGC IPOs, the option to test the waters ''reduces the cost of IPO withdrawal because it allows issuers to disclose information exclusively to investors, but not competitors, until the IPO becomes likely to succeed. This will especially benefit issuers with high proprietary disclosure costs.'' [196] The study also notes that testing the waters ''provides issuers with more certainty regarding the prospects of the IPO before publicly filing with the SEC.'' [197]

In addition, for issuers that elect to proceed with a registered offering, testing the waters may serve as an element of their marketing strategy by allowing them to inform solicited investors about a potential future offering. However, the marketing benefit to such issuers will be limited because communications are only permitted with QIBs and IAIs and because investors are not permitted to commit capital at the test-the-waters stage.

Similarly, some fund issuers could use test-the-waters communications to gather information about investors' interest in a particular investment strategy or fee structure or to market a potential future offering. However, as discussed in greater detail in Section IV.C.5 below, such benefits may be limited for most funds.

To the extent that the final rule facilitates the registered offering process and potentially lowers its costs and risks for some issuers, the availability of testing the waters might facilitate capital formation as a result of additional issuers conducting registered securities offerings,[198] particularly for non-EGC issuers that are ineligible for the test-the-waters provision of Section 5(d). In evaluating the potential benefits of expanded test-the-waters communications under the final rule for capital formation, we acknowledge that the issuers affected by the final rule already have the flexibility to solicit the same general categories of investors in connection with private placements. Nevertheless, even if the net level of capital formation is unchanged, due to affected issuers switching from private placements to registered offerings, the added flexibility under the final rule might enable issuers to adopt the most efficient and lowest-cost capital raising strategy. Further, if the final rule encourages additional issuers to conduct a registered securities offering, issuers may benefit from greater secondary market liquidity associated with registered securities, compared to exempt securities, to the extent that greater liquidity makes the issuers' securities potentially more attractive to prospective investors. Any additional issuers that elect to conduct a registered offering in part as a result of the final rule also may benefit from the greater ease of raising follow-on financing through future registered offerings.

The final rule requires that the solicited investor is, or that the issuer reasonably believes the investor to be, a QIB or IAI. The reasonable belief standard is expected to provide issuers with the flexibility to use methods that are cost-effective to identify eligible investors but appropriate in light of the facts and circumstances of each contemplated offering and each potential investor. This approach also helps issuers to reduce the risk of a violation of Section 5 due to inadvertent solicitation of an investor that is not a QIB or IAI. Therefore, we believe this approach will encourage more issuers to rely on the final rule, thereby enhancing the aggregate economic benefits of the rule. Various commenters expressed support for the reasonable belief standard.[199]

Underwriters in offerings involving test-the-waters communications under Rule 163B may indirectly benefit as a result of the decreased risk of conducting a public offering. A track record of successful offerings strengthens an underwriter's reputation in the marketplace. Conversely, an offering that is initiated but subsequently withdrawn due to a lack of market interest may adversely affect an underwriter's reputation. To the extent that test-the-waters communications reduce the risk of such offerings, underwriters may benefit from a decrease in the reputational costs and risks associated with failed offerings.

2. Potential Costs to Issuers and Intermediaries

Because the use of test-the-waters communications will remain voluntary under the final rule, we anticipate that issuers will elect to rely on test-the-waters communications only if the benefits anticipated by issuers outweigh the expected costs to issuers. Issuers that elect to test the waters under the final rule might incur costs, including costs of identifying QIBs and IAIs (and, for issuers soliciting investors they reasonably believe to be QIBs or IAIs, the costs of establishing such reasonable belief[200]); costs associated with holding events with QIBs and IAIs to engage in testing the waters; developing test-the waters solicitation materials; indirect costs of potential disclosure of proprietary information to solicited investors (albeit to a limited number of prospective investors); and in some instances, potential legal costs associated with liability arising from test-the-waters communications with prospective investors.[201] Further, issuers subject to Regulation FD, may incur costs associated with ensuring communications made pursuant to the final rule comply with such requirements or an exemption thereof.[202] We note that issuers that proceed with a registered offering without testing the waters similarly incur costs of searching and soliciting investors (frequently, institutions), either on their own or through an intermediary, as well as direct and indirect costs of disclosure of

[195] By enabling issuers to better gauge investor demand before setting initial offer prices, testing the waters may allow issuers to better determine the lowest offer price at which they can raise the required amount of capital, thus potentially enabling issuers to decrease the risk of a failed offering, raise more capital, and/or lower the cost of capital. It is difficult to assess the extent to which test-the-waters communications after the initial filing would incrementally help issuers gauge the demand of QIBs and IAIs as some of these issuers might have obtained similar information about investor demand through the bookbuilding process.

[196] *See* DFG Study, at 122.

[197] *See id.,* at 124.

[198] *See also supra* notes 158–160 and accompanying text.

[199] *See infra* note 217. *But see* letter from Better Markets (opposing the reasonable belief standard).

[200] As discussed above, with respect to QIBs and IAIs, we expect that it would be efficient for issuers, depending on the facts and circumstances of an offering, to continue to rely on the existing methods of establishing such a reasonable belief that have emerged in prevailing market practices associated with Rule 144A and Rule 506 offerings, which might mitigate such costs.

[201] In addition, similar to Section 5(d), the final rule does not modify existing rules on solicitation in conjunction with private placements. The Commission's 2007 framework for analyzing how an issuer can conduct simultaneous registered and private offerings will continue to apply. *See Revisions of Limited Offering Exemptions in Regulation D,* Release No. 33–8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)].

[202] The application of Regulation FD to Rule 163B communications was generally supported by commenters. *See, e.g.,* letters from Cravath, Davis Polk, and SIFMA. *But see* letter from CRT (stating that it ''believes test-the-waters flexibility or specifically market soundings prior to a new credit issue should have reasonable exceptions to Regulation FD for some communications such as open ended dialogues on investor and issuer needs and wants'').

information once they publicly file the registration statement.

As discussed above, the final rule will benefit those non-EGC issuers that are comparable to EGC issuers or that face similar challenges in gauging investor demand for a public offering and that might find test-the-waters communications to be of value.[203] In turn, to the extent that EGCs compete with non-EGCs for investor capital, as well as in the product market, the incremental benefits that accrue to non-EGCs under the final rule might lead to an adverse competitive effect on comparable EGCs.

In cases where issuers authorize intermediaries to engage in test-the-waters communications on their behalf under Rule 163B in connection with a contemplated registered securities offering, to the extent that intermediaries incur costs associated with testing the waters and meeting the requirements of Rule 163B, we anticipate that intermediaries generally will pass through such costs to issuers, along with other offering expenses.

3. Potential Benefits to Investors

To the extent that the final rule encourages additional issuers to conduct a registered securities offering, a broader set of investors might allocate capital more efficiently among issued securities. These efficiency benefits are more likely to accrue to non-accredited investors, whose investments are more reliant on public markets due to their limited ability to invest in exempt offerings. Further, to the extent that additional issuers consider a registered securities offering instead of a private placement as a result of the final rule, investors that would otherwise have invested in unregistered securities of the same issuer might benefit from greater liquidity of registered securities (because resales of such securities will not be restricted and such securities are more likely to have a secondary market). If additional issuers consider registered offerings, investors also will benefit from the availability of disclosure and market information about registered securities (resulting in more informationally efficient prices and potentially better informed investment decisions). By increasing shareholder value of affected issuers through cost savings and improved ability to raise external financing, the final rule also could benefit existing shareholders of affected issuers.

Test-the-waters communications might in some circumstances offer some solicited investors the potential benefit of additional time to evaluate, understand, and ask questions about potential future investment opportunities before a registration statement is publicly filed. In some cases, the additional lead time before a potential offering might provide some solicited investors with small incremental informational benefits in the form of better informed decisions about future investments in the related offering and allocation of capital across issuers and sectors.

However, the incremental value, if any, of the early arrival of such information about any individual contemplated offering at the test-the-waters stage is likely small, for several reasons: (i) It is difficult for solicited investors to take advantage of the early arrival of test-the-waters information because no investor commitments can be made at that stage; (ii) even if solicited investors view the potential offering as an attractive investment opportunity on the basis of test-the-waters communications, the information is highly preliminary in nature and offering terms may change after testing the waters; (iii) extensive information about the issuer and the offering must be disclosed in a publicly filed registration statement should an issuer decide to proceed with an offering, which further attenuates the incremental value of the information conveyed to solicited investors through test-the-waters communications; (iv) to the extent that under the baseline potential issuers newly eligible for testing the waters under the final rule would have otherwise provided similar information to the same institutional investors in the course of seeking private financing, such potential informational benefits could be reduced; (v) potential informational benefits to solicited investors likely would be even smaller for issuers in follow-on offerings, as such issuers will have provided disclosures in an IPO registration statement and subsequent Exchange Act reports; and (vi) communications made pursuant to the final rule may be subject to Regulation FD (to the extent that an issuer is not exempt from Regulation FD and is not eligible for an exception) and thus may be required to be publicly filed, which would make the information available to all investors.

4. Potential Costs to Investors

Selective solicitation of QIBs and IAIs may result in the solicited institutional investors potentially having a competitive advantage relative to investors that are not solicited. This competitive advantage may stem from early access to preliminary information about contemplated registered offerings, which might potentially place some investors that are not solicited at a relative competitive disadvantage.[204] This potential effect is likely to be mitigated by several factors, including:

- The inability of solicited investors to invest in the contemplated offering at the test-the-waters stage;
- The likely preliminary nature of the information conveyed during testing the waters;
- The access of all investors to registration statement disclosures if the issuer proceeds with an offering; and
- Regulation FD, which would require the public disclosure of material nonpublic information, making it available to all investors, in certain circumstances (to the extent applicable to the issuer conducting test-the-waters communications).

Furthermore, to the extent that offering terms for issuers that proceed with an

[203] *See, e.g.,* letters from Cravath (describing ''proposed Rule 163B as a commendable effort to level the playing field for EGCs and other issuers contemplating a registered securities offering''); Davis Polk (stating that ''[c]urrently, non-EGCs cannot take advantage of this expanded [testing-the-waters] process unless they have publicly filed a registration statement or already have a shelf registration statement on file. We do not see any reason to treat non-EGCs differently. . . . Proposed rule 163B will simply level the capital-raising playing field for all companies.''); Nasdaq (stating that ''[i]n addition to facilitating IPOs, the proposal also will facilitate secondary offerings by companies that have already gone public. The SEC rules currently allow 'well-known seasoned issuers' (WKSIs) to engage in 'test the waters' communications for secondary offerings, subject to certain legending and filing requirements. In addition, EGCs retain their ability to engage in 'test the waters' communications following their IPO, provided they continue to qualify as an EGC. However, public companies that fall in between these two categories cannot do so and are put at an unnecessary disadvantage. Leveling the playing field for these companies will enhance their ability to access the public markets for secondary offerings and therefore to continue to grow.''); Sullivan (stating that ''[a]dopting the Proposed Rule would level the playing field by allowing every issuer, whether or not it is an EGC or WKSI, to engage in wall-crossing activities even when it does not have a registration statement on file''). *See also, generally, supra* note 157.

[204] *See also* letter from Better Markets (stating that ''permitting issuers (and persons authorized to act on their behalf, including underwriters) to communicate with QIBs and IAIs of their choosing would increase the problem of information asymmetry between investors who are 'in the know' and investors who learn about the existence and characteristics of a securities offering only once it is made public through the ordinary filing of a registration statement. This risks de-leveling the playing field and giving further advantage to some sophisticated investors, who are able to afford underwriters and other intermediaries who are more connected to existing or prospective issuers, over other investors, who are otherwise qualified (*e.g.,* smaller pension funds or asset managers) that do not have similar connections. The problem of information asymmetry becomes more pronounced the more beneficial and informative the [testing-the-waters] communications become.'').

offering are informed by testing the waters, investors who were not solicited may benefit from being able to invest at a price that reflects information gathered during testing the waters, which should further mitigate any disadvantage to investors who were not solicited.

Solicited investors may also potentially derive competitive advantages from the ability to provide feedback to the issuer at the early stages of the offering process and thereby potentially exert some influence over future offering terms, should the issuer proceed with an offering. However, in assessing this potential effect of the final rule relative to the baseline, we recognize that, aside from test-the-waters communications (whether under Section 5(d) or under the final rule), disparities in investor access to the issuer and the ability to exert influence over the offering process routinely emerge under the baseline. For instance, issuers (and intermediaries, if applicable) also commonly solicit a select subset of eligible investors in the course of the bookbuilding process for IPOs, in confidentially marketed follow-on offerings, and in private placements.

Further, in assessing the potential costs of the final rule to investors due to disparate access to issuers contemplating registered securities offerings and information about such offerings, relative to the baseline, we recognize that, in the absence of the final rule, disparities in investor access to issuers and information about contemplated registered offerings already exist for EGC issuers, which account for a considerable share of issuers in IPOs.[205]

Some solicited investors might potentially use the information from test-the-waters communications to realize trading profits at a cost to investors that were not solicited. Such trading may, for instance, involve issuers with a traded class of securities that test the waters in conjunction with a follow-on offering; peers or competitors (with a traded class of securities) of issuers engaging in test-the-waters communications; or, in some limited instances of issuers contemplating an IPO whose unregistered securities have a secondary trading market, private securities of those issuers.[206] However, this possibility may be partly mitigated by (1) the requirement that Exchange Act reporting companies disclose specified information in periodic and current reports and (2) the general applicability of Exchange Act Section 10(b) and Rule 10b–5. Further, communications made pursuant to the proposed rule may in some circumstances be subject to Regulation FD, as discussed in Section IV.A above.

In light of the factors discussed above, we do not anticipate the final rule to have a significant adverse competitive impact on investors that are not solicited under the final rule.

The expansion of permissible test-the-waters communications also might result in costs to solicited investors, including potentially less informed decisions or less efficient capital allocation, if test-the-waters communications contain incomplete or misleading information and if solicited investors rely on test-the-waters communications rather than the filed offering materials in their investment decisions. We expect that any such potential adverse effects on solicited investors would be alleviated by the following factors:

- Because test-the-waters communications represent an offer of securities, although they will not be subject to liability under Section 11 of the Securities Act, they will remain subject to general anti-fraud provisions under the Securities Act and the Exchange Act and to liability under Section 12(a)(2) of the Securities Act.[207] In addition, the associated risk of private securities litigation may further reduce incentives to engage in misleading test-the-waters communications.
- Reputational concerns of underwriters and/or issuers that may expect to participate in future offerings with the same institutional investors may reduce the incentives to engage in misleading test-the-waters communications with these investors.
- The issuer will be required to publicly file a registration statement once it determines to proceed with a public offering, enabling solicited investors to review the filed offering materials and to obtain full information about the issuer and the offering before investing. This should serve as a crucial deterrent against the potential for misleading test-the-waters communications at the pre-filing stage because we expect that a solicited QIB or IAI will verify the claims made as part of test-the-waters communications against the complete set of disclosures in the registration statement, which is subject to liability under Section 11 of the Securities Act. Moreover, the Commission has reiterated that information provided in test-the-waters communications must not contain material misstatements or omissions at the time the communication is made.[208]
- To the extent that test-the-waters communications are used by issuers in follow-on registered offerings, solicited investors can access the issuers' past filings of registration statements and Exchange Act reports to aid in the interpretation and verification of information in test-the-waters communications.
- Test-the-waters communications will be permitted only with QIBs and IAIs. Although the level of investor sophistication may vary somewhat across such investors,[209] QIBs and IAIs generally are expected to have a sophisticated ability to process investment information and to review the offering materials, once those materials are filed, before making an investment decision.
- The final rule might be less likely to be relied upon by micro-cap firms,[210] because institutions tend to have smaller stakes in such issuers.[211]

[205] *See supra* note 181.

[206] In recent years, markets have developed that facilitate the resale of securities of non-reporting companies. *See Concept Release on Harmonization of Securities Offering Exemptions,* Release No. 33–10649 (Jun. 18, 2019) [84 FR 30460 (Jun. 26, 2019)] (''Harmonization Concept Release''), at n. 34. *See also* David F. Larcker, Brian Tayan, and Edward Watts, *Cashing it in: Private-Company Exchanges and Employee Stock Sales Prior to IPO, Stanford Closer Look Series* (Sep. 12, 2018) (''The pre-IPO marketplace has traditionally been dominated by networks of venture-capital firms, private placement agents, brokers, and banks. These markets have historically been fragmented and opaque, severely limiting access and transparency for potential investors. In the response to the trend of companies staying private longer, a number of secondary private-company marketplaces have evolved to facilitate transactions between employees or early stage investors wishing to liquidate a portion of their holdings and qualified buyers. Buyers generally include wealthy individuals, venture-capital firms, hedge funds, private equity firms, and institutional investors.'').

[207] Some states also may impose blue-sky restrictions on pre-offering communications related to non-exchange-listed securities offerings.

[208] *See* Section II.A.3.

[209] For example, the level of sophistication may be relatively higher for the larger institutions, which are likely to have more investment and due diligence expertise than relatively smaller QIBs and IAIs.

[210] One commenter suggested that, some microcap firms may be associated with a higher risk to investors. *See infra* note 238 (letter from Better Markets). *See also, e.g.,* Joshua White (2016) Outcomes of Investing in OTC Stocks, white paper, *https://www.sec.gov/dera/staff-papers/white-papers/16dec16_white_outcomes-of-investing-in-otc-stocks.html; infra* note 239 (discussing academic studies).

[211] For example, institutional ownership is negatively related to firm size among listed stocks. *See, e.g.,* Stefan Nagel, *Short Sales, Institutional Investors and the Cross-Section of Stock Returns,* 78 J. Fin. Econ. 277, 277–309 (2005), Table 1 (correlation between institutional ownership and logarithm of market capitalization is 0.53). Another study finds, among other results, lower post-IPO institutional ownership for IPO issuers with lower

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• If an issuer proceeds with an offering, written test-the-waters materials generally may be subject to staff review.[212]

In evaluating any potential adverse effects of the risk of incomplete or misleading test-the-waters communications under the final rule on solicited QIBs and IAIs, it is important to recognize that issuers already have the ability to solicit accredited investors in connection with private placements, which are associated with substantially less disclosure and less extensive investor protections and regulatory oversight than registered offerings. Issuers unable to meet their external financing needs through registered offerings commonly sell securities to IAIs and other accredited investors through private placements. To the extent that the expansion of permissible test-the-waters communications under the final rule induces some issuers to elect a registered offering instead of a private placement, the amount of disclosure and the level of investor protection afforded to the investors in the issuer's securities will be expected to increase relative to the baseline.

The final rule requires that the solicited investor be a QIB or IAI, or that the issuer or person acting on behalf of the issuer reasonably believe the investor to be a QIB or IAI. Following the regulatory framework for private placements under Rule 506(b) and Rule 144A, and as proposed, Rule 163B does not require issuers to verify the status of solicited investors or prescribe specific steps that issuers must take to establish a reasonable belief.[213] While issuers will not be required to verify investor status, the rule limits solicitations to QIBs or IAIs, and requires issuers to have a reasonable belief that the intended recipients of the test-the-waters communications are QIBs or IAIs. As discussed above, the issuer could not, for example, form such reasonable belief if it has knowledge that the investor is not a QIB or IAI. Further, as discussed above, the Commission has provided guidance that issuers may continue to rely on existing means of establishing reasonable belief that are used in Rule 506 or Rule 144A offerings. We believe that issuers and underwriters might draw on some of the existing market practices developed for determining QIB status in Rule 144A offerings and IAI status in Rule 506 offerings for purposes of forming a reasonable belief about the status of investors they solicit under the final rule.[214] We recognize, as stated in the Proposing Release, that if the reasonable belief provision results in the solicitation of some investors that are not QIBs or IAIs, this may in some instances contribute to less informed investment decisions by some of those investors, to the extent that (i) such non-QIB/non-IAI investors, which may be less sophisticated in their ability to process information than QIBs or IAIs, rely on test-the-waters communications and not on the registration statement, and (ii) the information in test-the-waters communications substantially differs from the information in the registration statement.[215] Although we acknowledge that the reasonable belief provision could impact the risk of soliciting investors that are not QIBs or IAIs, we lack data that would allow a quantification of the incremental impact of this provision, if any, on such investors. Based on the qualitative analysis of the risks and benefits of the reasonable belief standard, however, we are persuaded that the final rule strikes the appropriate balance between realizing the intended economic benefits of the rule for issuers and providing appropriate investor protections.

While one commenter objected to the reasonable belief provision on investor protection grounds,[216] various other commenters expressed support for the reasonable belief provision and stated that it is consistent with investor protection.[217] Overall, after evaluating commenter input, we continue to believe that the potential costs to investor protection from inadvertent solicitation of investors that are not QIBs or IAIs but that issuers (or persons authorized to act on their behalf) reasonably believe to be QIBs or IAIs will be substantially alleviated by the mitigating factors discussed above, in particular:

• The requirement to publicly file a registration statement for issuers that determine to proceed with a public offering, enabling solicited investors to review the filed offering materials and to obtain full information about the issuer and the offering before investing;

• The applicability of general anti-fraud provisions and liability under Section 12(a)(2) of the Securities Act, as well as the risk of private securities litigation;

• The ability of the staff to review test-the-waters materials for issuers that proceed with a public offering;

filing prices. *See* Chitru S. Fernando, Srinivasan Krishnamurthy, & Paul A. Spindt, *Are Share Price Levels Informative? Evidence from the Ownership, Pricing, Turnover, and Performance of IPO Firms,* 7 J. Fin. Markets 377, 377–403 (2004), Table 2 (filing price has a positive effect on institutional ownership). As a caveat, these studies focus on listed stocks and do not capture smaller institutional owners.

[212] Based on a review of staff comment letters issued in connection with IPO registration statements of EGCs during 2012–2018 identified through Intelligize data, comment letters commonly request issuers to submit to the staff for review any written test-the-waters communications made in reliance on Section 5(d). *See also supra* Section II.A.

[213] Rule 144A(d) specifies nonexclusive means to establish a reasonable belief as to whether a prospective purchaser is a QIB. *See supra* note 103.

Rule 506(c) contains a requirement to verify investor status before sales are made and provides nonexclusive means on which issuers may rely to verify accredited investor status (although those means pertain to natural persons). As distinct from Rule 506(c), which conditions sales on verification of investor status, the final rule concerns offers. Crucially, nothing in the final rule changes the requirement that sales be made only pursuant to an effective registration statement, which affords purchasers the benefit of registration statement disclosures and the robust set of protections of the registration process.

[214] *See, e.g.,* letter from Cravath (stating that ''[i]ssuers currently rely on various indicia (publicly available financial statements of prospective investors, documents filed by them with the Commission or other government agencies, or a certification by the chief financial officer of such prospective purchaser, among others) to establish a reasonable belief regarding an investor's status as a QIB or accredited investor, and we think such system works reasonably well to ensure appropriate status. Issuers and their advisors should be allowed to follow reasonable steps based on the particular facts and circumstances of a prospective investor without having to abide by inflexible prescribed methods that may be unduly costly or time consuming.'') and letter from SIFMA (stating that ''[b]roker-dealers participating in Rule 144A offerings have experience applying the standard, which is applied in such offerings using largely consistent practices'').

[215] *See also* letter from Better Markets.

[216] *See id.*

[217] *See* letters from CCMC; Cleary (stating that ''we agree with the view expressed in the Release that a facts-and-circumstances approach is sufficient and that an issuer should continue to rely on its current methods for developing a reasonable belief regarding investor status under Rule 144A and Rule 501(a)''); Cravath (stating that ''[u]nlike in the context of Rule 506(d), all investors who are targeted with Rule 163B communications and who in turn proceed to make an investment in the issuer will ultimately have the benefit of a registration statement that has been declared effective and would presumably be in compliance with the Securities Act and the rules and regulations thereunder''); Davis Polk (stating that ''the reasonable-belief standard is sufficient, and that the standard for rule 163B needs to be no more burdensome for companies and their underwriters than current practice in rule 144A and Section 4(a)(2) private placements, in which companies and their underwriters refer to their own documentation as well as to industry-known reliable sources to check investor qualification. after all, unlike with Regulation D offerings, no investors will purchase securities in an offering subject to proposed rule 163B until they have been furnished with a statutory prospectus.''); Hamilton (stating that ''[g]iven that the investors will not actually invest until a registration statement has been filed, we believe the 'reasonable belief' requirement is adequate''); and SIFMA (stating that ''[w]e believe the reasonable belief standard should be retained as proposed. Market participants are familiar with the reasonable belief standard. Existing guidance and practice is sufficient for issuers and broker-dealers. We do not believe there is widespread misapplication of the standard.'').

• The reputational incentives of underwriters and issuers; and

• For issuers in follow-on offerings, the availability of past registration statements and Exchange Act filings that provide additional disclosures about the issuer and can aid solicited investors in the interpretation and verification of information in test-the-waters communications.

After considering the available market and academic evidence, as well as commenter feedback, we do not see a basis to conclude that the final rule will result in significantly increased risk of investor harm, relative to the baseline, as a result of inadvertent solicitation of investors that are not QIBs or IAIs.

5. Variation in Economic Impact Due to Issuer Characteristics

The described economic effects of the final rule are expected to vary as a function of issuer and offering characteristics and investors' ability to process information.[218] The incremental benefits of the final rule are expected to be generally smaller for large [219] and well-established issuers with low information asymmetries and a history of public disclosures, issuers of securities with low information sensitivity (*e.g.,* straight investment-grade debt), and issuers in follow-on offerings [220] with an established track record of capital raising. Issuers whose communications with investors may be subject to Regulation FD might also be less likely to utilize, and benefit from, the final rule.[221] In addition, issuers with low costs of proprietary disclosure (*e.g.,* low research and development intensity and limited reliance on proprietary technology) may be less likely to utilize, and benefit from, the final rule. In turn, due to greater market scrutiny and lower information asymmetries associated with such issuers, the potential of such issuers' test-the-waters communications to bias investor ability to assess the offering is also expected to be small. All else equal, issuers that predominantly market their offerings to individual investors or other investors that are not QIBs or IAIs, including many registered investment companies,[222] might realize relatively smaller benefits from the final rule. Further, issuers relying upon other rules that permit offering-related communications may be less likely to benefit from the final rule.[223]

In contrast, other types of issuers might realize relatively greater benefits from expanded testing the waters under the final rule. Because Rule 163B mitigates the risk of competitors learning potentially valuable proprietary information about the issuer's financing needs, business, products, and research and development, it is expected to particularly benefit issuers with high costs of proprietary disclosure (*e.g.,* issuers in research and development-intensive industries, such as life sciences and technology). In addition, issuers not subject to Regulation FD are more likely to utilize, and benefit from, the final rule.[224] As described above, test-the-waters communications offer a low-risk, low-cost way of obtaining information about investor interest in a potential registered offering and evaluating whether such an offering could be successful. Thus, the flexibility to test the waters under the final rule is expected to be most valuable for issuers that have greater uncertainty about: the interest of prospective investors in the offering; investor valuation of the issuer's securities; and investor concerns and questions about the issuer's business or the planned offering. These uncertainties are particularly present for: IPO issuers; issuers with high information asymmetries or a lesser degree of investor recognition (*e.g.,* small issuers, issuers with limited operating history, foreign issuers); and issuers of securities with high information sensitivity (*e.g.,* equity, convertible debt, speculative-grade straight debt) or securities with difficult to value, complex payoffs (*e.g.,* structured finance products and other innovative financial instruments). At the same time, due to lower market scrutiny applied to such issuers with higher information asymmetries or greater complexity of valuing such securities, the potential of test-the-waters communications to bias investor ability to assess information about the offering might be relatively higher.[225] All else equal, issuers that predominantly market their offerings to institutional investors are expected to realize relatively greater benefits from the expansion of test-the-waters communications under the final rule.[226]

The final rule will be available to a number of issuers that are not currently eligible to engage in test-the-waters communications under Section 5(d) of the Securities Act, including registered investment companies, non-EGC BDCs, and ABS issuers. The extent of reliance of such issuers on test-the-waters communications under the final rule is difficult to predict. Generally, as discussed above, testing the waters might be relatively more valuable for issuers with a largely institutional investor base, issuers with high information asymmetries, and issuers of information-sensitive securities and securities with complex payoffs. To the extent that funds on average have a high share of retail rather than institutional ownership, those benefits will likely be limited for funds.[227] Further, as

[218] However, one commenter stated that the size or reporting status of an issuer is not generally correlated with its desire to gauge investor interest prior to a registered public offering. *See* letter from Sullivan.

[219] At the same time, it is possible that large private issuers have a more complex business structure and may realize a greater benefit from test-the-waters communications. *See* letter from CCMC (stating that ''[b]ecause larger, more-diversified companies often have more complicated business models that require additional explanation relative to smaller ones, we believe non-EGCs would find testing the waters attractive''). *See also supra* note 171.

[220] *But see* letter from Nasdaq (stating that ''[i]n addition to facilitating IPOs, the proposal also will facilitate secondary offerings by companies that have already gone public'').

[221] *See supra* note 20. *But see* letter from Davis Polk (stating that ''[i]f the proposed offering or its abandonment were itself material to investors of an already-public company, the company could easily comply with Regulation FD the same way companies do today, benefitting all investors equally. The company would have to obtain confidentiality undertakings and restrict the contacted investors from trading in the company's securities for a day or two, until the contemplated offering is publicly launched or abandoned. This process ensures that investors are protected and the timing of material information disclosure remains fair for all investors.''), and letter from SIFMA (stating that ''Regulation FD currently provides sufficient flexibility to allow issuers to engage in meaningful communications with investors'').

[222] *See infra* note 227.

[223] *See supra* Section II.D. For example, WKSIs may elect to rely on Rule 163. We estimate that there were approximately 3,621 WKSIs that filed Securities Act registration statements or Exchange Act periodic reports in 2018, based on the analysis of filings of automatic shelf registration statements and XBRL data in periodic reports during calendar year 2018. *See also Securities Offering Reform for Closed-End Investment Companies,* Release No. 33–10619 (Mar. 20, 2019) [84 FR 14448 (Apr. 10, 2019)] (proposing to expand the availability of Rule 163 to BDCs and registered closed-end funds).

[224] *See supra* note 21.

[225] In 1995 the Commission proposed to expand permissible pre-IPO solicitations of interest for most issuers, subject to certain conditions. *See Solicitations of Interest Prior to an Initial Public Offering,* Release No. 33–7188 (Jun. 27, 1995) [60 FR 35648 (Jul. 10, 1995)] (''1995 Proposing Release''). While this proposal was never adopted, it would have excluded certain specified categories of issuers, particularly blank check and penny stock issuers ''because of the substantial abuses that have arisen in such offerings.'' However, the proposal did not impose restrictions on investors to whom test-the-waters communications may be directed. In contrast, the final rule discussed in this release is limited to QIBs and IAIs, which are expected to have a high level of sophistication in processing investment information.

[226] However, certain characteristics of such issuers (*e.g.,* size, exchange listing approval, more established track record, and low information asymmetry) that attract institutional investors may reduce the value of testing the waters.

[227] The vast majority (89%) of mutual fund shares are estimated to be held through retail accounts. *See*

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discussed in Section II.E above, with respect to registered investment companies, if a fund is contemplating a registered offering at the time of its organization, we recognize it is common practice to simultaneously file a registration statement under both the Investment Company Act and the Securities Act to take advantage of certain efficiencies. If these funds continue to file a single registration statement under both Acts, as one commenter suggested they would, they will be less likely to benefit from the option to conduct test-the-waters communications prior to a public registration filing.[228] Since a BDC is not required to register under the Investment Company Act, it may be more likely to benefit from the final rule with respect to pre-filing communications. However, like registered investment companies, many BDCs have relatively high levels of retail investor ownership, which may reduce the likelihood that these BDCs will engage in and benefit from these pre-filing communications under Rule 163B.[229]

Some funds that preliminarily engage in exempt offerings, including certain registered closed-end funds and BDCs, could rely on the final rule to engage in pre-filing communications if they are considering a subsequent registered offering. In addition, funds could realize benefits from relying on Rule 163B for post-filing communications. The final rule will allow funds to communicate with QIBs and IAIs about a contemplated offering without complying with the requirements of Section 24(b) of the Investment Company Act or Rules 482 or 34b–1, including the associated filing, disclosure, and legending requirements, which could result in potentially lower costs and greater flexibility for funds seeking to engage in post-filing communications with QIBs and IAIs. We recognize, however, that funds may choose to rely on other available communications rules to engage in post-filing communications instead of Rule 163B. If funds continue to rely on these other rules, funds' cost savings associated with Rule 163B for post-filing communications likely will not be significant.[230]

6. Variation in Economic Impact Due to Investor Characteristics

The composition of QIBs and IAIs solicited in conjunction with an issuer's contemplated registered offering also might affect the economic impact of the final rule. Testing the waters with QIBs and IAIs that have more investment and due diligence expertise might yield more valuable information to issuers, and such investors might be less susceptible to biased information if any is presented while testing the waters. In turn, the presence of QIBs and IAIs with relatively less investment and due diligence expertise might decrease the value of information obtained from investors through test-the-waters communications and might increase the risk of test-the waters communications biasing the ability of solicited investors to adequately assess the offering.

To the extent that certain categories of issuers, including funds, may be less likely to rely on the final rule, those QIBs and IAIs that mainly invest in the securities of such issuers may be less affected by the final rule.

As a general consideration, the provisions of Rule 163B mostly follow the provisions of the existing Section 5(d) accommodation. Such harmonization of permissible test-the-waters communications across all issuers is expected to minimize confusion among potential investors regarding permissible solicitation of investor interest before registered offerings, irrespective of the issuer's EGC status.

D. Reasonable Alternatives

We evaluate reasonable alternatives to the final rule and their anticipated economic effects below. The final rule will provide the option to engage in test-the-waters communications to all issuers. The conditions of Rule 163B will be generally similar to the requirements presently applicable to EGC issuers under Section 5(d). As an alternative, we could apply substantially different requirements to test-the-waters communications under Rule 163B. Compared to the final rule, applying less extensive (more extensive) requirements to test-the-waters communications under the final rule would increase (decrease) the benefits related to the level, efficiency, and cost of capital raising for issuers that would have sought to test the waters under the final rule. Further, compared to the final rule, applying more extensive requirements to test-the-waters communications under Rule 163B could reduce the benefit of the final rule for non-EGC issuers that are comparable to EGC issuers or that face similar challenges in gauging investor demand for a public offering but that remain ineligible to test the waters under Section 5(d). The effects specific to individual reasonable alternatives are discussed in greater detail below.

The final rule will permit all issuers to test the waters, which was generally supported by commenters.[231] As an alternative, the final rule could exclude certain categories of issuers,[232] such as blank check issuers,[233] penny stock

2019 ICI Factbook. Based on staff analysis of Form 13F data, the mean institutional holding is estimated to be approximately 48% for exchange-traded funds and 23% for registered closed-end funds. Therefore, among registered investment companies, mutual funds may be least likely to rely on the final rule because they have the highest share of retail ownership. BDCs, which are closed-end funds exempt from registration under the Investment Company Act, have an estimated mean institutional holding of approximately 29%, so the benefits of the final rule may be similarly limited for some BDCs. We calculated ''institutional holding'' as the sum of shares held by institutions (as reported on Form 13F filings) divided by shares outstanding (as reported in CRSP). Year-end 2018 Form 13F filings were used to estimate institutional ownership. Closed-end funds were matched to reported holdings based on CUSIP. As a caveat, we note that there are long-standing questions around the reliability of data obtained from Form 13F filings. *See Covered Investment Fund Research Reports,* Release No. 33–10580 (Nov. 30, 2018) [83 FR 64180, 64199 (Dec. 13, 2018), n. 223].

[228] *See* letter from ICI. While a registered investment company could engage in test-the-waters communications for a limited period of time after making a notice filing to become a registered investment company and before filing an Investment Company Act registration statement (generally three months), the benefits of such communications may be diminished since the registered investment company is obligated to file an Investment Company Act registration statement regardless of whether it conducts an exempt or registered offering. *See* 17 CFR 270.8b–5.

[229] *See supra* note 227.

[230] *See* letter from ICI (expressing doubt that funds would rely on proposed Rule 163B for post-filing communications since they are already familiar with other communications rules and stating that the proposed rule would likely provide only minimal cost savings for funds over existing rules).

[231] *See, e.g.,* letters from CCMC, B. Clark, Cravath, ICI, Nasdaq, and Sullivan.

[232] In the 1995 Proposing Release, the Commission excluded registered investment companies, ABS issuers, partnerships, limited liability companies and other direct participation investment programs because they might be ''unsuited to a 'test the waters' concept, given the complex and contractual nature of the issuer.'' Further, blank check and penny stock issuers were excluded ''because of the substantial abuses that have arisen in such offerings.'' However, the 1995 Proposing Release would have allowed testing the waters with all investors, not just QIBs and IAIs. *See* 1995 Proposing Release. Title I of the JOBS Act, enacted in 2012, did not limit the availability of Section 5(d) to EGCs on the basis of blank check or penny stock issuer status.

[233] We estimate that 228 issuers, other than ABS issuers or registered investment companies, that had filed a report on Form 10–K, 10–Q, 20–F, or 40–F, or a registration statement on Form S–1, S–3, S–4, S–11, F–1, F–3, F–4, or F–10, or amendment to it, during calendar year 2018, were blank check issuers based on Ives Group's Audit Analytics and OTC Markets data as of December 2018 and XBRL data in filings made during calendar year 2018. Based on Ives Group's Audit Analytics data as of December 2018, among those, approximately 79% were EGCs. Blank check issuer status was determined based on having SIC code 6770.

issuers,[234] ABS issuers,[235] foreign issuers,[236] or all or some registered investment companies.[237] If, as one commenter suggested,[238] some solicited investors make less informed decisions as a result of test-the-waters communications by these categories of issuers,[239] the alternative of excluding these categories of issuers might potentially result in more efficient investor decisions compared to the final rule. However, we expect several factors to mitigate this concern: the availability prior to investing of the registration statement to the solicited investors in addition to any test-the-waters communications, should the issuer proceed with an offering; the generally high level of sophistication of QIBs and IAIs in processing information; and the other mitigating factors discussed in Section IV.C.4 above.[240] To the extent that these categories of issuers would have elected to test the waters under the final rule, this alternative would not allow such issuers to realize the benefits of the final rule (*e.g.,* potentially more efficient and lower cost of capital raising), particularly non-EGC issuers ineligible under Section 5(d).[241] To the extent that some of these issuers may be less likely to rely on Rule 163B as discussed in Section IV.C.5 above, the effects of excluding them from Rule 163B would be more limited.

Similar to Section 5(d), the final rule will permit solicitation of investor interest both before and after the filing of a registration statement. As an alternative, the final rule could permit issuers to test the waters only before or only after the public filing of the registration statement. Compared to the final rule, this alternative would afford less flexibility to affected issuers, and fewer potential benefits for the level, efficiency, and cost of capital raising for affected issuers, particularly non-EGC issuers ineligible under Section 5(d).[242]

Similar to Section 5(d), the final rule will not require issuers to use legends with test-the-waters communications. As an alternative, the final rule could require issuers to include certain legends with test-the-waters communications. Compared to the final rule, the alternative of requiring legends on test-the-waters communications under the final rule could impose small incremental costs on issuers. However, given the investment and due diligence expertise of QIBs and IAIs, such an alternative likely would not result in significant additional benefits compared to the final rule.[243]

Similar to Section 5(d), the final rule will not require issuers to publicly file test-the-waters communications. As an alternative, we could require the filing of test-the-waters communications. Compared to the final rule, the alternative of requiring the filing of test-the-waters materials could impose additional costs on issuers that elect to test the waters under Rule 163B. These potential costs include the direct cost of filing additional exhibits and costs associated with requesting confidential treatment or disclosing proprietary information. For example, in instances where test-the-waters materials contain proprietary information, the disclosure of which could cause competitive harm, this alternative could impose potential costs of requesting confidential treatment for that information pursuant to Securities Act Rule 406, or alternatively, the risk of disclosure of proprietary information to competitors in instances where confidential treatment of test-the-waters communications is not requested, or requested but not granted. This alternative also could deter issuers from relying on the final rule and thereby decrease the benefits of the final rule for the level, efficiency, and cost of capital raising for affected issuers, particularly non-EGC issuers.

Compared to the final rule, by subjecting test-the-waters communications to Section 11 liability applicable to registration statements, this alternative could improve the accuracy of information provided as part of test-the-waters communications. However, this benefit is expected to be limited by the factors associated with the final rule discussed in Section IV.C.4 above, including the ability of investors to review the information in the registration statement before investing; the generally high sophistication of QIBs and IAIs in processing investment information; and the applicability of Section 12(a)(2) liability and general anti-fraud provisions to test-the-waters communications. Compared to the final rule, the alternative of filing test-the-waters materials with the registration statement could offer informational benefits to investors that have not been solicited.[244] However, the benefits of this alternative, compared to the final rule, are likely minimal because issuers already are required to disclose

[234] We estimate that 1,314 issuers, other than ABS issuers or registered investment companies, that had filed a report on Form 10–K, 10–Q, 20–F, or 40–F, or a registration statement on Form S–1, S–3, S–4, S–11, F–1, F–3, F–4, or F–10, or amendment to it, during calendar year 2018 had at least one class of shares trading on the OTC Market at a closing price below $5 based on OTC Markets data as of December 2018. Including both OTC-quoted and exchange-listed securities, we estimate that 2,187 issuers that had filed a report on Form 10–K, 10–Q, 20–F, or 40–F, or a registration statement on Form S–1, S–3, S–4, S–11, F–1, F–3, F–4, or F–10, or amendment to it, during calendar year 2018 had at least one class of shares (on the OTC Market or a national securities exchange) with a closing price below $5 based on OTC Markets or Ives Group's Audit Analytics data as of December 2018. Based on Ives Group's Audit Analytics data as of December 2018, among those, approximately 30% were EGCs.

[235] *See supra* note 179.

[236] We estimate that 1,115 issuers, other than ABS issuers or registered investment companies, filed annual reports on Form 20–F or 40–F or registration statements on Form F–1, F–3, F–4, or F–10, or amendment to it, during calendar year 2018. Based on Ives Group's Audit Analytics data as of December 2018, among those, approximately 24% were EGCs.

[237] *See supra* note 180 and *supra* Section II.E.

[238] *See* letter from Better Markets (expressing concern regarding the reasonable belief standard and stating that there might be particular risks with permitting ''blank check, penny stock issuers, asset-backed securitizers, leveraged business development companies, and certain investment companies'' to engage in Rule 163B communications).

[239] *See also supra* note 225. We note, however, that concerns raised in some studies about risks involving some microcap firms significantly predate the availability of testing the waters or are not focused on solicitations targeted at QIBs and IAIs. *See, e.g.,* Kevin C. Bartels, *Click Here to Buy the Next Microsoft: The Penny Stock Rules, Online Microcap Fraud, and the Unwary Investor,* 75 Ind. L. J. 353, 353–377 (2000); Reajesh Aggarwal & Guojun Wu, *Stock Market Manipulations,* 79 J. Bus. 1915, 1915–1953 (2006); Daniel J. Bradley, John W., Cooney, Jr., Steven D. Dolvin, & Bradford D. Jordan, *Penny Stock IPOs,* 35 Fin. Mgmt. 5, 5–29 (2006) (examining the 1990–1998 period); Randolph Beatty & Padma Kadiyala, *Impact of the Penny Stock Reform Act of 1990 on the Initial Public Offering Market,* 46 J. L. & Econ. 517, 517–541 (2003); Michael Hanke, M. & Florian Hauser, *On the Effects of Stock Spam Emails,* 11 J. Fin. Markets 57, 57–83 (2008); Rainer Böhme & Thorsten Holz, *The Effect of Stock Spam on Financial Markets* (Working Paper, 2006); Shimon Kogan, Tobias Moskowitz, & Marina Niessner, 2018, *Fake News: Evidence from Financial Markets* (Working Paper, 2018); Jonathan Clarke, Hailiang Chen, Ding Du, & Yu Jeffrey Hu, *Fake News, Investor Attention, and Market Reaction* (Working Paper, 2018); Thomas Renault, *Market Manipulation and Suspicious Stock Recommendations on Social Media* (Working Paper, 2017). (Working papers and reports cited here and elsewhere have not undergone peer review and may be revised at a future date.)

[240] *See, e.g.,* letter from Cravath (stating that QIBs and IAIs have the sophistication to evaluate investment opportunities regardless of the type of issuer).

[241] *See also* letter from Nasdaq (stating that the proposal will level the playing field in secondary offerings by companies that have already gone public).

[242] *See also supra* note 193 and accompanying text.

[243] *See, e.g.,* letters from CCMC, Cleary, Cravath, Davis Polk, Federated, ICI, SIFMA, and Sullivan.

[244] One commenter stated that ''[r]equiring the filing of these already-prepared and disseminated communications would add no additional burden on the issuers and would provide the Commission with information to monitor and police the market. Moreover, this requirement would allow current and future investors to compare the [testing-the-waters] communications (and the claims made therein) with the prospectus of the issuer and the performance of the securities themselves.'' *See* letter from Better Markets.

extensive information in a registration statement and because issuers would retain the option to request confidential treatment for proprietary information in such exhibits, subject to the provisions of Rule 406. Further, in certain circumstances, communications under the final rule may be subject to Regulation FD, as discussed in Section IV.A above. In addition, test-the-waters communications are frequently made in oral format,[245] which attenuates the economic effects of a filing requirement for written test-the-waters materials.

Building on the existing provisions of Section 5(d), as proposed the final rule will permit issuers to test the waters with QIBs and IAIs. As an alternative, the final rule could permit issuers to test the waters with all investors,[246] or with a broader subset of investors.[247] This alternative might benefit issuers, particularly issuers whose offerings attract investors that are not QIBs or IAIs by providing additional flexibility and enabling issuers to reduce the costs of a registered offering. This alternative could therefore facilitate capital formation efforts of such issuers. At the same time, the Commission has not previously recognized non-accredited investors as having the ability to fend for themselves for purposes of securities offerings under the Securities Act, and non-accredited investors have not been included among the investors eligible for solicitation under Section 5(d).

Similar to Section 5(d), the final rule will not restrict issuers from relying on other communications provisions, such as Rules 163 or 255 under the Securities Act (depending on the nature and timing of the communication and the issuer's ability to meet the eligibility and other rule requirements), which was supported by all commenters that expressed a view on this provision.[248] Those rules contain investor safeguards specific to the circumstances in which such communications are permitted. As an alternative, we could have restricted issuers relying on the final rule from engaging in other communications under the existing rules. Compared to the final rule, this alternative would restrict the ability of issuers to tailor their solicitation strategy to their needs, which might result in decreased capital formation and a less efficient or costlier capital raising process for some issuers, without a corresponding benefit to investors. For example, issuers might have to choose between incurring costs of early public disclosure of a contemplated offering and forgoing the option of subsequent offering-related communications with a broader range of investors. One commenter further suggested that non-exclusivity is particularly important to preserve the viability of various market practices that have developed in the absence of a comprehensive rule such as proposed Rule 163B.[249] The extent to which such an alternative reduces the flexibility afforded to issuers would depend on whether in practice affected issuers would have elected to combine multiple types of communications.

The final rule does not limit the scope of the content or types of information that may be a part of test-the-waters communications. As an alternative, we could limit the scope of permissible test-the-waters communications to certain types of information about the issuer or offering. For instance, we could limit the scope of communications in a manner similar to Securities Act Rules 17 CFR 230.134 or Rule 482 with respect to advertising and sales literature, for all or some of the issuers eligible to rely on the final rule.[250] Limiting the scope of test-the-waters communications could lower the potential for incomplete or misleading information or improve comparability in such materials, which could benefit investors. However, we believe that these benefits to investors would be relatively insignificant given the sophisticated nature of investors that may receive the test-the-waters communications and the other mitigating factors analyzed in Section IV.C.4.[251] Such restrictions also may reduce the utility of test-the-waters communications to issuers and the associated benefits for capital formation, compared to the final rule.

As discussed above, Rule 163B contains a reasonable belief provision, which was supported by most commenters,[252] but does not require issuers to take specified steps to determine that the solicited investor is a QIB or IAI or specify steps that an issuer could or must take to establish a reasonable belief. As an alternative, we could require issuers to take specified steps to determine that the investor is a QIB or IAI or specify steps that an issuer could or must take to establish a reasonable belief.[253] Compared to the final rule, these alternatives might result in a lower risk of solicitation of investors that are not QIBs or IAIs.[254] However, they also might significantly increase costs for issuers electing to rely on the final rule and as a result decrease the use of test-the-waters communications and the benefits for the level, efficiency, and cost of capital raising, compared to the final rule.[255] The incremental investor protection benefits of this alternative, compared to the final rule, may be limited by factors that already mitigate the potential harm to an investor that could be solicited based on an incorrect, though

[245] *See* letter from Davis Polk. Issuers that find the filing requirement to be costly may elect to engage only in oral test-the-waters communications under this alternative, further mitigating the effects of a filing requirement.

[246] For example, Rules 163 and 164 under the Securities Act permit eligible issuers to engage in communications with any investor, including an investor that is not a QIB or IAI, subject to a requirement to file such materials. Regulation A permits issuers to test the waters with all investors. However, Regulation A requires test-the-waters communications to be publicly filed and to include certain required legends and disclaimers. Regulation A also imposes offering limits; imposes investment limits for non-accredited investors; and does not preempt state review of offering materials for Tier 1 offerings.

[247] *See* letters from Federated and ICI (recommending that funds be permitted to solicit registered investment advisers); L. Ameri (recommending expanding the rule to include individual accredited investors); C. Anderson (generally recommending that the rule be ''expanded beyond this small group of accredited investors''); CCMC (recommending expanding the rule to non-U.S. parties who may purchase outside of the U.S. in a non-U.S. tranche of a registered offering); and SIFMA (recommending expanding the rule to include individual accredited investors). The scope of investors that may be solicited under the final rule is unchanged from the proposal. The solicitation of QIBs and IAIs under the final rule is in line with testing the waters under Section 5(d).

Separately, the Commission is continuing to consider the broader question of which categories of investors (including natural persons and entities) should be treated as sophisticated and able to fend for themselves as part of the ongoing review of the accredited investor definition under Rule 501. *See* Harmonization Concept Release.

[248] *See* letters from CCMC, Dechert, Federated, and ICI.

[249] *See* letter from CCMC.

[250] *See* letter from ICI (recommending that the Commission require funds to include performance information in a standardized manner in their test-the-waters communications similar to Rule 482). *See also supra* Section II.E (explaining why we are not requiring fund issuers to include standardized performance information in their test-the-waters communications).

[251] *See also* letter from Hamilton (stating that this alternative ''seems to offer little real benefit to investors, especially given that there would be no restriction on the use made of testing the waters communications by EGCs'').

[252] *See* letters from CCMC, Cleary, Cravath, Davis Polk, Hamilton, and SIFMA.

[253] *See* letter from Better Markets (stating that ''at a minimum, the Commission must establish specific criteria that issuers must use to evaluate the status of the investor and ensure the investor is in fact a QIB or an IAI'').

[254] *See id.* (stating that the proposed rule would permit solicitations to retail and other investors lacking sophistication by issuers relying on a check-the-box or other self-certification method).

[255] *See, e.g.,* letter from Davis Polk (stating that the standard for proposed Rule163B should be no more burdensome for issuers and their underwriters than current practice in Rule 144A and Section 4(a)(2) private placements, which permit issuers and their underwriters to refer to their own documentation as well as to industry-known reliable sources to check investor qualification).

reasonable belief, that the investor is a QIB or an IAI. As discussed in greater detail in Section IV.C.4 above, these include the requirement to publicly file a registration statement for issuers that determine to proceed with a public offering, enabling solicited investors to review the filed offering materials and to obtain full information about the issuer and the offering before investing; the applicability of general anti-fraud provisions and liability under Section 12(a)(2) of the Securities Act, as well as the risk of private securities litigation; the ability of the staff to review test-the-waters materials for issuers that proceed with a public offering; the reputational incentives of underwriters and issuers; and, for issuers in follow-on offerings, the availability of past registration statements and Exchange Act filings that provide additional disclosures about the issuer and can aid solicited investors in the interpretation and verification of information in test-the-waters communications.[256]

As discussed in Section II.E. above, although funds are eligible to rely on the final rule, the final rule does not affect Investment Company Act registration requirements. As an alternative, following the suggestion of two commenters,[257] we could provide an exemption from Investment Company Act registration to funds while they engage in test-the-waters communications under Rule 163B. In light of the existing industry practice discussed in the Proposing Release, whereby funds commonly file a single registration statement under both the Investment Company Act and the Securities Act to take advantage of certain efficiencies, such an alternative would allow funds to more effectively use the rule to engage in pre-filing communications. However, the benefits of such an alternative may be limited since communications under the rule are limited to QIBs and IAIs and most funds have a large retail investor base.[258] Further, such an exemption could impose significant costs on investors in a resulting public offering if funds relying on it engage in activities that are contrary to the substantive requirements of the Investment Company Act that protect investors in a registered fund's offering (*e.g.,* certain self-dealing transactions—which the Act prohibits for registered funds—that benefit a fund's investment adviser or other affiliated persons while the fund is actively considering and soliciting interest in a public offering).

V. Paperwork Reduction Act

As discussed in the Proposing Release, the final rule does not impose any recordkeeping requirement or otherwise constitute a ''collection of information'' as defined in the regulations implementing the Paperwork Reduction Act of 1995 (''PRA'').[259] The Commission did not receive public comments in response to its request for comments in the Proposing Release regarding the assertion that the proposed rules would not create any new, or revise any existing, collection of information pursuant to the Paperwork Reduction Act. Accordingly, we are not submitting the final rule to the Office of Management and Budget for review in accordance with the PRA.[260]

VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis (''FRFA'') has been prepared in accordance with the Regulatory Flexibility Act (''RFA'').[261] It relates to final Rule 163B and final amendments to Rule 405 of the Securities Act. An Initial Regulatory Flexibility Act Analysis (''IRFA'') was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Reasons for, and Objectives of, the Amendments

In 2012, Congress passed the JOBS Act, which created new Section 5(d) of the Securities Act permitting EGCs to engage in test-the-waters communications. The purpose of the final rule is to permit all issuers to engage in test-the-waters communications with potential investors that are, or that the issuer reasonably believes to be, QIBs or IAIs, either prior to or following the date of filing of a registration statement related to such offering. These amendments provide increased flexibility to issuers with respect to their communications about contemplated registered securities offerings, as well as a cost-effective means for evaluating market interest before incurring the costs associated with such an offering. The need for, and objectives of, the final rule are discussed in more detail in Section II above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, the Commission requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA.

C. Small Entities Subject to the Amendments

The final rule will affect issuers that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.''[262] For purposes of the RFA, under 17 CFR 230.157, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities not exceeding $5 million. Under 17 CFR 240.0–10(a), an investment company, including a business development company, is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The rule will permit all issuers, including small entities, to engage in test-the-waters communications. We estimate that there are currently 1,171 issuers that file with the Commission, other than investment companies, that would be eligible to rely on the final rule that may be considered small entities.[263] In addition, we estimate that, as of December 2018, there were 114 registered investment companies and BDCs that would be eligible to rely on the final rule that may be considered small entities.[264]

Small entities meeting the definition of EGC are currently eligible to engage in test-the-waters communications pursuant to Section 5(d) of the Securities Act. These small entities and

[256] *See also supra* note 217.

[257] *See supra* note 131.

[258] *See supra* Section IV.C.5.

[259] *See* 5 CFR 1320.3(c); 44 U.S.C. 3506.

[260] 5 CFR 1320.11; 44 U.S.C. 3507(d).

[261] 5 U.S.C. 601 *et seq.*

[262] 5 U.S.C. 601(6).

[263] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10–K, 20–F and 40–F, or amendments thereto, filed during the calendar year of January 1, 2018 to December 31, 2018. Analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

[264] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data filed with the Commission (Forms N–Q and N–CSR) for the second quarter of 2018.

other small entities that do not meet the definition of EGC may rely on Rule 163B. Because reliance on the rule is voluntary, we cannot accurately estimate the number of small entities that will choose to test the waters, though we anticipate that the small entities most likely to engage in these communications will be those that expect the benefits of this strategy to outweigh the costs.

D. Reporting, Recordkeeping and Compliance Requirements

The purpose of the rule is to allow all issuers, not solely EGCs, to engage in communications with certain potential investors to determine their interest in an offering before or after the filing of a Securities Act registration statement. Under the rule, the use of test-the-waters communications is voluntary and any communications that comply with the rule do not need to include a legend or be filed with the Commission, provided that the communications do not trigger a disclosure obligation pursuant to any other rules.

Given the voluntary nature of the test-the-waters communications and that the rule does not impose a filing requirement, the rule is not expected to significantly impact existing reporting, recordkeeping, and other compliance burdens. Small entities choosing to avail themselves of the rule may seek the advice of legal or accounting professionals in connection with making test-the-waters communications. We discuss the economic impact, including the estimated costs and benefits, of the rule to all issuers, including small entities, in Section IV above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the final rule, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

For the reasons given above, we believe the rule will limit the compliance burden on issuers, including small entities that choose to rely on the rule.[265] We do not believe that the rule will impose any significant new compliance obligations. Accordingly, we generally do not believe it is necessary to establish different compliance requirements or to exempt small entities from all or part of the rule.

VII. Statutory Authority

We are adopting the rule amendments contained in this document under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, and Sections 6, 24, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Final Amendments

In accordance with the foregoing, we are amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78*o*, 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 2. Add § 230.163B to read as follows:

§ 230.163B Exemption from section 5(b)(1) and section 5(c) of the Act for certain communications to qualified institutional buyers or institutional accredited investors.

(a) Attempted compliance with this rule does not act as an exclusive election, and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this rule does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act (15 U.S.C. 77e).

(b)(1) An issuer, or any person authorized to act on behalf of an issuer, may engage in oral or written communications with potential investors described in paragraph (c) of this section to determine whether such investors might have an interest in a contemplated registered securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission. Communications under this rule will be exempt from section 5(b)(1) (15 U.S.C. 77e(b)(1)) and section 5(c) of the Act (15 U.S.C. 77e(c)).

(2) Any oral or written communication by an issuer, or any person authorized to act on behalf of an issuer, made in reliance on this rule will be deemed an ''offer'' as defined in section 2(a)(3) of the Act (15 U.S.C.77b(a)(3)).

(3) Any oral or written communication by an issuer, or any person authorized to act on behalf of an issuer, made in reliance on this rule is not required to be filed with the Commission, including pursuant to § 230.424(a) or § 230.497(a) of Regulation C under the Act or section 24(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(b)) and the rules and regulations thereunder.

(c) Communications under this rule may be made with potential investors that are, or that an issuer or person authorized to act on its behalf reasonably believes are:

(1) Qualified institutional buyers, as defined in § 230.144A; or

(2) Institutions that are accredited investors, as defined in §§ 230.501(a)(1), (a)(2), (a)(3), (a)(7), or (a)(8).

■ 3. In § 230.405 amend the definition of ''Free writing prospectus'' by revising paragraphs (2) and (3) and adding paragraph (4) to read as follows:

§ 230.405 Definitions of terms.

* * * * *

Free writing prospectus. * * *

(2) A written communication used in reliance on Rule 167 and Rule 426 (§ 230.167 and § 230.426);

(3) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act; or

(4) A written communication used in reliance on Rule 163B (§ 230.163B) or on section 5(d) of the Act.

* * * * *

By the Commission.

Dated: September 25, 2019.

Vanessa Countryman,

Secretary.

[FR Doc. 2019–21304 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[265] *See* Section VI.C above.

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 620

RIN 1205–AB81

Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or the Department) is issuing this final rule to permit States to drug test unemployment compensation (UC) applicants and to identify occupations that the Secretary of Labor (Secretary) has determined regularly conduct drug testing. These regulations implement the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) amendments to the Social Security Act (SSA), permitting States to enact legislation that would allow State UC agencies to conduct drug testing on UC applicants for whom suitable work (as defined under the State law) is available only in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary). The Secretary is required under the SSA to issue regulations determining those occupations that regularly conduct drug testing. These regulations succeed a final rule issued on August 1, 2016, that Congress rescinded under the authority of the Congressional Review Act (CRA). These regulations, as required under the CRA, are not substantially the same as the rescinded final rule.

DATES: This final rule is effective November 4, 2019.

FOR FURTHER INFORMATION CONTACT: Gay Gilbert, Administrator, Office of Unemployment Insurance, U.S. Department of Labor, 200 Constitution Avenue NW, Room S–4524, Washington, DC 20210; telephone (202) 693–3029 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (the Act), Public Law 112–96, on February 22, 2012. Title II of the Act amended 42 U.S.C. 503 to add a new subsection (l) permitting States to enact legislation to require drug testing of UC applicants as a condition of UC eligibility under two specific circumstances: (1) If the applicant was terminated from employment with his or her most recent employer because of the unlawful use of a controlled substance, *see* 42 U.S.C. 503(l)(1)(A)(i); or (2) if the only available suitable work (as defined in the law of the State providing the UC) for that individual is ''in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary).'' *See* 42 U.S.C. 503(l)(1)(A)(ii). States are not required to drug test in either circumstance; the law merely permits States to enact legislation to do so when either of the two circumstances is present. A State may deny UC to an applicant who tests positive for drug use under either of these circumstances. *See* 42 U.S.C. 503(l)(1)(B).

On October 9, 2014, the Department published a Notice of Proposed Rulemaking (NPRM) determining occupations that regularly conduct drug testing for the purposes of 42 U.S.C. 503(l)(1)(A)(ii). *See* 79 FR 61013 (Oct. 9, 2014). After reviewing the comments received, the rule, as proposed in the 2014 NPRM, was modified, and on August 1, 2016, the Department published regulations determining occupations ''that regularly conduct[ ] drug testing'' in the **Federal Register** as 20 CFR part 620 (81 FR 50298). The 2016 final rule established, as occupations that regularly conduct drug testing, only those occupations ''specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances,'' as well as specific occupations identified in Federal regulations and any occupation that required employees to carry firearms. *See* former 20 CFR 620.3 (81 FR 50298). It became effective on September 30, 2016.

On March 31, 2017, President Trump signed a joint resolution of disapproval under the authority of 5 U.S.C. 801(b), CRA (5 U.S.C. 801 *et seq.*), Public Law 104–121. Section 801(b) provides that a disapproved rule shall not take effect and that such a rule may not be reissued in substantially the same form unless authorized by Congress. Consistent with this law, the Department published the notice of revocation of the regulations in the **Federal Register** at 82 FR 21916 (May 11, 2017).

Because 42 U.S.C. 503(l) was not repealed or amended following the resolution of disapproval, the statute continues to require the Secretary to issue regulations to enable the determination of occupations in which drug testing regularly occurs. To comply with both the mandate to issue regulations to enable the determination of occupations in which drug testing regularly occurs, and the CRA prohibition on reissuing the rule ''in substantially the same form,'' on November 5, 2018, the Department issued a new NPRM substantially departing from the rescinded final rule. *See* 83 FR 55311.

In this final rule, the Department implements a more flexible approach to the statutory requirement that is not substantially the same as the rescinded 2016 final rule, enabling States to enact legislation to require drug testing for a far larger group of UC applicants than the previous final rule permitted. This flexibility recognizes the diversity of States' economies and the different roles of employer drug testing across the States. The Department has determined that imposing a nationally uniform list—like the one-size-fits-all approach that the Department attempted in the disapproved 2016 rule—does not fully effectuate Congress' intent regarding what constitutes employer drug testing in an occupation. Employers exercise a variety of approaches and practices in conducting drug testing of employees. Some States have laws that impose very minimal restrictions on employer drug testing of employees, while other States have very detailed and prescriptive requirements about what actions the employer may take; this means occupations may be regularly drug-tested in some States, but not in others. This diversity among States also renders an exhaustive list of such occupations impractical. This final rule lays out a flexible standard that States can individually meet under the facts of their specific economies and practices. Its substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the requirement of 42 U.S.C. 503(l)(1)(A)(ii) to issue regulations addressing what occupations regularly conduct drug testing.

When developing the previous proposed rule published in 2014, the Department consulted with a number of Federal agencies with expertise in drug testing to inform the proposed regulations. Specifically, the Department consulted with the

Substance Abuse and Mental Health Services Administration (SAMHSA) in the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DOD); the U.S. Department of Homeland Security (DHS); DOL's Bureau of Labor Statistics (BLS); and DOL's Occupational Safety and Health Administration (OSHA). The Department consulted these agencies because they have experience with required drug testing. DOD and DHS deferred to SAMHSA for interpretation of the drug testing requirements, and the Department gave due consideration to the SAMHSA guidance when developing the 2014 proposed rule.

II. Summary Discussion of the Final Rule

The rule implements the statutory requirement that the Secretary issue regulations determining how to identify ''an occupation that regularly conducts drug testing'' for the purposes of permitting States to require an applicant for UC, for whom suitable work is only available in an occupation that regularly drug tests, to pass a drug test to be eligible for UC.

In this final rule, the Department takes a fundamentally different approach to identifying these occupations than it did in the previous final rule that Congress later rescinded. The list of occupations in the 2016 final rule that ''regularly'' conduct drug testing was limited to certain specifically listed occupations and those in which drug testing is required by Federal or State law. In this final rule, the Department has expanded that list in light of the congressional disapproval of the 2016 final rule. It expands the consideration of what occupations regularly conduct drug testing by accounting for significant variations in State practices with respect to drug testing. An occupation that regularly drug tests in one State may not regularly test in another, making a national one-size-fits-all list impractical and infeasible, and therefore inappropriate. Thus the Secretary has determined in this rule to include in the list of occupations that regularly conduct drug testing those occupations for which each State has a factual basis for finding that employers in that State conduct drug testing as a standard eligibility requirement for employing or retaining employees in the occupation. This new addition provides substantially more flexibility to States and recognizes that, in some States, drug testing is regularly conducted in more occupations than were initially included in the 2016 final rule.

This final rule also provides definitions of key terms. In particular, for the purpose of determining occupations that regularly test for drugs, this rule defines an ''occupation'' as a position or a class of positions with similar functions or duties. While the Department considered adopting a specific taxonomy of occupations, such as the Standard Occupational Classification (SOC), this rule does not do so, in order to provide flexibility to States to choose an approach that best matches its workforce. For further explanation, see the preamble discussion related to § 620.3.

In this rule, the Department is adopting the finding in the 2016 Rule that any occupation for which Federal or State law requires drug testing is among those that are drug tested ''regularly.'' The Department recognizes that Federal and State laws may evolve in identifying which positions or occupations are required to drug test. Thus, this rule allows for occupations identified in future Federal or State laws as requiring drug testing to be occupations that States will be able to consider for drug testing of UC applicants.

This rule also includes a section on conformity and substantial compliance.

Finally, this final rule includes minor changes from the proposed rule to add clarity. Specifically, changes were made to the rule text in the introductory text of section 620.3 and in paragraphs (b) through (g) of that section.

III. Summary of the Comments

Compliance With the Congressional Review Act

Comment: The Department received one comment regarding the CRA and the Department's initiation of new rulemaking. This commenter asserted that the NPRM is inconsistent with the CRA prohibition in 5 U.S.C. 801(b)(2) because that provision, according to the commenter, ''forbids the executive branch from re-regulating the same matter without additional legislation.''

Department's Response: The commenter misunderstands the prohibition in 5 U.S.C. 801(b)(2). That provision does not prohibit re-regulating ''the same matter;'' rather, it prohibits issuing a regulation on the same matter that is ''substantially the same'' as the rescinded regulation.

Section 801(b)(2) provides, in relevant part, that a [disapproved] rule may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. It is clear from a plain reading of this provision that a reissued or new rule on the same subject is permitted provided that it is not substantially the same. Further, the legislative history for Public Law 115–17 demonstrates Congressional intent that the Department issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted. *See, e.g.,* 163 Cong. Rec. H1200–01 (Feb. 15, 2017) (Rep. Brady, describing the eventually-rescinded rule as ''incredibly narrow,'' stated that it ''ignored the intent of Congress,'' and noted that a comment was submitted by the House Ways and Means Committee during the rulemaking process calling for the Department to issue a broader rule).

The Department looks to the plain meaning of the term ''substantially.'' The Merriam-Webster Dictionary defines ''substantial,'' the adjective form of the adverb ''substantially,'' as ''being largely but not wholly that which is specified.'' The Oxford English Dictionary provides two slightly different definitions of ''substantially:'' (1) ''[t]o a great or significant extent;'' and (2) ''[f]or the most part; essentially.'' These definitions suggest that a rule is ''substantially the same'' where it is for the most part the same as the prior rule. The changes in this rule clear the bar. The scope of occupations that ''regularly conduct drug testing'' is the central issue, and the change in scope here is a significant change to the previous final rule. Thus, a rule that substantially broadens the list of occupations that ''regularly conduct[ ] drug testing'' clearly is not ''in substantially the same form'' as the much more restrictive final rule that Congress rescinded. Further, there is very little legislative history regarding the CRA interpreting what is meant by a rule ''reissued in substantially the same form,'' or a ''new rule'' that is ''substantially the same,'' and the courts have not ruled on the matter.

In the NPRM, the Department proposed a substantially different and more flexible approach to the statutory requirements than the rescinded final rule, enabling States to enact legislation to require drug testing for a larger group of UC applicants than the previous final rule permitted. The proposed rule's substantially different scope and fundamentally different approach satisfies the requirements of the CRA that the Department not reissue a rule that is ''substantially the same'' as the

rule disapproved by Congress. Thus, no changes have been made to the rule text as a result of the comment.

Additional Comments Received on the Proposed Rule

The analysis in this section provides the Department's responses to public comments received on the proposed rule. If a section or paragraph that appeared in the proposed rule is not addressed in the discussion below, it is because the public comments submitted in response to the proposed rule did not substantively address that specific section, or that no comments were received on that section or paragraph; thus, no changes have been made to the regulatory text. Further, the Department received a number of comments on the proposed rule that were outside the scope of the proposed regulations. Accordingly, the Department offers no response to such comments. These comments expressed support for or opposition to drug testing in general, discussed personal narratives, or were opinions on marijuana legalization.

The Department's proposed rule to implement 42 U.S.C. 503(l)(1)(A)(ii) was published on November 5, 2018 (83 FR 55311). During the 60-day public comment period, the Department received a total of 211 public comments on the proposed rule. Of those, 56 comments were deemed substantive, and three were duplicates. The Department, in the NPRM, sought comments on the entirety of the proposed rule, in addition to specific areas where the Department solicited comments, as noted below. The comments of general application received in response to the solicitation have been grouped by subject matter and are discussed below. No changes have been made to the rule text as a result of any of the comments received.

General Comments

Comments: Several commenters voiced support for the proposed rule as a means to help prevent fraud and waste, and to ensure a more efficient unemployment insurance (UI) program.

Department's Response: The issues raised by the comments point to an important issue for the Department; that is, the integrity of the UI program. This rule and 42 U.S.C. 503(l)(1)(A) provide a means of ensuring continued integrity by enabling States to enact laws that will bolster their findings that a claimant is able and available for work as required by Federal law and, therefore, eligible for benefits.

Comments: A number of commenters asserted that drug testing should be mandatory to receive unemployment benefits, or any government benefit. These commenters asserted that if job applicants and employees are required to undergo drug testing for certain occupations, it stands to reason that individuals seeking unemployment benefits or any form of government assistance should be drug tested as well.

Department's Response: The specific language in 42 U.S.C. 503(l)(1)(A) limits States' authority to test UC applicants for drugs to only two circumstances: Where the individual was fired from his or her last employer for testing positive for drugs; or where suitable work is only available in an occupation that regularly tests for drugs. Thus, the Department is limited in these regulations to implementing the specific terms of the statute, and makes no change to the final rule.

Comments: Several commenters asserted that the drug testing permitted by the NPRM is inconsistent with the prohibition against unreasonable searches in the Fourth Amendment to the U.S. Constitution. The objections cited Federal court decisions that have struck down mandatory drug testing as a condition of benefits under the Temporary Aid to Needy Families program in *Lebron* v. *Secretary of Florida, Department of Children & Families,* 772 F.3d 1352 (11th Cir. 2014), and as a condition of candidacy for elected office in *Chandler* v. *Miller,* 520 U.S. 305 (1997). One commenter asserted that the proposed rule would be ''saddling states with the prospect of costly litigation,'' and that it ''would leave states wide open to likely legal challenges in which most courts would rule against the states.'' Another commenter, citing *Chandler* v. *Miller,* above, asserted that ''a suspicion-less drug test can only be Constitutional if the Government shows a 'special need' to conduct testing,'' and that the ''proposed regulation makes no attempt to limit the State's use of this authority to Constitutional boundaries of a 'special need.' '' A commenter also asserted that the Department, ''as administrator of the Federal-State UI system, has a responsibility to foster compliance with all applicable Constitutional and statutory requirements'' and ''should not issue regulations that specifically authorize drug testing that would clearly violate the Fourth Amendment.''

Most commenters acknowledged that any possible Constitutional issues would arise from inappropriate State implementation of drug testing, rather than from the regulations themselves. For example, several commenters (in identical or nearly identical language) stated:

> The proposed regulation does not attempt to limit the State's use of this authority to drug test UI applicants to Constitutional boundaries. The previous version of this regulation may have passed Constitutional muster because of its close adherence to the language of the authorizing statute. However, in this NPRM, the Department's open-ended invitation to impose drug testing on applicants for unemployment compensation based on a standardless exercise in alleged fact-finding opens the door to widespread application of this authority in a manner in clear violation of the Fourth Amendment.

Department's Response: As the comments acknowledge, the NPRM itself did not conflict with the Fourth Amendment. The NPRM merely proposed adding a provision permitting a State to identify additional occupations in that State where employers ''regularly'' require drug testing as a condition of employment, provided that the State has a factual basis for doing so; the proposed rule did not mandate that States engage in drug testing, and the proposed rule did not relieve the States from the responsibility to ensure that whatever practices they adopt meet Constitutional requirements. Thus, the NPRM did not require any action by States that would conflict with the Constitution, nor did it grant States authority to implement the rule in a way that would not meet Constitutional requirements.

In granting broader flexibility to States to identify occupations that regularly test for drugs in the State where there is a factual basis for doing so, the Department neither encourages nor discourages drug testing as a condition of UC eligibility. The flexibility granted is in keeping with the nature of the UC system as a Federal-State partnership that grants broad discretion to States to implement their UC programs. Granting States broader flexibility to implement drug testing in occupations that regularly test for drugs in their particular State does not violate the Fourth Amendment, and States that choose to drug test under this rule are responsible for implementing drug testing in a manner consistent with Constitutional requirements. Accordingly, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters asserted that some individuals could have difficulty accessing testing services, for a variety of reasons: Distance to testing services and lack of transportation, particularly in rural areas; lack of childcare; and lack of income for transportation.

Department's Response: The Department issued Unemployment Insurance Program Letter (UIPL) No.

2–16 (October 1, 2016) to ensure both physical and meaningful access to the UC program. As a result, State UC agencies are already required to ensure access to services, a requirement that will also cover drug testing under this rule. Thus, the Department has not made any changes to the rule as a result of these comments.

Comments: Several commenters asserted that the drug testing provision in 42 U.S.C. 503(l)(1)(A)(ii) would add unfair and unnecessary hurdles to receipt of UC, and will increase harm to workers and families already struggling to meet basic needs. Still others stated that government, and in particular the Department, should be focused on helping more individuals obtain jobs and on protecting workers by addressing challenges to the unemployment insurance system before the next recession. Other commenters urged the Department to withdraw the proposed rule, with one commenter asserting that the Department should follow the clear intent of 42 U.S.C. 503(l)(1)(A)(ii).

Department's Response: The purpose of this regulation is to implement 42 U.S.C. 503(l)(1)(A)(ii) permitting States to enact legislation providing for drug testing of UC applicants if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]'' This rule implements the statute and assists States in determining that individuals are able and available for work, and can accept work when it is offered in their occupations that regularly conduct drug testing.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed concern that this regulation would adversely affect low-wage workers, low-income communities, and people of color. Among those commenters, one specifically addressed the wage gap between white males and black males, white women and black women, and white men and women and Latinos and Latinas.

Department's Response: The purpose of this rule is to implement the provisions of sec. 2105 of the Middle Class Tax Act (the Act), which amended sec. 303 of the Social Security Act (SSA) to add sec. 303(l)(1)(A), permitting States to drug test UC applicants in the specified limited circumstances.

This rule is not designed to negatively impact any specific demographic among applicants for UC. It permits States to conduct drug testing of UC applicants for whom suitable work is available only in an occupation that regularly conducts drug testing. States that choose to drug test applicants under the rule are responsible for implementing the drug testing program in a manner that does not result in discrimination against protected classes.

States' UI programs remain subject to sec. 188 of the Workforce Innovation and Opportunity Act and 29 CFR 38.2(a)(2), so they are prohibited from discriminating against UC applicants on the bases of, among other protected characteristics, race, color, sex, national origin, and disability. *See* 29 U.S.C. 3248; *see also* 29 CFR 38.2(a)(2) and 38.5. Section 188's prohibition on discrimination extends to policies and procedures that have discriminatory effects as well as those that have discriminatory purposes. *See, e.g.,* 29 CFR 38.6, 38.11, and 38.12. States are required to collect and maintain data necessary to determine whether they are in compliance with the provisions of sec. 188. *See* 29 CFR 38.41.

The Department previously made clear to the States in UI Program Letter (UIPL) No. 2–16 (published October 1, 2015) that nondiscrimination laws applicable to State UC agencies prohibit discrimination based on both disparate treatment and disparate impact.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern that drug testing UC applicants stigmatizes both unemployment insurance use and individuals who use or are addicted to drugs. Some of those commenters suggested that the rule is an attempt to demonize UC applicants, or that requiring drug testing of UC applicants would be arbitrary and would result in humiliating UC applicants. One commenter suggested the rule require States to create funded programs for drug treatment.

Department's Response: The purpose of this regulation is to implement the provisions of 42 U.S.C. 503(l)(1)(A)(ii) to permit States to test UC applicants for drugs if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]''

This rule, and the enabling statute, do not permit states to indiscriminately test UC applicants for illegal drug use. Rather, only UC applicants who meet the statutory threshold set out above may be tested. Those applicants should, based on prior employment in such an occupation, already know that pre-employment or post-hire drug testing is a requirement for the occupation in which suitable work is available to them. Further, such testing is related to the individual being able to and available for work.

There is no intent to stigmatize employment in these occupations or receipt of UI benefits, and no stigma should attach simply because the State UI agency conducts such a test as a condition of the applicant being able and available for work in occupations which regularly conduct drug testing. Nor is such testing intended to demonize or humiliate the UC applicant for whom drug testing is a usual condition of hire, or continued employment, in those occupations that regularly test employees for drugs, either pre-hire or post-hire. Thus, the Department makes no change to the final rule based on these comments.

As noted in the preamble discussion related to § 620.4, below, States may provide information on the availability of treatment for drug use or addiction if they so choose, but may not use federal UI administrative funding to do so.

Discussion of Comments by Section

Comments Regarding § 620.2 Definitions

The NPRM proposed definitions for several key terms used in the proposed regulatory text. These are: Applicant, controlled substance, occupation, suitable work, and unemployment compensation. The Department received no comments on the definitions of occupation, suitable work, and unemployment compensation. Accordingly, the definitions of these terms are adopted in the final rule as proposed.

Definition of Applicant

Comment: The Department received one comment agreeing with the analysis in the Preamble that limited the definition of ''applicant'' to an individual filing an initial claim for unemployment compensation. The commenter asserted that the definition adopts an interpretation of ''applicant'' that has been consistently applied by both the previous and current administrations at DOL, and which appears well supported by analysis of the language of various statutory provisions relating to initial applications for unemployment compensation and claimants for continuing compensation. There were no comments opposed to the proposed definition. Accordingly, the definition of ''applicant'' is adopted in the final rule as proposed.

Definition of Controlled Substance

With regard to the definition of ''controlled substance,'' the Department,

as required by statute (*see* 42 U.S.C. 503(l)(2)(B)), adopted the definition of that term as set forth in sec. 102 of the Controlled Substances Act (Pub. L. 91–513, 21 U.S.C. 802). As explained in that Act, ''[c]ontrolled substance'' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.* The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Comments: The Department received comments related to the proposed definition of ''controlled substances,'' which includes marijuana, and its impact on States with laws that decriminalize the use of marijuana for medical and/or recreational purposes.

One commenter asserted that the Department was acting arbitrarily and capriciously by defining ''controlled substances'' as that term is defined in Federal law in light of the fact that various States have decriminalized the possession of marijuana for medical and/or recreational use. By adopting such a definition, the commenter asserted, some States may ''deny unemployment compensation benefits to an individual using marijuana for either medical or recreational purposes that are not in violation of any State law.'' This commenter also noted that the NPRM preamble did not even discuss marijuana decriminalization in some States ''thus failing the [Administrative Procedures Act] APA requirement that an agency explain the basis for its actions.'' Another commenter argued that ''the implementation of drug testing requirements for UI applicants as endorsed by this proposed rule would disproportionately punish individuals who use marijuana in compliance with State law.''

Several commenters expressed concerns that the proposed rule would exacerbate the existing conflict between Federal and State laws regarding marijuana use and would disproportionately punish individuals whose marijuana use is decriminalized in their respective States. These commenters added that the proposed rule ''could create issues with states [sic] rights and workers who live in states with legal marijuana but work in states without it.'' As a solution, a couple of commenters suggested that States could provide waivers to those UC claimants who live in States that have decriminalized the use of marijuana, noting that the United States Army has adopted such a solution.

Department's Response: Proposed § 620.4(a) of the NPRM provides, in relevant part, that ''[s]tates may require drug testing for unemployment compensation applicants, as defined in sec. 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation. . . .'' Proposed § 620.2 defines ''controlled substances'' consistent with how that term is defined in sec. 102 of the Controlled Substances Act (21 U.S.C. 802).

The Department has made no changes to the final rule in response to these comments. As noted above, the statute requires that the Department define ''controlled substance'' according to a provision in a Federal statute, the Controlled Substances Act. Thus, regardless of how State laws treat marijuana, the Department is statutorily required to adopt the definition of ''controlled substances'' as set forth in the Controlled Substances Act. *See* 42 U.S.C. 503(l)(2)(B). The Department does not have the authority to adopt a definition of ''controlled substances'' different from what Congress expressly provided. Furthermore, the Department has no statutory authority to prohibit a State from testing for a substance that is a ''controlled substance'' under Federal law if the other statutory requirements to allow testing are met. This is the case regardless of whether the State has partially or wholly decriminalized marijuana possession or use, or whether an interstate UC claim is filed by a claimant who resides in a State where marijuana is decriminalized and seeks work in another State where it is not decriminalized.

We also note proposed § 620.4(a) is permissive in nature and not mandatory. It provides that a State may drug test, as a condition of UC eligibility, ''for the unlawful use of one or more controlled substances'' as defined in Federal law. The plain language of this regulation allows drug testing; it does not require it. Further, it permits States to omit any controlled substances they so choose from drug testing. Thus, States that choose to drug test as a condition of UC eligibility are permitted to omit marijuana, or any other controlled substance(s), from drug testing. Accordingly, the rule does not conflict with any State laws that partially or wholly decriminalize marijuana, nor can it resolve any conflicts of law within or between States. Regarding the comments that States provide waivers to interstate claimants who live in States that have decriminalized marijuana but work in States that have not, the rule already provides sufficient flexibility for States to exempt claimants from drug testing in such circumstances, or to omit marijuana from drug testing altogether. However, the Department has no authority to require States to provide such waivers.

Comments Regarding § 620.3 Occupations That Regularly Conduct Drug Testing for Purposes of Determining Which Applicants May Be Drug Tested When Applying for State Unemployment Compensation

In this regulation, the Department recognizes both the historic Federal-State partnership that is a key hallmark of the UC program, as well as the wide variation among States' economies and practices. This rule recognizes the need for States' participation in identifying which occupations regularly conduct drug testing in each State, and whether additional occupations should be included. Section 620.3 describes a number of different occupations that the Department has determined regularly drug test. States may use this list, in addition to the broader criterion, in identifying occupations for which drug testing is regularly conducted, based on the criteria set by the Secretary under these regulations. A minor edit to the introductory text of this section, inserting, ''enact legislation to,'' more closely aligns the regulation with the statutory text, but does not change the substance of the requirements in this section.

Paragraph (a) includes the class of positions that requires the employee to carry a firearm as an ''occupation'' that regularly drug tests.

Paragraphs (b)–(g) include various specific occupations that were listed in the previous rule as ones that regularly require drug test, since various Federal laws require drug testing of employees in each of these occupations. This rule identifies in paragraphs (b)–(g) six specific sections of regulations issued by several agencies of DOT and the Coast Guard that identify classes of positions that are subject to drug testing. Any position with a Federal legal requirement for drug testing was determined to constitute an occupation that regularly conducts drug testing. However, this final rule departs from the NPRM by removing the parentheticals describing the categories of occupations. This is because the parentheticals did not fully describe the regulations cited and because the regulations are subject to amendment that could render the descriptions obsolete.

Paragraphs (h) and (i) include in the list of occupations that regularly

conduct drug testing any occupation that is required to be drug tested under any Federal law or under the law of the State seeking to drug test UC applicants in that occupation. The law need not currently exist; future Federal or State law requiring drug testing is included under this provision. As with the previous six sections, any position with a legal requirement for drug testing has been determined to constitute an occupation that regularly conducts drug tests.

Paragraph (j) adds to the list of occupations that regularly drug test a significant provision not contained in the previous final rule, and that fundamentally transforms the regulatory approach and scope of the proposed regulations. This fundamental change satisfies the requirements of the CRA and allows the Department to fulfill its continuing statutory obligation to regulate. Paragraph (j) provides that where there is a factual basis for doing so, a State may identify additional occupations in that State which require pre-hire or post-hire drug testing as a standard eligibility requirement. This provision reflects the Secretary's determination that, because there is wide variation among State economies and employment practices, it is not practicable to exhaustively list all occupations that ''regularly conduct[ ] drug testing.'' Instead, the Department sets out a Federal standard by which it is possible to assess—under Federal, not State, law—whether a State has a sufficient basis to require drug testing of a particular class of UC applicants. The Federal standard is as follows: When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies. This proposed standard effectuates the plain meaning of the Act's authorization of drug testing where suitable work ''is only available in an occupation that regularly conducts drug testing.'' Section 303(l)(1)(A)(ii). Once this final rule takes effect, the Department will review States' factual bases through reports authorized under 42 U.S.C. 503(a)(6) and 20 CFR 601.3; these reports are currently made through States' submissions of ETA Form MA 8–7 (OMB control number 1205–0222) prior to implementation by the State or any changes to State UI laws. Such reports would similarly be submitted prior to implementation of drug testing of applicants in occupations the State identifies as meeting the Federal standard described above.

The NPRM requested comments on the proposed standard and whether the Department should instead impose a heightened standard of evidence to demonstrate that an occupation is one that regularly conducts drug tests and, therefore, is an occupation for which drug testing is a standard eligibility requirement. The NPRM sought comments also on what heightened level of evidence of drug testing would be appropriate, if commenters believed a different standard than what was proposed in the NPRM should be used.

Comments: The Department received a number of comments regarding the proposed standard, many asserting that the standard was vague. Several commenters favored a heightened standard of evidence, arguing that the standard in the NPRM is insufficient. A few commenters also recommended an alternative standard.

One commenter argued that the proposed rule provides ''little to no guidance concerning how the determination'' of occupations is to be made. The commenter asserted that ''the regulatory text merely requires the State to have an undefined 'factual basis,' '' and that the NPRM preamble ''offers little guidance with its undescriptive and nonexclusive list of vague examples ranging from reports of trade and professional organizations to a virtually standard-less 'other studies'.'' The commenter asserted that this ''is the polar opposite of a determination under DOL regulations.''

Another commenter stated that ''we the regulated community have no idea what the standard is that DOL has proposed, so we don't know how to assess what would be 'heightened' standard.'' The commenter added that ''[a]t the least, a standard should require facts and conclusions that would survive a *Daubert* challenge to an expert witness in federal court.''

Department's Response: The Department does not consider the standard of evidence in the proposed rule to be vague or overly broad. The Department also disagrees with the assertion that the proposed rule provides insufficient guidance on how the determination of occupations must be made. Proposed § 620.3, like the rescinded final rule, contained a list of specific occupations in paragraphs (a) through (g), and a provision permitting drug testing for UC eligibility of any other occupation required to be drug-tested as a condition of employment under Federal or State law in paragraphs (h) and (i). Proposed paragraph (j) was added to account for any variations that may exist from State to State with regard to occupations that regularly conduct drug testing, but where such testing is not required by law. As described elsewhere, the proposed rule required a factual basis for identifying such occupations, and the Department will receive and review such identifications. Acknowledging these variations across States is consistent with the flexibility granted to States in the Federal-State partnership that Federal UC law broadly embraces.

Regarding the portion of the comment suggesting that DOL adopt a standard that would at least survive a *Daubert* challenge, the comment offered no clear alternative standard of evidence. A *Daubert* challenge, originating from the court decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), which established criteria for the admissibility of scientific expert testimony, refers to the process for challenging the validity and admissibility of expert testimony. The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case. However, *Daubert* does not provide an administrable substantive standard of evidence, or a clear level of evidence, that the Department or a State can apply in the context of this regulation.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Many commenters argued that the Department should use submissions from States to narrowly define the relevant occupations into a nationally applicable list.

Department's Response: The Department finds that using submissions of information from States to produce a nationally applicable list of occupations is not administratively feasible. It is extraordinarily difficult to develop a nationally applicable list of occupations that regularly drug test, beyond those that are legally required, while leaving flexibility to account for differences between practices in different States to allow for full implementation of the Congressional mandate. An occupation that is regularly drug-tested in some States might not be regularly drug-tested in others; a national list might not capture this discrepancy, and, indeed, could result in even broader drug testing than is consistent with the statute. Therefore, the Department declines this recommendation and makes no changes

to the final rule as a result of these comments.

Comment: One commenter argued that the Department should impose ''quality standards'' in the States' gathering of information for submissions to the Department on occupations that regularly drug-test; however, the commenter did not specify any recommended ''quality standards.''

Department's Response: The Department finds it is not administratively feasible to provide more definite standards in the rule text while maintaining States' flexibility to provide factual information from a wide range of sources. The Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will provide oversight of States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary. The Department makes no changes to the final rule in response to this comment.

Comment: A commenter criticized abandoning the rescinded regulations' reliance on SOCs established by the Bureau of Labor Statistics (BLS), because these codes ''are used in a variety of other setting [sic] for other uses such as establishing prevailing wages,'' which the commenter asserted undermined a statement in the NPRM that the BLS SOCs ''may not provide the best mechanism to support states in identifying occupations in which employers regularly drug test.''

Department's Response: That the proposed rule does not rely on BLS SOCs does not mean States may not rely on SOCs to identify occupations. Indeed, the rescinded final rule did not define occupations by BLS SOCs, and the NPRM in 2014 that preceded the rescinded final rule (which left unchanged the NPRM definition of ''occupation'') explained that the reliance on a ''class of positions'' in the definition was in contrast to reliance on single occupations identified in the BLS SOCs. The reference to BLS SOCs in the rescinded final rule was merely illustrative, not a requirement to use the system in determining occupations. As in the rescinded final rule, the absence of BLS SOCs in the proposed rule does not discourage States from embracing SOCs. However, the Department does not find it necessary or desirable to impose the SOCs established by BLS, as it may not always be the best system through which to classify occupations for the purposes of these regulations.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comment: A commenter cited the Conference Report accompanying the enactment of the statutory provision on UC drug testing, noting the Conference Report stated that drug testing is permitted under 42 U.S.C. 503(l)(1)(A)(ii) only where passing a drug test is ''a standard eligibility requirement.'' The commenter argued that drug testing is not a standard eligibility requirement in any occupation unless drug testing is conducted for every single employee in that occupation. The commenter argued that a requirement that all employees in an occupation be drug tested would be consistent with the treatment of employees in virtually all of the other categories in proposed § 620.3 with regard to drug testing.

Department's Response: The Department disagrees that ''a standard eligibility requirement'' necessarily requires that all employers drug test all employees in an occupation in order to include the occupation as among those subject to drug-testing. Such an interpretation is not required by the statute or the Conference Report language cited by the commenter. An occupation that ''regularly'' drug tests, or for which drug testing is ''a standard eligibility requirement,'' need not uniformly require testing under the plain meaning of either term. The plain meaning of ''standard'' does not support the commenter's recommendation. The Merriam-Webster Dictionary defines ''standard'' in the most relevant definition as ''regularly and widely used.'' The Oxford Dictionary in the relevant definition describes ''standard'' as something ''used or accepted as normal or average.'' The Cambridge Dictionary defines ''standard'' as ''usual or expected.'' None of these definitions requires that a practice be universal in order to be ''standard.'' Thus, the Department does not find a ''standard eligibility requirement'' need be universal in order to be standard. To be ''regular'' or ''standard'' it is sufficient that drug testing in an occupation be usual. While the other categories listed in this regulation do cover occupations in which drug testing is required by all employers, that is not the statutory requirement.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comments: Commenters also suggested that the Department consider the reason an occupation regularly tests employees and whether that reasoning has a ''nexus with unemployment in general or with whether the claimant is able and available for work in particular.''

Department's Response: The Department did not make changes in response to the comments suggesting that the standard should connect drug testing to unemployment. The purpose of the standard is to implement the requirements of 42 U.S.C. 503(l). Section 503(l) of 42 U.S.C. does not require a connection between unemployment and drug testing, only that it be established that an occupation regularly conducts drug testing. However, though no such connection is required, if the only suitable work available to an individual is in an occupation that regularly conducts drug testing, there is a strong connection between being able to pass a drug test and being able and available for work as required by 42 U.S.C. 503(a)(12). Under the final rule, the Department intends to give States the flexibility to consider these reasons in their particular circumstances.

Comments: Several commenters expressed a concern that the proposed standard set forth in the NPRM for identifying occupations that regularly conduct drug testing ''is rife with potential for abuse and for inappropriate motives.'' These commenters suggested that the Department should require States to provide more information about the fact-finding conducted than is specified in the proposed rule. In general, these commenters did not specify the abuse or inappropriate motives that would be risked, nor did they recommend an alternative heightened standard for the Department to consider. A few of the commenters elaborated that drug test providers contracted by States might have an inappropriate financial self-interest to encourage broader drug testing by States than is merited by evidence, which could inappropriately influence the decisions of policy makers to authorize broad drug testing.

Department's Response: The Department did not make changes in response to these comments. These assertions are unrelated to the requirements of 42 U.S.C. 503(l), and issues such as these, if they arise, will be addressed administratively by the Department's monitoring and oversight of § 620.3(j).

Comments: Several commenters argued that the proposed rule could lead, in various ways, to discrimination. One commenter argued that the proposed standard could allow States to ''depress equal access to earned benefits,'' and that the Department should take steps to minimize this

possible consequence by ''working with states to make sure working people have fair access to earned benefits.'' However, this commenter did not recommend an alternative standard of evidence. Relatedly, one commenter argued for heightened standards of evidence because drug testing ''should not be permitted as a blanket for all occupations which could lead to discriminatory implementation.'' This commenter also did not specify an alternative standard of evidence. Another commenter argued that ''[t]he degree of flexibility this regulation gives to states has tremendous potential to target occupations that are more likely to employ working people of color.'' Similarly, another commenter argued that it is ''problematic'' that each ''state can decide which professions to routinely drug test,'' because the ''tendency is to administer drug tests to industries which disproportionately employ people of color.'' These commenters also did not recommended a specific alternative standard.

Department's Response: Commenters' concerns relate to a State's implementation of paragraph (j), rather than to the proposed Federal standard for drug testing by States. This particular provision does not provide States with unfettered discretion to drug test UC applicants and it must be viewed in connection with the other requirements of this rule, namely that drug testing of UC applicants in general is not permitted unless the only suitable work for an applicant is in an occupation that regularly conducts drug testing. As discussed above, States' UI programs are subject to sec. 188 of the Workforce Innovation and Opportunity Act, and States are prohibited from discriminating against UC applicants on the bases of the protected characteristics listed above, which include race and color. Also, States will be subject to Department monitoring and oversight of occupations to be drug tested under proposed § 620.3(j). Therefore, the Department made no changes to the final rule in response to these comments.

The Department also asked for comments on any suggested additions, deletions, or edits to the list and descriptions of occupations that regularly conduct drug testing, or on the scope of the latitude accorded to States in the proposed approach.

Comments: The Department received a number of comments that proposed paragraph (j) constitutes an unlawful delegation to the States of the Department's authority to determine which occupations regularly conduct drug testing. In general, commenters advanced two types of arguments toward this conclusion. One was that Federal law prohibits a Federal agency from delegating its authority to an outside entity absent clear Congressional authorization to do so. A second argument was that proposed paragraph (j) is arbitrary and capricious under § 706 of the APA.

In support of the unlawful delegation argument, commenters relied on several court decisions that have held that ''[a]n agency [unlawfully] delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement has been satisfied or where the agency abdicates its final reviewing authority.'' *Fund for Animals* v. *Kempthorne,* 538 F.3d 124, 133 (2d Cir. 2008), citing *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 567 (D.C. Cir. 2004), *and Nat'l Park & Conservation Ass'n* v. *Stanton,* 54 F.Supp.2d 7, 19 (D.D.C. 1999). According to these commenters, paragraph (j) impermissibly shifts the entire determination of which occupations regularly drug test by allowing each State to identify those occupations within its State that regularly drug test without providing guidance concerning how the States should make such determinations.

One commenter noted that ''[w]hile an agency may be able to delegate some amount of 'fact gathering' to an outside party [citing the *U.S. Telecom* court decision above], the grant of authority to States to determine occupations that regularly drug test goes far beyond fact gathering.'' Specifically, the commenter argued that ''[d]etermining how to interpret and define the concept of 'regularly' is the antithesis of fact gathering. It is exercising discretion and policy-making.'' The commenter added—

> [T]he requirement to determine which occupations regularly drug test leaves states with another substantial interpretative task. While ''occupations'' do not drug test, employers drug test and employees are drug tested. Thus, a decision has to be made in interpreting how to determine what to measure. To the extent that this provision can be interpreted to carry out Congressional intent, DOL, not state agencies, must exercise discretion to decide whether an occupation regularly drug tests when measured by the percentage of employers of that occupation drug testing employees in that occupation or when measured by the percentage of employees in that occupation who are drug tested.

Separately, regarding delegation, some commenters asserted that the State UC agencies in their respective States have a pattern of administrative practices that are inconsistent with State and Federal Constitutional requirements. These commenters argued that ''[t]here is no basis whatsoever to assume that state agencies delegated with new administrative authority to deny benefits will use such authority consistent with the U.S. Constitution or the rules and regulations of the Social Security Act.''

Department's Response: The Department disagrees with the comments that the rule improperly shifts to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly determined, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that are regularly drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of § 620.3 allows each State to identify occupations in that State that regularly drug test and relies on each State as a fact-finder with regard to its local circumstances. Furthermore, the Department will review additional occupations identified by the State. Each State will be required to submit for Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement for obtaining or maintaining employment in the State, and the factual bases on which it relied. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply allows each State to identify factual bases for finding that additional occupations regularly conduct drug testing in that particular State. Such a grant of limited discretion is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124 (finding that the Fish and Wildlife Service did not abdicate its authority to regulate the takings of migratory birds when it granted limited discretion to state agencies to determine whether the killing of a migratory bird in the agency's State was necessary to prevent the depredation of fish, wildlife, plants, and their habitats in the State's local area); *see also Stanton,* 54 F.Supp.2d at 19 (finding that ''[t]he relevant inquiry'' is whether the Federal agency ''retained

sufficient final reviewing authority'' over the subordinate's actions.)

Finally, regarding some commenters' assertions that a State UC agency might not administer the program consistent with State or Federal Constitutional requirements if given discretion, the Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will monitor States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Separately from the above arguments regarding improper delegation, many commenters asserted that proposed § 620.3(j) is arbitrary and capricious under the APA. One commenter in particular elaborated in detail this argument. This commenter argued that the Department:

> was arbitrary and capricious in adding section 620.3(j) of the NPRM after determining in its 2016 Final Rule that (1) ''whether an occupation is subject to 'regular' drug testing was not chosen as a standard here it would be very difficult to implement in a consistent manner'' and (2) ''we are unable to reliably and consistently determine which occupations require 'regular' drug testing where not required by law.''

See 81 FR 50300 (August 1, 2016).

The commenter continued that the proposed rule provides ''no specific explanation of its change in position on those two statements in the preamble to the 2016 Final Rule,'' as required by law. The commenter made four additional assertions arguing the proposed rule is arbitrary and capricious in its delegation of authority. First, the commenter argued that it is arbitrary and capricious ''to assign responsibility for determining which occupations regularly drug test to States.'' Second, the commenter argued that it is arbitrary and capricious ''to allow States to have inconsistent determinations of which occupations drug test in the face of a Congressional provision clearly calling for one uniform determination on that issue by specifically assigning that responsibility to DOL.'' Third, the commenter argued that it is arbitrary and capricious ''to allow States to individually determine how to interpret the concepts of 'regular' and 'standard eligibility requirement' without [the Department] explaining why . . . [such an approach] was consistent with the statutory requirement that occupations that regularly drug test be determined under regulations issued by DOL and why a uniform application of the drug testing requirements for unemployment compensation applications is not required.'' Fourth, the commenter argued that it is arbitrary and capricious ''to allow States to gather facts concerning which occupations drug test without detailed quality standards setting forth how that fact gathering should be conducted.''

Some commenters argued that the Department failed to set out with any specificity what would constitute a sufficient factual basis for identifying occupations that regularly drug test. These commenters stated that ''[r]eports by trade and professional organizations may reflect initiatives that do not comport with the narrow strictures of [Sec. 303(l)(1)(A)(ii), SSA] and may not establish a 'factual basis' for testing. In addition, allowing 'other studies' provides so little guidance that it is rendered essentially meaningless.'' Commenters added, ''Congress clearly assigned to the DOL, in the plain language of the authorizing statute, the responsibility to define which occupations are covered.''

The commenters argued that sec. 303(l), SSA, was drafted as it was in order ''to limit inappropriate influence in the determination of which working people could be required to take drug tests as a condition of receiving UI.'' Another commenter suggested that proposed § 602.3(j) was subject to potential inappropriate influence, that ''[d]epending on the experience rating system in a state, employers could also be incentivized to adopt new drug testing regimes solely for the purpose of minimizing their liability for unemployment benefits.''

Department's Response: The Department has considered the various assertions that the proposed rule is arbitrary and capricious in violation of the APA and, for the following reasons, disagrees.

First, the assertion that the 2016 final rule has any bearing on this proposal is inconsistent with the CRA. 5 U.S.C. 801(f) provides that ''[a]ny rule that takes effect and later is made of no force or effect by enactment of a joint resolution under sec. 802 shall be treated as though such rule had never taken effect.'' Public Law 115–17 invalidated the 2016 final rule, stating that the rule ''shall have no force or effect.'' As this rule is not an amendment to the prior, rescinded final rule, it is not necessary under the APA to explain the rationale for taking a different approach in this rule than was taken in the 2016 rule.

Second, even if the Department was required to explain why it had changed its earlier position, the argument that the Department did not give an adequate rationale for departing from the rescinded 2016 final rule is inaccurate. By rescinding the previous rule, Congress rejected the approach in the 2016 rule of limiting the standard to occupations drug tested as a condition of employment under State or Federal law. Given the CRA's prohibition on republishing the 2016 rule in substantially the same form and the requirement that the Department promulgate a regulation to implement sec. 303(l) of the SSA, the Department was legally required to adopt a different regulatory approach. The rescinded final rule noted that it rejected the regularity of drug testing in private employment as a standard because it would be very difficult to implement in a consistent manner and that the Department determined that it would be unable to reliably and consistently determine which occupations regularly require drug testing beyond those required by law. In developing its new proposal, the Department, for the reasons explaining proposed § 602.3(j) in the preamble to the NPRM, adopted a standard that overcomes the issues identified by the commenter by utilizing States' expertise to research and identify which occupations drug test regularly in their own States.

Regarding other arguments that the proposed rule is ''arbitrary and capricious,'' first, the proposed rule does not assign responsibility for determining which occupations regularly drug test to States. Rather, under the proposed rule, the Department is leveraging the expertise of the States to identify occupations in which employers regularly drug test in their States, while the Department retains authority to review, monitor, and oversee States' identification of those occupations and the factual bases for their identification. Second, 42 U.S.C. 503(l), by its terms, does not require a determination of occupations which regularly test for drugs in all States; it simply prohibits the Department from interfering with State requirements for drug testing of an applicant in an occupation that regularly conducts drug testing. As mentioned above, the proposed rule is consistent with the rescinded final rule, which also allowed differences across States based on the occupations each State's law required to be drug-tested as a condition of employment. The proposed rule departs from the rescinded final rule, not in

allowing ''inconsistent'' choices of occupations across States, but in whether drug testing must be a State law requirement to consider the occupation one in which drug testing is a regular requirement for employment. Third, it is inaccurate to describe the proposed rule as deferring to States the interpretation of what constitutes ''regular'' drug testing and what constitutes a ''standard eligibility requirement.'' Rather, the proposed rule articulates a Federal standard—the *Secretary's* interpretation of those statutory terms, not the *States'* interpretations—under which States make factual findings, *i.e.,* as the NPRM preamble clearly states, the proposed rule requires States to have a factual basis for identifying additional occupations that regularly conduct drug testing, which is subject to the Department's review. Further, the Department has never required a ''uniform application of the drug testing requirements'' across the States. As noted above, the rescinded final rule also permitted States to drug test different occupations based on what occupations must be drug-tested as a condition of employment under different States' laws. Fourth, there is no requirement that regulations contain specific ''quality standards'' for fact-gathering by States, nor is it arbitrary or capricious for the proposed rule to let the ''factual basis'' standard be fleshed out through Department review of States' particular findings. Rather, this flexible approach is consistent with case law discussed above, and with the Federal-State UC partnership, by which the Department is responsible for monitoring and overseeing broad requirements that States must meet to receive administrative grants, and for employers in a State to receive credits against their Federal unemployment taxes.

Regarding assertions that the proposed rule is arbitrary and capricious because it lacks specificity, and that the Department has deferred the decision-making regarding which occupations regularly conduct drug testing to States, proposed § 620.3(j) does not remove the Department from exercising independent judgment in the determination of occupations. Rather, the NPRM made clear that any ''factual basis'' by a State for identifying an occupation that regularly conducts drug testing is subject to Departmental review. The Department retains authority to find that a State lacks sufficient factual basis to include an occupation it wishes to drug test. Therefore, the Department retains independent judgment.

Finally, regarding incentives to drug test, it is highly unlikely that employers in an occupation will adopt drug testing based upon the distant potential that other employers will adopt testing to result in the occupation being one which regularly requires drug testing in order to reduce their experience rating. Further, as a number of commenters pointed out, Federal funding for administration of the UI program is currently low, and States will have a strong incentive to control the cost of drug testing because they will receive no additional Federal funding for those costs. Thus, these objections are unsupported, and are not a basis to find proposed § 620.3(j) to be arbitrary or capricious.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comment: One commenter expressed that States should be permitted to drug test for occupations that are potentially dangerous or those that regularly involve drug testing, and another commenter stated that drug testing should be limited to those positions with legitimate safety concerns and proper justification for what the commenter characterized as invasive testing.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Safety concerns can be a reason why drug testing is regularly conducted for some occupations. However, limiting those occupations for which a UC applicant may be tested for drugs to only those where there are safety concerns is inconsistent with the statutory language permitting drug testing where an occupation regularly conducts such testing.

Congress disapproved the earlier regulation implementing 42 U.S.C. 503(l)(1)(A)(ii), which limited testing to those positions or occupations where there are certain safety concerns or where drug testing is required by Federal or State law. Thus, it is clear Congress intended the regulation to reflect a broader interpretation of ''occupations that regularly drug test,'' not a narrower one. As a result, the Department makes no changes to the rule based on this comment.

The Department likewise sought comments on its conclusion that it is impracticable to develop a nationally uniform list of occupations that regularly drug test, given the wide variations in regional economies, employer practices, and in State law.

Comments: One commenter stated that creating a uniform list of occupations that drug test is impractical, and the Secretary, in the alternative, should provide national guidelines for categories of positons for which States may drug test.

Several commenters made statements of support for the promulgation of a nationally uniform list of occupations that regularly drug test, stating that, by not creating one, the Department was not adhering to the authorizing statute or the will of Congress. Commenters stated that the Department was avoiding its responsibility by allowing flexibility, and did not explain how it reached its interpretation of Congressional intent. Commenters asked for these occupations to be defined narrowly, because the occupation must be the only viable option available for the applicant to find new employment. In the absence of a nationally uniform list, one commenter suggested, the Department should keep a list of nationally applicable occupations.

One commenter stated the Department suffered a lack of will to exhaustively catalogue all employment-related drug testing requirements under State laws, and to do so for the benefit of this rulemaking is not beyond the Department's capabilities. The commenter asserted that the Department lacked any ''robust'' evidence to support the asserted impracticality of creating such a list.

Department's Response: The Department considered these comments and maintains that the creation of a nationally uniform list is impractical and will not provide the flexibility needed by States to implement the will of Congress. The Department disagrees with the comments that it improperly shifted to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly identified, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that may be drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of proposed § 620.3 provides States with fact-finding authority to identify occupations that regularly drug test in their own State and relies on each State as a fact-finder with regard to its own localized context. Furthermore, the Department will review any occupations the State identifies and the facts presented to substantiate adding them. Each State will be required to submit for

Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement in the State, and will require the State to submit the factual bases it relied on. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply grants States fact-finding authority to find factual bases for identifying additional occupations that regularly conduct drug testing in their own States. Such a grant of fact-finding authority is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124; *see also Stanton,* 54 F.Supp.2d at 19.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed support for the Department's determination, stating that it recognized the value and importance of giving flexibility to individual States to identify what type of oversight system is most appropriate for employers and employees, and that State governments and officials are more familiar with the industries and occupations of a State. This will alleviate arbitrary determinations, stated one commenter, by recognizing State officials' power to develop policies pertinent to drug testing in the State. Flexible standards based on State-specific economies, one commenter put forth, means the regulations States enact will ensure effectiveness and consistency within the State. These commenters stated that it would be poor public policy to apply the same standards to vastly different economies. Standards for a State with a large manufacturing base may not be appropriate for a State with a primarily rural economy, stated one of these commenters.

Department's Response: The Department considered these comments and will be maintaining the policies and approaches noted in the commenters' supportive statements.

Finally, the Department asked for comments on its planned approach of using submissions through ETA's Form MA 8–7 as the method for reviewing States' factual bases for finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation.

Comments: Some commenters asserted that the ETA Form MA 8–7 ''requires too little analysis on the part of the States.'' These commenters stated that the form should require reasoned analysis of attached supporting documentation to address the rationale for drug testing in specific occupations and whether that reasoning should extend to prevent deserving claimants from receiving UC.

Department's Response: Form MA 8–7 is not intended to be a stand-alone tool for analyzing materials submitted by States. Rather, it is the form used by the Department to collect the necessary information, authorized under section 303(a)(6), SSA and 20 CFR 601.3, to ensure State laws, regulations, and policies conform to and comply with Federal law. The Department has an established methodology in place to identify and review all changes to States' UI programs. By reviewing materials submitted with ETA Form MA 8–7, which States are already required to use for all changes in law, regulations, policies, and procedures, the Department will analyze a State's factual basis for identifying an occupation as one in which employers conduct pre- or post-employment drug testing as a standard eligibility requirement for obtaining or maintaining employment. As provided in 20 CFR 601.3, the Secretary of Labor requires States to submit State laws and plans of operation for implementing those laws. The Department implements this provision through ETA FORM MA 8–7 which requires States to submit ''all relevant state materials.'' Plans of operation in this context includes states' factual bases for identifying any additional occupations that regularly conduct drug testing pursuant to the Rule. In addition, the Department retains oversight authority and will conduct routine monitoring of State administration of the UI program, including state implementation of the drug testing provisions of 42 U.S.C. 503(l)(1)(A) and this final rule. As a result, the Department makes no changes to the final rule.

Comments Regarding: § 620.4 Testing of Unemployment Compensation Applicants for the Unlawful Use of a Controlled Substance

Consistent with 42 U.S.C. 503(l), § 620.4 provides that a State may require applicants to take and pass a test for the illegal use of controlled substances as a condition of initial eligibility for UC under specified conditions, and that applicants may be denied UC based on the results of these tests. States are not required to drug test as a condition of UC eligibility based on any of the occupations set out under this final rule. States may choose to do so based on some or all of the identified occupations; however, States may not, except as permitted by 42 U.S.C. 503(l)(1)(A)(i) (governing drug testing of individuals terminated for the unlawful use of a controlled substance), conduct drug testing based on any occupation that does not meet the definition in § 620.3 for purposes of determining UC eligibility.

Paragraph (a) provides that an applicant, as defined in § 620.2, may be tested for the unlawful use of one or more controlled substances—also defined in § 620.2—as an eligibility condition for UC, if the individual is one for whom suitable work, as defined by that State's UC law, is only available in an occupation that regularly conducts drug testing, as determined under § 620.3. As discussed in the Summary of the proposed rule, the term ''applicant'' means an individual who is filing an initial UC claim, not a claimant filing a continued claim. Thus, States may only subject applicants to drug testing.

Paragraph (b) provides that a State choosing to require drug testing as a condition of UC eligibility may apply drug testing based on one or more of the occupations under § 620.3. This flexibility is consistent with the statute, which permits, but does not require, drug testing, and the partnership nature of the Federal-State UC system.

Paragraph (c) provides that no State would be required to drug test UC applicants under this part. This provision was not in the 2016 final rule, but again reflects the partnership nature of the Federal-State UC system and the Department's understanding that the Act permits, but does not require, States to drug test UC applicants under the identified circumstances.

Comment: In response to the NPRM's broader, more flexible approach for identifying occupations that regularly drug test, one commenter raised a concern that such an approach ''risks conflicting with statutory protections mandated by the [Americans with Disabilities Act] ADA,'' and noted that ''[t]he Equal Employment Opportunity Commission has been aggressively challenging employers whose drug screens lead to denial of a job without an individualized assessment to determine whether the person's lawful use of prescription drugs may be considered a disability.'' However, the commenter never explained how the

proposed rule risks a conflict with the ADA.

Department's Response: Section 620.3 of the NPRM sets forth a proposed list of occupations for which drug testing is regularly conducted. Proposed paragraph (j) of this section embodied the Department's new, more flexible, approach to identifying the occupations which regularly drug test, by allowing each State to identify additional occupations in that State where employers require pre-hire or post-hire drug testing as a standard eligibility requirement provided that the State has a factual basis for doing so. As explained in the NPRM, factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies, and would be reviewed by the Department. *See* 83 FR 55311, 55315 (Nov. 5, 2018).

Section 303(l)(1), SSA, permits States to drug test applicants whose only suitable employment is in an occupation that regularly conducts drug testing or who were terminated from employment with their most recent employer because of the unlawful use of a controlled substance; this rule does not authorize States to engage in conduct that would violate Federal disability non-discrimination laws, including the ADA. Indeed, States must continue to adhere to Federal disability non-discrimination law as a condition of receiving UC administrative grants under Title III of the SSA, and the annual unemployment insurance funding agreements between the Department and each State includes this requirement. Accordingly, the Department makes no changes to the final rule in response to this commenter's concern.

Comments: A number of commenters stated that there is no evidence that unemployed workers are more likely to use drugs, while one commenter stated that there is no evidence suggesting that drug testing deters drug use. Several commenters raised concerns that drug testing UC applicants would do nothing to help people struggling with addiction, or to identify individuals in need of treatment.

Department's Response: These regulations, which implement 42 U.S.C. 503(l)(1)(A)(ii), specifically address drug testing of UC applicants for whom suitable work is only available in an occupation that regularly conducts drug testing.

While the Department is without authority to use this rule to mandate drug treatment, UC applicants who fail drug tests may be encouraged to confront and overcome the challenges associated with substance use disorder by getting treatment, and to successfully return to the workforce.

States may not pay those costs, including costs of providing information on substance use disorder or the cost of treatment, from Federal UI administrative grant funds. However, nothing in this rule prevents States from providing brochures or other information, paid for from other sources, on the availability of drug treatment to UC applicants who have failed a drug test. Moreover, as noted below, the Department has made funds available to States to address the effects of the opioid crisis on the economy.

In March 2018, the Department announced a National Health Emergency demonstration project through Training and Employment Letter (TEGL) No. 12–17, to identify, develop, and test innovative approaches to address the economic and workforce-related impacts of the opioid epidemic. In July 2018, the Department approved six grant awards, totaling more than $22 million, to the following states: Alaska ($1,263,194), Maryland ($1,975,085), New Hampshire ($5,000,000), Pennsylvania ($4,997,287), Rhode Island ($3,894,875), and Washington State ($4,892,659).

In September, 2018, the Department issued TEGL No. 4–18 to describe how the National Dislocated Worker Grant (Disaster Recovery DWG) Program's disaster grants apply to the unique challenges of the opioid crisis. All states, outlying areas, and appropriate tribal entities are eligible to apply for Disaster Recovery DWG assistance as described in TEGL No. 4–18. Eligible applicants use Disaster Recovery DWGs to create disaster-relief employment to alleviate the effects of the opioid crisis in affected communities, as well as provide employment and training activities, including supportive services, to address economic and workforce impacts related to widespread opioid use, addiction, and overdose.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern over the possibility of positive test results that could occur because an applicant was taking prescription medication or over-the-counter medication. One commenter addressed drug testing of individuals who are enrolled in medication-assisted treatment for opioid addiction, noting that some drug tests can detect methadone and buprenorphine. A commenter noted that ''conventional urinalysis testing methods are prone to false positives,'' and that urinalysis indicates only the presence of a drug or metabolites in the body. One commenter stated that drug testing of chemically treated hair, or hair that is dark in color, ''can be especially susceptible to external contamination.''

Department's Response: This rulemaking is limited to implementing the statutory requirement to identify occupations that regularly conduct drug testing. These comments regarding potential false positives are outside the scope of this rule, therefore, the Department makes no changes to the regulatory text in response to these comments.

Comment: Another commenter asserted that drug testing UC applicants is a waste of tax dollars, and the ''only ones who will win in this case will be the companies billing the State after the test has been administered.''

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Thus, whether and to what extent a State's activities may benefit drug testing companies is unrelated to the purpose of this regulation. The Department makes no changes to the final rule as a result of this comment.

Comments: A number of commenters expressed that drug testing of UC applicants undermines the purpose of the UC program. These commenters stated that making it more difficult for unemployed workers to access benefits blunts the UC program's capacity as a counter-cyclical economic tool and weakens the safety net.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) permitting States to drug test UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing. The regulation does not require States to implement a drug testing program, and the basic eligibility requirements for UC are unchanged. To be eligible for UC, claimants must be able and available to accept suitable work. This rule allows States to implement drug testing as a means for ensuring that UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing can demonstrate that they are able and available to accept suitable work by passing a drug test. We also note that the drug testing provisions in 42 U.S.C. 503(l)(1)(A)(ii) are narrowly drawn. There will be minimal effect on the UC program's role in minimizing

economic impacts in an economic downturn.

Therefore, the Department makes no changes to the final rule in response to these comments.

IV. Administrative Information

Paperwork Reduction Act

The Department has determined that any use of the existing form MA 8–7 under this rule is already approved under OMB control number 1205–0222.

Plain Language

The Department drafted this rule in plain language.

Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), at 5 U.S.C. 603(a), requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, which describes the impact of this final rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This rule does not affect small entities as defined in the RFA. Therefore, the rule will not have a significant economic impact on a substantial number of these small entities. The Department has certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA.

Executive Order 13771

Comments: The Department received one comment asserting that the proposed rule did not comply with Executive Order (E.O.) 13771 (Reducing Regulations and Controlling Regulatory Costs).

Department's Response: This final rule is not subject to E.O. 13771 because the cost is *de minimis.* The drug testing of UC applicants as a condition of UC eligibility is entirely voluntary on the part of the States, and because permissible drug testing is limited under the statute and this rule, the Department believes only a small number of States will establish a testing program for a limited number of applicants for unemployment compensation benefits.

Executive Orders 12866 and 13563: Regulatory Planning and Review

Comment: The Commenter argues that the Department's cost and benefits analysis was ''cursory and unrigorous;'' the argument relies on the Department's admission that it lacked data to quantify administrative costs.

Department's Response: E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For a ''significant regulatory action,'' E.O. 12866 asks agencies to describe the need for the regulatory action and explain how the regulatory action will meet that need, as well as assess the costs and benefits of the regulation.[1]

This regulation is necessary because of the statutory requirement contained in 42 U.S.C. 503(l)(1)(A)(ii), which requires the Secretary to determine the occupations that regularly conduct drug testing for the purpose of determining which applicants may be drug tested when applying for unemployment compensation. This rule is a ''significant regulatory action,'' as defined in sec. 3(f) of E.O. 12866, because it raises novel legal or policy issues arising out of legal mandates. Before the amendment of Federal law to add the new 42 U.S.C. 503(l)(1), Federal law did not permit drug testing of applicants for UC as a condition of eligibility.

The decision to conduct drug testing for any of the occupations identified in the final rule is entirely voluntary on the part of the States (see § 620.4). To date, only three States (Mississippi, Texas, and Wisconsin) have enacted laws to permit drug testing of UC applicants under the circumstances addressed by this rule. These States, however, have not yet begun testing because the prior rule was rescinded, and this rule was not yet published. As a result, the Department does not have sufficient information to determine how many States will establish a drug testing program, and what the costs and benefits of such a program might be to States. Before the enactment of the Federal law in 2012, States were not permitted to condition eligibility for UC on drug testing. Due to variations among States' laws, and in the number of UC applicants, level of benefits, and prevalence of drug use in a State, the Department is unable to estimate the extent to which States' costs in administering drug testing would be offset by savings in their UC programs.

[1] Exec. Order No. 12866, section 6(a)(3)(B).

The Department requested comments on the costs of establishing and administering a State-wide testing program; the number of applicants for unemployment compensation that fit the criteria established in the law; estimates of the number of individuals who would subsequently be denied unemployment compensation due to a failed drug test; and the offsetting savings that could result. The Department received comments, discussed below, on the costs of establishing and administering a testing program and the cost of drug tests. However, no other comments were received providing specific information on the other issues on which the Department requested comment.

Comments: One commenter wrote that Ohio had a 4.3 percent unemployment rate as of May 2018, which equates to approximately 530,000 unemployed workers in Ohio. At an average cost of $30 per drug test, it would cost $18 million to test UC applicants. The commenter stated that that money could instead be allocated for improving infrastructure issues, drug treatment programs, education programs, and job training programs.

A number of commenters wrote that States would spend much more to implement a drug testing program than it would be worth in savings to the UI trust funds. These commenters stated that when 13 States spent $1.6 million collectively to drug test Temporary Assistance for Needy Families (TANF) applicants in 2016, only 369 people tested positive out of approximately 250,000. The commenters argued that because States are experiencing record-low administrative funding, they cannot afford additional administrative burdens, particularly when few people tested positive.

Only three States have enacted laws to pursue drug testing of UC applicants under this statutory provision to date, and they have not yet begun testing. There are limited data on which to base estimates of the cost associated with establishing a testing program, or the offsetting savings that a testing program could realize. Only one of the three States that enacted conforming drug testing laws issued a fiscal estimate. That State, Texas, estimated that the 5-year cost of administering the program would be $1,175,954, taking into account both one-time technology personnel services to program the system and ongoing administrative costs for personnel. The Department has not evaluated the methodology of Texas' estimate. Separately, it would be inappropriate to extrapolate the Texas cost analysis to all States, in part

because of differences between Texas law and the laws of other States, and because of the variations in States' programs noted above. Therefore, the Department cites this information only for the purpose of disclosing the minimal information available for review.

One commenter wrote that drug tests can be expensive and that funds could be reappropriated for initiatives such as rehabilitation, common-sense drug education, and overdose first aid. The commenter also stated that it is not the States' duty to drug test unemployed workers; rather, it is a potential employer's duty to test applicants if the employer wishes.

Several commenters wrote that the cost of drug testing would be an unnecessary drain on resources that should be made available to workers affected by reductions in force. The commenters argued that the financial costs would far outweigh any savings from drug testing UC applicants and would place further stress on State budgets, especially when the Federal grants that States principally rely on to administer their programs have been reduced significantly. Simply put, these commenters concluded that drug testing is not a good use of scarce resources.

One commenter wrote that studies have shown that the vast majority of individuals receiving public assistance do not use drugs. The commenter supports a policy orientation in favor of an exercise of this authority, if at all, only for occupations in which the rationale for drug testing is truly compelling.

Two commenters wrote that Michigan has unsuccessfully attempted to test recipients of cash assistance. In 2000, a Michigan law providing for random testing of welfare recipients was declared unconstitutional by a federal court. In 2016, Michigan administered a pilot program of suspicion-based drug testing, but no recipients or applicants were tested. The commenters argued that these programs did not save money or reveal any undeserving claimants—they merely increased administrative costs. These commenters asserted that States may be pressured by this final rule to use already-limited UI funding to establish and administer a testing program.

Department's response: The Department carefully reviewed the comments and concluded that they did not adequately provide reliable information on the costs of establishing and administering a State-wide testing program; the number of applicants for UC who would be tested; and individuals who would subsequently be denied UC due to a failed drug test. In the absence of such data, the Department is unable to quantify the administrative costs States would incur if they choose to implement drug testing pursuant to this final rule.

As explained above, nothing in the Act amending section 303, SSA, or in this regulation requires States to establish a drug testing program. *See* § 620.4 of this final rule. States may choose to enact legislation to permit drug testing of UC applicants consistent with Federal law. In doing so, States will make that decision based on many factors, including the costs and benefits of a drug testing program that is limited to only those UC applicants specifically permitted to be drug tested as a condition of UC eligibility in the Act.

The Department reiterates that States will voluntarily make their own determination whether to establish a testing program. States may determine that current funding for the administration of State UC programs is insufficient to support the additional costs of establishing and administering a drug testing program, which would include the cost of the drug tests, staff for administration of the drug testing function, and technology to track drug testing outcomes. States would also incur ramp-up costs to implement the processes necessary for determining whether an applicant is one for whom drug testing is legally permissible; referring and tracking applicants for drug testing; and conducting and processing the drug tests. States would also have to factor in the increased costs of adjudication and appeals of both the determination that an individual is subject to drug testing and resulting determinations of benefit eligibility based on the test results. However, these costs could vary widely across States, and the Department has no ability to develop an estimate that could be relevant across multiple States.

The benefits of the rule are equally difficult to quantify. As explained above, the Texas analysis estimated a potential savings to the Unemployment Trust Fund of $13,700,580 over the 5-year period, resulting in a net savings of approximately $12.5 million. However, due to differences in State laws, the number of claims, benefit levels, and the prevalence of substance use disorder in a State, the Department is unable to use the savings anticipated by Texas as a national norm. In addition, as previously discussed, permissible drug testing is limited under the statute and this rule; the Department expects only a small number of UC applicants will be tested. As such, the Department makes no changes as a result of these comments.

Executive Order 13132: Federalism

Comment: The specific comment regarding noncompliance with E.O. 13132 is that the rule would permit drug testing of UC applicants when testing is required under Federal law, and that the rule would have a substantial effect on States by compelling them to provide a factual basis for imposing a drug-testing requirement using ETA form MA 8–7.

Department's Response: Section 6 of E.O. 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the E.O. Sec. 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

E.O. 13132, sec. 3, establishes Federalism Policymaking Criteria that agencies must follow when formulating and implementing policies with Federalism implications. Those criteria include:

- That agencies consider statutory authority for any action that would limit State policymaking discretion;
- That the national government grant States maximum administrative discretion possible; and
- That agencies encourage States to develop their own policies to achieve program objectives and, where possible, defer to States to develop standards.

This rule accomplishes each of the requirements set out above. First, the Department is required by 42 U.S.C. 503(l)(1)(A)(ii) to identify in regulation the occupations that regularly conduct drug testing. State UC agencies are permitted to drug test UC applicants for whom the only suitable work is in an occupation that regularly drug tests. Thus, the Department has statutory authority to issue this regulation.

Second, this rule gives States significant flexibility to identify additional occupations in their State that regularly drug test job applicants, either pre-hire or post-hire based on a factual analysis. See sections 620.3 and 620.4 of this final rule.

Third, this rule encourages States that choose to enact drug testing legislation as permitted by 42 U.S.C. 503(l)(1)(A)(ii) to develop policies and establish standards to achieve the program objectives, consistent with Federal law.

The Department retains oversight responsibility to ensure State law conforms to, and the State is in compliance with, Federal UC law.

Thus, this rule does not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the E.O. because drug testing authorized by the regulation remains voluntary on the part of the State—it is not required.

Unfunded Mandates Reform Act of 1995

Comment: The commenter states that the Department incorrectly concluded that the Unfunded Mandates Reform Act of 1995 does not apply to this rule. The commenter's reasoning is that required drug testing under other federal laws would be required of a State that enacts a drug testing law consistent with 42 U.S.C. 503(l)(1)(A), and that the State UC agency would have unfunded mandates conditioned on designating some occupations for drug testing.

Department's Response: The Unfunded Mandates Reform Act of 1995 defines ''Federal Intergovernmental Mandate'' to mean ''any provision in legislation, statute, or regulation that (i) would impose an enforceable duty upon a State. . . .''

This regulation does not impose any duty on States; rather, it permits States, consistent with the statutory authority in 42 U.S.C. 503(l)(1)(A) to enact legislation to test UC applicants for drugs under the limited circumstances set out in the statute. The requirement that States submit the factual basis for identifying an occupation under § 620.3(j) of the regulation using ETA form MA 8–7 is consistent with long-standing procedures by which States must inform the Department of changes in State law.

Effect on Family Life

Comment: The commenter referred to at the beginning of this discussion of compliance with several E.O.s and statutory requirements questions the Department's certification that this rule does not impact family well-being. The commenter cites the requirement in section 654(c) of the Treasury and General Government Appropriations Act that agencies must determine whether the action increases or decreases disposable income or poverty of families and children and determine whether the proposed benefits of the action justify the financial impact on the family.

Department's Response: This regulation has no impact on family well-being because it merely affords States an option that they must independently choose. Allowing States to drug test UC applicants in the very limited circumstances set out in 42 U.S.C. 503(l)(1)(A)(ii) does not, in and of itself, increase or decrease disposable income or poverty, or otherwise affect family well-being.

Based on available data (or lack thereof), it is impossible for the Department to predict the number of States that will exercise this option or how broadly they will implement any drug testing in their State. Similarly, there is no existing data or way to predict, positively or negatively, what impact, if any, such State drug testing may have on family well-being. This regulation only implements the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing.

Thus, the Department makes no change to its certifications that the rule complies with each of the Executive Orders and other provisions discussed above.

List of Subjects in 20 CFR Part 620

Unemployment compensation.

■ For the reasons stated in the preamble, the Department amends 20 CFR chapter V by adding part 620 to read as follows:

PART 620—DRUG TESTING FOR STATE UNEMPLOYMENT COMPENSATION ELIGIBILITY DETERMINATION PURPOSES

Sec.
620.1 Purpose.
620.2 Definitions.
620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.
620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.
620.5 Conformity and substantial compliance.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(l)(1)(A)(ii).

§ 620.1 Purpose.

The regulations in this part implement 42 U.S.C. 503(l). 42 U.S.C. 503(l) permits States to enact legislation to provide for State-conducted testing of an unemployment compensation applicant for the unlawful use of controlled substances, as a condition of unemployment compensation eligibility, if the applicant was discharged for unlawful use of controlled substances by his or her most recent employer, or if suitable work (as defined under the State unemployment compensation law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part). 42 U.S.C. 503(l)(1)(A)(ii) provides that the occupations that regularly conduct drug testing will be determined under regulations issued by the Secretary of Labor.

§ 620.2 Definitions.

As used in this part—

Applicant means an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.

Controlled substance means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.,* as defined in Sec. 102 of the Controlled Substances Act (21 U.S.C. 802). The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Occupation means a position or class of positions with similar functions and duties. Federal and State laws governing drug testing refer to classes of positions that are required to be drug tested. Other taxonomies of occupations, such as those in the Standard Occupational Classification (SOC) system, may be used by States in determining the boundaries of a position or class of positions with similar functions and duties under § 620.3. Use of the SOC codes, however, is not required, and States may use other taxonomies to identify a position or class of positions with similar functions and duties.

Suitable work means suitable work as defined by the unemployment compensation law of a State against which the claim is filed. It must be the same definition the State law otherwise uses for determining the type of work an individual must seek, given the individual's education, experience, and previous level of remuneration.

Unemployment compensation means any cash benefits payable to an individual with respect to the individual's unemployment under the State law (including amounts payable under an agreement under a Federal unemployment compensation law).

§ 620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.

In electing to test applicants for unemployment compensation under this part, States may enact legislation to require drug testing for applicants for whom the only suitable work is in one or more of the following occupations that regularly conduct drug testing, for purposes of § 620.4:

(a) An occupation that requires the employee to carry a firearm;

(b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested;

(c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;

(d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;

(e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;

(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;

(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

(h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;

(i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances; and

(j) An occupation where the State has a factual basis for finding that employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the occupation.

§ 620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.

(a) States may require drug testing for unemployment compensation applicants, as defined in § 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation, if the individual is one for whom suitable work, as defined in State law, as defined in § 620.2, is only available in an occupation that regularly conducts drug testing as identified under § 620.3.

(b) A State conducting drug testing as a condition of unemployment compensation eligibility, as provided in paragraph (a) of this section, may only elect to require drug testing of applicants for whom the only suitable work is available in one or more of the occupations listed under § 620.3. States are not required to apply drug testing to any applicants for whom the only suitable work is available in any or all of the occupations listed.

(c) No State is required to drug test UC applicants under this part 620.

§ 620.5 Conformity and substantial compliance.

(a) *In general.* A State law implementing the drug testing of applicants for unemployment compensation must conform with—and the law's administration must substantially comply with—the requirements of this part 620 for purposes of certification under 42 U.S.C. 502(a), governing State eligibility to receive Federal grants for the administration of its UC program.

(b) *Resolving issues of conformity and substantial compliance.* For the purposes of resolving issues of conformity and substantial compliance with the requirements of this part 620, the provisions of 20 CFR 601.5 apply.

John P. Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2019–21227 Filed 10–3–19; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9866]

RIN 1545–BO54; 1545–BO62

Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits

Correction

In rule document C1–2019–12437, appearing on page 44223 in the issue of Friday, August 23, 2019 make the following corrections in § 1.951–1:

§ 1.951–1 [Corrected]

1. In the center column, in instruction 2, on the second line, ''(b)(2)(vi)(B)(1)'' should read ''(b)(2)(vi)(B)(*1*)''.

2. In the same column, in the same instruction, the table heading ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(1)'' should read ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(*1*)''.

[FR Doc. C2–2019–12437 Filed 10–3–19; 8:45 am]

BILLING CODE 1300–01–D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Rules of Procedure; Corrections

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Correcting amendments.

SUMMARY: This document makes technical amendments to the final rule published by the Occupational Safety and Health Review Commission in the **Federal Register** on April 10, 2019 and corrected on August 30, 2019. That rule revised the procedural rules governing practice before the Occupational Safety and Health Review Commission.

DATES: Effective on October 4, 2019.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney-Advisor, Office of the General Counsel, by telephone at (202) 606–5410, by email at *rbailey@oshrc.gov,* or by mail at: 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.

SUPPLEMENTARY INFORMATION: OSHRC published revisions to its rules of procedure in the **Federal Register** on April 10, 2019 (84 FR 14554) and published corrections on August 30, 2019 (84 FR 45654). This document makes further technical amendments to the final rule.

List of Subjects in 29 CFR Part 2200

Administrative practice and procedure, Hearing and appeal procedures.

Accordingly, 29 CFR part 2200 is amended by making the following correcting amendments:

PART 2200—RULES OF PROCEDURE

■ 1. The authority citation for part 2200 continues to read as follows:

Authority: 29 U.S.C. 661(g), unless otherwise noted.

Section 2200.96 is also issued under 28 U.S.C. 2112(a).

■ 2. Amend § 2200.7 by revising paragraph (k)(1)(ii) to read as follows:

§ 2200.7 Service, notice, and posting.

* * * * *

(k) * * *

(1) * * *

(ii) A copy of the Secretary's statement of reasons, filed in conformance with § 2200.38(a).

* * * * *

■ 3. Amend § 2200.37 by revising the last sentence of paragraph (d)(4) to read as follows:

§ 2200.37 Petitions for modification of the abatement period.

* * * * *

(d) * * *

(4) * * * The requirements set forth in § 2200.35(b) through (c) shall apply.

* * * * *

■ 4. Amend § 2200.64 by revising the last sentence of paragraph (b) to read as follows:

§ 2200.64 Failure to appear.

* * * * *

(b) * * * See § 2200.90(c).

* * * * *

■ 5. Amend § 2200.73 by revising paragraph (g) to read as follows:

§ 2200.73 Interlocutory review.

* * * * *

(g) *When filing effective.* A petition for interlocutory review is deemed to be filed only when received by the Commission, as specified in § 2200.8(d)(3)(ii).

■ 6. Amend § 2200.90 by revising paragraph (c) to read as follows:

§ 2200.90 Decisions and reports of Judges.

* * * * *

(c) *Relief from default.* Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement under § 2200.101(b), § 2200.52(f)(2), or § 2200.64(b).

* * * * *

■ 7. Amend § 2200.91 by revising paragraph (e) to read as follows:

§ 2200.91 Discretionary review; petitions for discretionary review; statements in opposition to petitions.

* * * * *

(e) *When filing effective.* A petition for discretionary review is filed when received by the Commission, as specified in § 2200.8(d)(3)(ii).

* * * * *

■ 8. Amend § 2200.93 by revising the first sentence of paragraph (i) to read as follows:

§ 2200.93 Briefs before the Commission.

* * * * *

(i) *Brief of an amicus curiae.* The Commission may allow a brief of an amicus curiae pursuant to the criteria and time period set forth in § 2200.24. * * *

■ 9. Amend § 2200.211 by revising the first sentence to read as follows:

§ 2200.211 Applicability of subparts A through G.

The provisions of subpart D (§§ 2200.50–2200.57) and §§ 2200.34, 2200.37(d), 2200.38, 2200.71, and 2200.73 will not apply to Simplified Proceedings. * * *

Dated: September 25, 2019.

James J. Sullivan, Jr.,

Chairman.

[FR Doc. 2019–21414 Filed 10–3–19; 8:45 am]

BILLING CODE 7600–01–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010

Financial Crimes Enforcement Network; Inflation Adjustment of Civil Monetary Penalties; Correction

Correction

In rule document 2019–21156 beginning on page 51973 in the issue of Tuesday, October 1, 2019, make the following correction:

§ 1010.821 [Corrected]

■ On page 51974, Table 1 should read as follows:

TABLE 1 OF § 1010.821—PENALTY ADJUSTMENT TABLE

U.S. Code citation	Civil monetary penalty description	Penalties as last amended by statute	New maximum penalty amounts or range of minimum and maximum penalty amounts for penalties assessed after 1/15/2017 but before 3/19/2018	New maximum penalty amounts or range of minimum and maximum penalty amounts for penalties assessed after 3/18/2018
*	*	*	*	*	*	*

* * * * *

[FR Doc. C1–2019–21156 Filed 10–3–19; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2019–0588]

Special Local Regulation; Annual OPA World Championships, Gulf of Mexico; Englewood Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce special local regulations for the OPA World Championships from November 22, 2019 through November 24, 2019, to provide for the safety of life on navigable waterways during this event. Our regulation for the annual OPA World Championships identifies the regulated area for this event in Englewood, FL. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: The regulations in 33 CFR 100.735 will be enforced from 8 a.m. until 6 p.m., each day from November 22, 2019 through November 24, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Marine Science Technician First Class Michael D. Shackleford, Sector St. Petersburg Prevention Department, Coast Guard; telephone (813) 228–2191, email *Michael.d.shackleford@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce special local regulations in 33 CFR 100.735 for the OPA World Championships regulated area from 8 a.m. to 6 p.m. on November 22, 2019 through November 24, 2019. This action is being taken to provide for the safety of life on navigable waterways during this 3-day event. Our regulation for the annual OPA World Championships, § 100.735, specifies the location of the regulated area for the

OPA World Championships which encompasses portions of the Gulf of Mexico near Englewood, FL. During the enforcement periods, as reflected in § 100.735, if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via the Broadcast Notice to Mariners.

Dated: September 16, 2019.

Matthew A. Thompson,

Captain, U.S. Coast Guard, Captain of the Port Saint Petersburg.

[FR Doc. 2019–21528 Filed 10–3–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0729]

RIN 1625–AA09

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Fort Pierce, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is modifying the operating schedule that governs the A1A North Causeway Bridge across the Atlantic Intracoastal Waterway (AICW), mile 964.8 at Fort Pierce, St Lucie County, FL. This action will eliminate the on-demand drawbridge openings. This action is intended to reduce vehicular traffic congestion and provide scheduled openings for the bridge.

DATES: This rule is effective November 4, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*. Type USCG–2018–0729 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LT Samuel Rodriguez-Gonzalez, Sector Miami Waterways Management Division, U.S. Coast Guard; telephone 305–535–4307, email *Samuel.Rodriguez-Gonzalez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking(Advance, Supplemental)
§ Section
U.S.C. United States Code
AICW Atlantic Intracoastal Waterway
FL Florida
FDOT Florida Department of Transportation

II. Background Information and Regulatory History

On August 2, 2019, we published a Notice of Proposed Rulemaking (NPRM) entitled ''Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Fort Pierce, FL'' in the **Federal Register** (84 FR 37810). There were six comments received on the NPRM. This NPRM was preceded by two six-month test deviations published in the **Federal Register**. On August 30, 2018, the Coast Guard published the first Test Deviation entitled ''Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Fort Pierce, FL'' in the **Federal Register** (83 FR 44233). The majority of the 113 comments received were in support of scheduled openings; however, most felt the bridge still opened too frequently. Subsequently, on March 21, 2019, the Coast Guard published an alternate Test Deviation entitled ''Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Fort Pierce, FL'' in the **Federal Register** (84 FR 10411). The 33 comments received were in favor of the alternate test deviation.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The A1A North Causeway Bridge across the AICW, mile 964.8 in Fort Pierce, St Lucie County, FL is a bascule bridge. It has a vertical clearance of 26 feet at mean high water in the closed position and a horizontal clearance of 90 feet. The bridge currently operates under 33 CFR 117.5. The Florida Department of Transportation (FDOT), who owns and operates the A1A North Causeway Bridge, has requested a rule to allow for scheduled drawbridge openings. There has been an increase in vehicular traffic over the bridge in recent years due to residential development along the beach. Placing the bridge on regularly scheduled openings will allow for more efficient and economical operation of the bridge given the volume of vehicular traffic crossing the bridge.

IV. Discussion of Comments, Changes and the Final Rule

During the first test deviation, the majority of 113 comments received were in support of scheduled openings. The test provided for the bridge to open on signal except that from 7 a.m. to 7 p.m. Monday through Friday, with the exception of Federal Holidays, Saturdays and Sundays, the draw will open three times per hour: on the hour, 20 minutes past the hour and 40 minutes past the hour. However, most felt the bridge was still opening too frequently. A review of the bridge tender logs did not support the claim that the bridge was opening too frequently. However, the logs did show the openings tended to be twice per hour as opposed to three times per hour. In addition, the majority of comments recommended scheduled openings during the evening and on weekends.

During the alternate test deviation, all 33 comments received were in favor of the alternate operating schedule that allowed for around the clock openings on the hour and half hour.

Based on the comments received from the test deviations, a NPRM was published to allow for around the clock openings on the hour and half hour. Of the six comments received, five were in favor of the scheduled openings. One commenter felt that a twice per hour opening was restrictive and may compromise safe navigation due to tidal flow. The commenter proposed two schedules that would restrict bridge openings during daylight hours and provide on demand openings at all other times. These proposals were similar to the first test deviation. The Coast Guard considered the options but determined that the proposed rule strikes the correct balance between relieving traffic congestion while ensuring safe navigation and therefore decided against adopting the propsed suggestions.

It is the Coast Guard's opinion that this rule meets the reasonable needs of marine navigation while having a positive effect on vehicular traffic. The rule allows for more efficient and economical operation of the bridge.

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 protesters.

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, it 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 fact that vessels can still transit the bridge twice an hour and vessels of a certain size may also transit under the bridge without an opening at any time. Vessels in distress, public vessels of the United States and tugs with tows will be allowed to pass at any time.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. 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 bridge 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** above.

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 calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

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.

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. The Coast Guard received no comments on this section.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, U.S. Coast Guard Environmental Planning Policy COMDTINST 5090.1 (series) and U.S. Coast Guard Environmental Planning Implementation Procedures (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). We have made a determination that this action falls within a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the ''For Further Information Contact'' section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 117.261 by adding paragraph (n) to read as follows:

§ 117.261 Atlantic Intracoastal Waterway from St. Marys River to Key Largo.

* * * * *

(n) *A1A North Causeway Bridge, mile 964.8 at Fort Pierce.* The draw shall open on the hour and half-hour.

* * * * *

Dated: September 25, 2019.

Eric C. Jones,

Rear Admiral, U.S. Coast Guard, Commander Seventh Coast Guard District.

[FR Doc. 2019–21508 Filed 10–3–19; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Parts 3002 and 3004

[Docket No. RM2019–15; Order No. 5257]

Freedom of Information Act

AGENCY: Postal Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The Commission seeks to adopt direct final rules making minor changes related to its Freedom of Information Act (FOIA) regulations indicating that FOIA requests will be processed by the Office of the General Counsel.

DATES: This rule is effective November 18, 2019 without further action, unless adverse comment is received by November 4, 2019. If adverse comment is received, the Commission will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: For additional information, Order No. 5257 can be accessed electronically through the Commission's website at *https://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Background
II. Basis and Purpose of Rule Change
III. Final Rule

I. Background

In the past, the Commission processed FOIA requests through its Office of Secretary & Administration. As the nature of the Commission's FOIA requests has evolved, however, the Commission has determined that it is most efficient to process these requests within its Office of the General Counsel.

II. Basis and Purpose of Rule Change

Section 552(a)(1)(B) of title 5 of the United States Code requires federal agencies to separately state and currently publish ''statements of the general course and method by which [their] functions are channeled and determined'' in the **Federal Register** for the guidance of the public. Section 552(a)(1)(E) requires agencies to publish ''each amendment, revision, or repeal'' of these statements.

This direct final rule is intended to amend the Commission's FOIA regulations to more accurately reflect the Commission's current organization and practice. The revised rule complies with section 552(a)(1)(E)'s requirement that the Commission inform the public that it has made internal organizational changes that affect how it executes its FOIA-related functions.

III. Final Rule

List of Subjects

39 CFR Part 3002

Organization and functions (Government Agencies), Seals and insignia.

39 CFR Part 3004

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3002—ORGANIZATION

■ 1. The authority citation for part 3002 continues to read as follows:

Authority: 39 U.S.C. 503; 5 U.S.C. 552.

■ 2. Amend § 3002.11 by revising paragraph (d) to read as follows:

§ 3002.11 Office of Secretary and Administration.

* * * * *

(d) The Office of Secretary and Administration manages the Commission's records, including the Commission's seal, administrative policies, orders, reports, and official correspondence. In this role, the Office of Secretary and Administration manages the Commission's dockets and docket room, website, reference materials, and inter-agency reporting. All orders and other actions of the Commission shall be authenticated or signed by the Secretary or any such other person as may be authorized by the Commission.

* * * * *

■ 3. Amend § 3002.13 by revising paragraph (b) to read as follows:

§ 3002.13 Office of the General Counsel.

* * * * *

(b) The Office of the General Counsel provides legal assistance on matters involving the Commission's responsibilities; defends Commission decisions before the courts; and advises the Commission on the legal aspects of proposed legislation, rulemaking, requests made under the Freedom of Information Act, and policies on procurement, contracting, personnel matters, ethics, and other internal legal matters.

PART 3004—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

■ 4. The authority citation for part 3004 continues to read as follows:

Authority: 5 U.S.C. 552; 39 U.S.C 503.

■ 5. Amend § 3004.3 by revising paragraph (a) to read as follows:

§ 3004.3 How to make a request.

(a) To request Commission records, please contact the Commission via letter or use the online request form provided on the Commission's website at *http://www.prc.gov/foia/onlinerequest.*

* * * * *

■ 6. Amend § 3004.40 by revising paragraph (a)(7) to read as follows:

§ 3004.40 Hard copy requests for records and for expedited processing.

(a) * * *

(7) Be submitted to the Commission at the offices of the Commission (901 New York Avenue NW, Suite 200, Washington, DC 20268–0001).

* * * * *

■ 7. Amend § 3004.43 by revising paragraphs (a) through (c), (d) introductory text, and (e) introductory text to read as follows:

§ 3004.43 Response to requests.

(a) *Determination.* Within 20 days (excluding Saturdays, Sundays, and legal holidays) after receipt of a request for a Commission record, the Chief FOIA Officer or his/her designee will notify the requester of its determination to grant or deny the request and the right to seek assistance from the Commission's FOIA Public Liaison. In the case of an adverse determination, the Commission will notify the requester of his/her right to appeal and right to seek dispute resolution services from the Commission's FOIA Public Liaison or the Office of Government Information Services.

(b) *Granting request.* If granting the request, the Chief FOIA Officer or his/her designee will notify the requester of any fees that must be paid.

(c) *Partial granting of request.* If the Commission is unable to grant the request in its entirety, any reasonably segregable portion of the request shall be provided, with deleted portions treated as specified in paragraph (d) of this section, and the Chief FOIA Officer or his/her designee will notify the requester of any fees that must be paid.

(d) *Denying request.* If denying the request, in whole or in part, the Chief FOIA Officer or his/her designee will inform the requester in writing of:

* * * * *

(e) *Expedited processing.* Within 10 days (excluding Saturdays, Sundays and legal holidays) after receipt of a request for expedited processing, the Chief FOIA Officer or his/her designee will:

* * * * *

■ 8. Amend § 3004.44 by revising paragraph (a) to read as follows:

§ 3004.44 Appeals.

(a) The Commission may review any decision of the Chief FOIA Officer or his/her designee on its own initiative.

* * * * *

■ 9. Revise § 3004.60 to read as follows:

§ 3004.60 Chief Freedom of Information Act Officer.

The Commission designates the General Counsel of the Commission as the Chief FOIA Officer. The Chief FOIA Officer shall be responsible for the administration of and reporting on the Commission's Freedom of Information Act program.

By the Commission.

Darcie S. Tokioka,

Acting Secretary.

[FR Doc. 2019–21431 Filed 10–3–19; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2019–0047; FRL–10000–48–Region 8]

Approval and Promulgation of Implementation Plans; Montana; Regional Haze 5-Year Progress Report State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of Montana's Regional Haze Progress Report (''Progress Report''), submitted by the State of Montana through the Montana Department of Environmental Quality (MDEQ) on November 7, 2017, as a revision to the Montana Regional Haze State Implementation Plan (SIP). Montana's Progress Report addresses requirements of the Clean Air Act (CAA or Act) and the Federal Regional Haze Rule that require each state to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze and a determination of the adequacy of the state's existing SIP addressing regional haze (regional haze plan). The EPA is finalizing approval of Montana's determination that the State's regional haze plan is adequate to meet these RPGs for the first implementation period covering through 2018.

DATES: This rule is effective on November 4, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2019–0047. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kate Gregory, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6175, *gregory.kate@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

States are required to submit a progress report in the form of a SIP revision for the first implementation period that evaluates progress towards the RPGs for each mandatory Class I Federal area [1] (Class I area) within the state and for each Class I area outside the state which may be affected by emissions from within the state (40 CFR 51.308(g)). In addition, the provisions of 40 CFR 51.308(h) require states to submit, at the same time as the 40 CFR 51.308(g) progress report, a determination of the adequacy of the state's existing regional haze plan. The first progress report is due 5 years after submittal of the initial regional haze plan. Montana declined to submit a regional haze SIP covering all required elements in the EPA's Regional Haze Rule, which resulted in the EPA administration of the majority of the Regional Haze program in the State since the effective date of the Federal Implementation Program (FIP) of October 18, 2012.[2]

On November 7, 2017, Montana submitted its Progress Report which, among other things, detailed the progress made in the first implementation period toward the long-term strategy (LTS) outlined in the State's regional haze plan, the visibility improvement measured at the twelve Class I areas within Montana, and a determination of the adequacy of the State's existing regional haze plan.

In a notice of proposed rulemaking (NPRM) published on July 9, 2019 (84 FR 32682), the EPA proposed to approve Montana's Progress Report. The details of Montana's submission and the rationale for the EPA's actions are explained in the NPRM.

II. Response to Comments

Comments on the proposed rulemaking were due on or before August 8, 2019. The EPA received a total of three public comment submissions on the proposed approval. All public comments received on this rulemaking action are available for review by the public and may be viewed by following the instructions for access to docket materials as outlined in the **ADDRESSES** section of this preamble. After reviewing the comments, the EPA has determined that two of the comment submissions are outside the scope of our proposed action and/or fail to identify any material issue necessitating a response. We received one comment letter from the Montana Environmental Information Center (MEIC) and the National Parks Conservation Association (NPCA), containing three significant comments that we are responding to here. Below is a summary of those comments and the EPA's responses.

Comment: In a comment letter dated August 8, 2019, the MEIC and NPCA stated that one of the nitrogen oxides (NO_X) control technologies included in Montana's report is the SmartBurn® technology at Colstrip that ''reduce[s] NO_X emissions by '80% to 86%.' '' [3] The commenters assert these reductions are anecdotal, do not represent an enforceable emission limit, and cannot be relied on to show actual reductions for NO_X sufficient to satisfy requirements for Montana to make

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977 (42 U.S.C. 7472(a)). These areas are listed at 40 CFR part 81, subpart D.

[2] 77 FR 57864 (September 18, 2012).

[3] It is unclear whether the commenter understands SmartBurn® technology to be capable of (1) reducing NO_X between 80% and 86%, or (2) improving NO_X reductions from 80% to 86% (*i.e.,* by six percentage points). It is also unclear whether the commenter understands these reductions to be relative to the emission rates immediately prior to the SmartBurn® modifications or some even earlier baseline.

reasonable progress towards restoring clean air to Class I areas. The commenters assert EPA should not rely on these anecdotal reductions to demonstrate compliance, rather they argue the reductions must be incorporated into the facility's permit and actual compliance monitoring must be required.

Response: Each state is required to submit periodic progress reports in accordance with the requirements of 40 CFR 51.308(g) as well as a determination of the adequacy of the state's existing regional haze plan in accordance with the requirements of 40 CFR 51.308(h). To the extent the comment asserts that certain emission reductions should be included in Montana's implementation plan in order to make reasonable progress and addresses the enforceability of the reductions, these issues concern the requirements of 40 CFR 51.308(d) and/or 40 CFR 51.308(e) and are outside the scope of this action.[4] Compliance with and enforcement of the emission reductions mentioned in the comment that are not included in a state's implementation plan are not covered by 40 CFR 51.308(g) unless EPA makes a finding that the plan is not sufficient. We are not making that finding here.

The RPGs are not enforceable.[5] Montana has determined, and the EPA agrees, that to the extent Montana is not meeting its RPGs, the State's failure to meet the RPGs is attributable to wildfire. The United States Court of Appeals for the Ninth Circuit vacated the portions of the Montana FIP setting BART emissions limits for Colstrip Units 1 and 2.[6] Therefore, commenter's assertion that Montana cannot meet its RPGs because they depend on vacated BART measures is a given—the RPGs currently include the effects of measures that are not part of the LTS. That is, the current RPGs are not necessarily a proper reflection of the entire suite of determinations that may be necessary for Montana to make reasonable progress and may need to be revisited once the vacated determinations have been addressed. This obligation remains outstanding and is outside the scope of this action.

We think it is reasonable that Montana submitted a progress report addressing the elements of the plan that are in place and enforceable. To the extent that Montana has properly evaluated the contents of its implementation plan and assessed the progress the State is making with regard to its partial implementation plan, Montana has fulfilled its obligations under 40 CFR 51.308(g).

In sum, Montana has met the applicable legal requirements because the RPGs in the FIP are not necessarily reflective of what is necessary for Montana to make reasonable progress, but to the extent of the measures in the implementation plan, Montana has satisfied all its requirements for reporting on implementation and progress. This is a reasonable approach given where Montana is regarding development of its regional haze implementation plan.

While neither the SmartBurn® controls employed at Colstrip nor the scheduled closure of Colstrip Units 1 and 2 are relevant to the evaluation under 40 CFR 51.308(g), we note the following: The comments are made in relation to Chapter 2 of the Montana progress report[7] that provides a description of the status of implementation of all measures included in the implementation plan for achieving RPGs as required by 40 CFR 51.308(g)(1). Chapter 2 of the progress report refers to the application of SmartBurn® at Colstrip Unit 2, which is subject to BART, and Colstrip Units 3 and 4, which are subject to consideration of controls under reasonable progress. The content of the LTS, including any control measures selected as BART or under reasonable progress provisions, determines the RPGs (typically by means of photochemical modeling). The RPGs are a projected outcome, rather than visibility conditions established directly, and the Regional Haze Rule provides that the RPGs are not directly enforceable.[8] The rule further explains that the RPGs will be considered by the Administrator in evaluating the adequacy of the measures in the implementation plan to achieve the progress goal adopted by the State, which we have done in evaluating the State's Progress Report. Thus, we disagree with commenters apparent assertion that RPGs are enforceable.

Moreover, the LTS does not currently include BART requirements for Colstrip Units 1 and 2 because, as discussed previously, these requirements were vacated and remanded by the United States Court of Appeals for the Ninth Circuit.[9] In addition, in our 2012 FIP, the EPA did not establish any additional controls for Units 3 and 4 under reasonable progress.[10] There are currently no control measures required by the LTS for Colstrip in the implementation plan for which Montana could have provided the status. Accordingly, there is no deficiency in the progress report regarding the requirements of 40 CFR 51.308(g)(1) as they pertain to the Colstrip facility.

Though not central to our response, we are also providing background information regarding the NO_X reductions achieved with various SmartBurn® configurations that have been installed on Colstrip Unit 2, and separately on and Units 3 and 4, which the State discusses generally in its SIP submittal. SmartBurn, LLC is a company that offers NO_X reduction technologies such as combustion optimization and overfire air. The Title V operating permit for Colstrip[11] indicates that NOx controls on Unit 2 are comprised of an Alstom LNCFS™ II system (low-NO_X concentric firing system and separated overfire air [SOFA]) modified with a Smartburn® Low NO_X combustion system.[12] The SmartBurn® modifications were installed on Unit 2 in 2015. Emissions data in EPA's Air Markets Program Database (AMPD) indicate that after 2015, the annual emission rate for Unit 2 decreased from 0.321 lb/MMbtu to 0.154 lb/MMbtu, or by 52.0%.[13] Because of the large decrease in the NO_X emission rate, the EPA assumes that the modifications to Unit 2 in 2015 occurred due to additional air staging with overfire air.

Similarly, the Title V permit indicates that NO_X controls on Unit 3 and Unit 4 are comprised of an Alstom LNCFS™ III system (LNCFS™ with both close-coupled [CCOFA] and SOFA) modified with a Smartburn® Low NO_X combustion system.[14] LNCFS™ III was added to Units 3 and 4 in 2007 and 2009, respectively. Emissions data from AMPD indicates that, following the installation of LNCFS™ III (*i.e.,* both CCOFA and SOFA) at Unit 3, the annual emission rate decreased from 0.406 lb/MMBtu to 0.168 lb/MMbtu, or by

[4] Our proposal solicited comments on the requirements of and our proposed determinations regarding 40 CFR 51.308(g) and (h). 84 FR 32682 (July 9, 2019).

[5] 77 FR 23988, 24064–24067 (April 20, 2012).

[6] *National Parks Conservation Association* v. *EPA,* 788 F.3d 1134 (9th Cir. 2015) (vacating portions of the Montana FIP, 81 FR 57864 (September 18, 2012)).

[7] SmartBurn® is mentioned in Chapter 2, pp 2–5 and 2–8.

[8] 40 CFR 51.308(d)(1)(v).

[9] *NPCA* v. *EPA,* No. 12–73710, U.S. 9th Cir. (2015).

[10] 77 FR 23988, 24064–24067 (April 20, 2012), 77 FR 57864, 57902–57903 (September 18, 2012).

[11] Colstrip Final Title V Operating Permit #OP0513–14, effective July 17, 2018.

[12] Title V permit, Section 2.

[13] See spreadsheet created by EPA titled ''AMPD Colstrip emissions 2000 to mid–2019.xlsx'' located in the docket.

[14] Title V permit, Section 2.

58.6%.[15] Comparable reductions were achieved at Unit 4. However, these reductions were achieved by LNCFS™ III before the subsequent SmartBurn® modifications to Unit 3 and Unit 4 in 2016 and 2017, respectively. Emissions data for Unit 3, where the SmartBurn® modifications have been in place slightly longer than on Unit 4, indicate that the annual emission rate decreased from 0.167 lb/MMBtu to 0.150 lb/MMbtu, or by 9.7%, though a clear emissions trend is difficult to identify.[16] The EPA assumes that these reductions are due to combustion optimization (with existing equipment) because the reductions are modest and both SOFA and CCOFA were previously installed.

The emission reductions resulting from SmartBurn® modifications described previously are incorporated into Colstrip's Clean Air Act Title V permit and compliance monitoring is required. The Title V permit includes a 30-day rolling average emission limit of 0.20 lb/MMbtu for Unit 2 with associated compliance measures.[17] Likewise, the Title V permit includes a 30-day rolling average emission limit of 0.18 lb/MMbtu with associated compliance measures for Unit 3 and Unit 4 (individually).[18] As shown by the AMPD emissions data, these emission limits are commensurate with the actual emission rates being achieved with the SmartBurn® modifications at the three units.[19] However, as discussed previously, the EPA agrees that any reductions resulting from SmartBurn® technologies discussed in the progress report are not pertinent to whether the requirements of 40 CFR 51.308(g)(1) have been met. Furthermore, the commenters are mistaken in suggesting that it is sufficient for the emission reductions to be incorporated into a facility permit. Emissions limits or permits must be adopted into the implementation plan to meet the requirements of the Regional Haze Rule.[20]

Finally, in 2016, the owners of Colstrip (including Talen Energy, which also operates Colstrip) entered into a Consent Decree with the Sierra Club and the Montana Environmental Information Center, which requires closure of Colstrip Units 1 and 2 by July 1, 2022 [21] and set interim emission limits.[22] This will provide far greater NOx reductions at the Colstrip facility than those achieved by the SmartBurn® modifications.

Comment: The MEIC and NPCA also assert in the comment letter that the increase in fine particulate matter ($PM_{2.5}$) of 47% in the State is of concern and question the EPA's description of wildfire as nonanthropogenic. The commenters allege that both the EPA and the State are dismissive of the increase in fine PM and that wildfire is increasing due to climate change. Additionally, the commenters state that the Montana Progress Report submission is devoid of discussion related to wildfire as it relates to climate and for these reasons should be rejected by the EPA. The commenters provided a citation in the comments, however, the information cited was not included with the comments submitted.

Response: While we agree that the increase in $PM_{2.5}$ in the State for the time period listed is notable, we do not agree that we are dismissive of the increase in our proposed action. In our proposed action, we explain that Montana presented data in its Progress Report showing that wildfire activity, as can be examined through monitored pollutants (organic and elemental carbon specifically) and satellite and webcam imagery, are present on the majority of days selected as the 20 percent worst days.[23] This means that webcam imagery and satellite data correlate to monitored pollutant data and demonstrate that wildfire is a main impediment to visibility.

Our description and assessment of wildfire in our proposal is consistent with the definition of wildfire in our regulations, which when it occurs on wildland—as it has in Montana—is a natural event.[24] [25] The purpose of the regional haze program is to protect visibility and remedy visibility impairment from man-made air pollution. We agree with MDEQ's conclusion that the plan requires no further revision at this time to meet the 2018 RPGs.

Comment: Finally, the commenters allege that the State cannot meet its regional haze RPGs in the FIP because the FIP relies on installation of SNCR at Colstrip Units 1 and 2. While MEIC and NPCA acknowledge Talen's announcement that the two units will close, they assert that the EPA should not rely on closure of the EGU as a compliance mechanism unless that closure is incorporated into the SIP.

Response: We do not agree with commenters that the lack of SNCR installation at Colstrip will lead to Montana not meeting its RPGs. We address this issue in more detail in response to the first comment summarized.

The regional haze regulations require that the periodic progress report contain not only a description of the status of implementation measures and emission reductions achieved as a result of those measures, but importantly, an evaluation of visibility progress against the 2018 RPGs.[26] The RPGs are intended to reflect the emission reductions in states' LTS. The fact that Montana's long-term strategy may ultimately contain different emissions control technologies for Colstrip than those initially required by the EPA's FIP does not necessarily preclude the State from meeting the RPGs. Furthermore, as is shown in the NPRM for this action and stated previously, monitored pollutants (organic and elemental carbon, specifically) from fire—and not emissions from Colstrip—are the main impediment to visibility in Montana.[27] Additionally, Table 3 in the proposed action, titled ''Changes in Montana Total Emissions, Statewide,'' shows a statewide decrease in NO_X emissions of 32 percent between 2002 and 2014. Additionally, as indicated in our proposed action, in Table 5, ''Visibility Progress in Montana's Class I Areas,'' all of the IMPROVE monitoring sites within

[15] EPA Spreadsheet.

[16] EPA Spreadsheet.

[17] Title V permit, conditions B.4, B.19, B.27, B.29, B.32, and B.35.

[18] Title V permit, conditions C.14, C.20, C.35, C.41, C.49, C.51, C.53, C.54, C.55, C.57, C.58, and C.59.

[19] EPA spreadsheet. See charts comparing monthly actual emissions to the 30-day rolling average emission limits. Monthly emissions are used as a proxy to 30-day rolling average emission rates.

[20] Under the regional haze rule, a state's long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs. 40 CFR 51.308(d)(3). Additionally, the BART Guidelines require that states must establish an enforceable emission limit for each subject emission unit at the source and for each pollutant subject to review that is emitted from the source. Appendix Y to part 51, section V. Section 110(a)(2)(A) of the Clean Air Act also requires that SIPs shall ''include enforceable emission limitations . . . as may be necessary or appropriate to meet the applicable requirements of [the Act].'' While a state may include emission limitations in Title I construction permits, the emission limits and compliance requirements from a permit must be included in the SIP.

[21] *Sierra Club* v. *Talen Montana, LLC et al.,* No. 1:13–cv–00032– DLC–JCL, D. Mon. (2016), Doc. 316–1.

[22] The Consent Decree specifies a Unit 1 NO_X emission limit of 0.20 lb/MMbtu, and a Unit 2 NO_X emission limit of 0.45 lb/MMBtu (both 30-day rolling average). These limits became effective 30 days after the date of entry by the court, or on October 6, 2016.

[23] Montana Progress Report, pp. 4–8 to 4–13.

[24] EPA's regulations define a wildfire as fires that are started by an unplanned ignition caused by lightning; volcanoes; other acts of nature; unauthorized activity; or accidental, human-caused actions, or a prescribed fire that has developed into a wildfire. A wildfire that predominantly occurs on wildland is a natural event.

[25] See 40 CFR 50.1(n).

[26] 40 CFR 51.308(g)(1)–(3).

[27] Montana Progress Report, p. 3–9.

the State show the State meeting the 2018 RPGs for the 20 percent best days.[28] While only two of the Class I Areas meet the 2018 RPGs on the 20 percent worst days,[29] all Class I areas meet the RPGs when looking at the 20 percent most anthropogenically impaired days. In addition to evaluating the visibility conditions applying the regulatory test that applies to the 2018 RPGs, the EPA supplemented the most anthropogenically impaired days' data in the NPRM for the baseline period, current period, and difference in deciviews using the revised visibility tracking metric described in the EPA's December 2018 guidance document.[30] As explained in the NPRM for this action, though this revised visibility tracking metric is applicable to the second and future implementation periods for regional haze (and therefore not retroactively required for progress reports for the first regional haze planning period), the revised tracking metric's focus on the days with the highest daily anthropogenic impairment shifts focus away from days influenced by fire and dust events, and is therefore a better metric for showing visibility progress especially for Class I areas with strong impacts from fire, as was the case for the Class I areas within and affected by emissions from Montana during the first regional haze planning period. The Class I areas are already meeting the RPGs using the revised visibility metrics. For the reasons cited previously, we do not agree that the lack of SNCR will result in the State failing to meet its regional haze RPGs for 2018.

Though peripheral to our response, we also note that under the EPA's strategic plan's more effective partnerships approach, the EPA has been communicating with the State on implementation of the regional haze program. The EPA notes that in addition to preparing the report that is the subject of this SIP action, the State also intends to develop a SIP to replace EPA's regional haze FIP, including provisions for the regional haze rule and BART requirements for Colstrip Units 1 and 2 vacated by the Ninth Circuit.[31] As of this writing, EPA has reviewed pre-draft SIP submission materials from the State as it develops its SIP. Additionally, on August 29, 2019, the State announced the opportunity for public comment on the proposed incorporation of air pollutant emission limits, currently in EPA's FIP (40 CFR 52.1396), including limits on Colstrip Units 1 and 2, into a Montana Board of Environmental Review Board Order that may be submitted by the State into the SIP. The EPA intends to continue to work with the State as it develops its SIP for submittal.

[28] Montana Progress Report, p. 6–1.

[29] Montana Progress Report, p. 6–4.

[30] Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program (December 20, 2018), available at: *https://www.epa.gov/sites/production/files/2018-12/documents/technical_guidance_tracking_visibility_progress.pdf.*

[31] 40 CFR 51.308(d) and (e).

III. Final Action

EPA is finalizing its proposed approval of Montana's November 7, 2017 Progress Report as meeting the applicable regional haze requirements set forth in 40 CFR 51.308(g) and (h).

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 3, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by

reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 25, 2019.

Gregory Sopkin,

Regional Administrator, Region 8.

Title 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart BB—Montana

■ 2. Amend § 52.1370(e) in the table under the centered heading ''(1) Statewide'' by adding the entry ''Montana regional haze 5-year progress report'' following the entry ''Montana Code Annotated 2–2–121(2)(e) and 2–2–121(8)'' to read as follows:

§ 52.1370 Identification of plan.

* * * * *

(e) * * *

Title/subject	State effective date	Notice of final rule date	NFR citation
(1) Statewide			
* * *	*	*	* *
Montana regional haze 5-year progress report	11/07/2017	10/4/2019	[Insert **Federal Register** citation.]
* * *	*	*	* *

■ 3. Amend § 52.1387 by adding paragraph (c) to read as follows:

§ 52.1387 Visibility protection.

* * * * *

(c) Montana's November 7, 2017 Progress Report meets the applicable regional haze requirements set forth in § 51.308(g) and (h).

[FR Doc. 2019–21266 Filed 10–3–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2018–0840; FRL–10000–67–Region 5]

Air Plan Approval; Wisconsin; Infrastructure SIP Requirements for the 2012 $PM_{2.5}$ NAAQS; Interstate Transport

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving elements of the State Implementation Plan (SIP) submission from Wisconsin regarding the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2012 annual fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS or standard). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. This action pertains specifically to infrastructure requirements in the Wisconsin SIP concerning interstate transport provisions.

DATES: This final rule is effective on November 4, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2018–0840. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Samantha Panock, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8973, *panock.samantha@epa.gov.*

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

I. What is being addressed by this document?
II. What comments did we receive on the proposed action?
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

I. What is being addressed by this document?

On November 26, 2018, the Wisconsin Department of Natural Resources (WDNR) submitted a request to EPA for approval of its infrastructure SIP for the 2012 annual $PM_{2.5}$ NAAQS. On April 30, 2019, EPA proposed to approve the submission dealing with the first two requirements (otherwise known as ''prongs'' one and two) of the provision for interstate pollution transport under CAA section 110(a)(2)(D)(i), also known as the ''good neighbor'' provision.[1]

The November 26, 2018 submittal included a demonstration that Wisconsin's SIP contains sufficient major programs related to the interstate transport of pollution. Wisconsin's submittal also included a technical analysis of its interstate transport of pollution relative to the 2012 $PM_{2.5}$ NAAQS which demonstrated that current controls are adequate for Wisconsin to show that it meets prongs one and two of the ''good neighbor'' provision. After review, EPA proposed to approve Wisconsin's request relating

[1] There are four prongs to the Section 110(a)(2)(D)(i) ''good neighbor'' provision, which require that state plans: (1) Prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state; (2) prohibit any source or other type of emissions activity in one state from interfering with maintenance of the NAAQS in another state; (3) prohibit any source or other type of emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state; and (4) protect visibility in another state.

to prongs one and two of the ''good neighbor'' provision.

II. What comments did we receive on the proposed action?

Our April 30, 2019 proposed rule provided a 30-day review and comment period (84 FR 18191, April 30, 2019). The comment period closed on May 30, 2019. EPA received one anonymous submission with adverse comments. The adverse comments and EPA's responses are addressed below.

Comment: The commenter asserts that a fire that occurred at the U.S. Steel's Clairton Coke Works in Allegheny County, Pennsylvania (Clairton Coke Works) destroyed sulfur dioxide (SO_2) controls at the facility resulting in high SO_2 emissions. As a result, the commenter states that Allegheny County will likely not attain $PM_{2.5}$ standards as SO_2 is a $PM_{2.5}$ precursor. Therefore, the commenter asserts that Wisconsin should quantify contributions of $PM_{2.5}$ and $PM_{2.5}$ precursors to the Liberty monitor and further consider any potential controls to lower its contributions.

Response: EPA considered the comments and is finalizing its proposed determination that the current Wisconsin submittal meets the required infrastructure elements under CAA section 110(a)(2)(D)(i)(I), specifically prongs one and two. EPA has two main reasons, each of which is sufficient, by itself, to support its action. First, there are no areas in Wisconsin or downwind of Wisconsin that are projected to have nonattainment or maintenance problems by 2021, which is the attainment deadline for 2012 $PM_{2.5}$ NAAQS nonattainment areas classified as Moderate. EPA discussed this point in detail in the proposal, 84 FR 18193–94. As EPA noted, the downwind area of primary concern is Allegheny County, Pennsylvania, due to monitor readings at the Liberty Monitor. EPA explained why that monitor is expected to attain and maintain the 2012 annual $PM_{2.5}$ NAAQS by 2021. EPA disagrees with the commenter assertion that a recent fire at Clairton Coke Works resulted in increased emissions of SO_2, a $PM_{2.5}$ precursor, which in the commenter's view, means that the Liberty monitor should not be projected to attain and maintain the NAAQS. Although recent fires at the Clairton Coke Works did result in temporary outage of SO_2 controls, the owner/operator of the facility has resumed operation of the controls (News Release, ''Health Department Verifies Clairton Coke Works Pollution Controls Are Back Online,'' Allegheny County (June 18, 2019), *https://www.alleghenycounty.us/Health-Department/Resources/Public-Health-Information/News-Releases.aspx*). In addition, the owner/operator is working with the Allegheny County Health Department to upgrade the plant's particulate matter controls, (*https://www.alleghenycounty.us/Health-Department/Programs/Air-Quality/Public-Comment-Notices.aspx*). Accordingly, EPA continues to take the position that the Liberty monitor is expected to show attainment and maintenance in 2021.

Second, EPA's proposal indicated that Wisconsin did not have the potential to contribute to the Liberty monitor in Allegheny County, Pennsylvania. While we did not receive adverse comments on that discussion in the proposal, for this final rulemaking we have reviewed and included the additional, supportive information. Accordingly, we conclude that Wisconsin's emissions will not be large enough to significantly contribute to nonattainment, or interfere with maintenance, at the Liberty monitor, even if that monitor was projected to have nonattainment or maintenance problems.

For the 1997 and 2006 $PM_{2.5}$ NAAQS, we used air quality modeling and an air quality threshold of one percent of the $PM_{2.5}$ NAAQS to link contributing states to projected nonattainment or maintenance receptors (76 FR 48237, August 8, 2011). That is, if an upwind state contributes less than the one percent screening threshold to a downwind nonattainment or maintenance receptor, we determine that the state is not ''linked'' and therefore does not significantly contribute to nonattainment or maintenance problems at that receptor. We have not set an air quality threshold for the 2012 $PM_{2.5}$ NAAQS and we do not have air quality modeling showing contributions to projected nonattainment or maintenance receptors for this NAAQS.

EPA believes that a proper and well-supported weight of evidence approach can provide sufficient information for purposes of addressing transport with respect to the 2012 $PM_{2.5}$ annual NAAQS. We rely on the Cross-State Air Pollution Rule (CSAPR) air quality modeling conducted for purposes of evaluating upwind state impacts on downwind air quality with respect to the 1997 annual $PM_{2.5}$ NAAQS of 15 micrograms per cubic meter ($\mu g/m^3$) (as well as the 2006 24-hour $PM_{2.5}$ NAAQS, and 1997 Ozone NAAQS). Although not conducted for purposes of evaluating the 2012 annual $PM_{2.5}$ NAAQS, this modeling can inform our analysis regarding both the general magnitude of downwind $PM_{2.5}$ impacts and the downwind distance in which states may contribute to receptors with respect to the 2012 annual $PM_{2.5}$ NAAQS of 12 $\mu g/m^3$. If the same one percent contribution threshold used in CSAPR for the 1997 and 2006 $PM_{2.5}$ NAAQS is applied to the 2012 $PM_{2.5}$ NAAQS, we could consider the fact that a state's impact was below 0.12 $\mu g/m^3$. And in fact, as described in more detail below, the Wisconsin $PM_{2.5}$ contribution to the Liberty monitor in the CSAPR modeling was less than one percent of the 2012 $PM_{2.5}$ NAAQS. We also note that Wisconsin's submittal, as discussed below, relies on several factors to support a finding that emissions from Wisconsin sources do not significantly contribute to nonattainment, or interfere with maintenance of, the 2012 $PM_{2.5}$ NAAQS in downwind states.

We note that no single piece of information is by itself dispositive of the issue. Instead, the total weight of all the evidence taken together is used to evaluate significant contributions to nonattainment or interference with maintenance of the 2012 $PM_{2.5}$ NAAQS in another state.

Wisconsin's submittal used this weight-of-evidence approach to demonstrate that controls and emission limits already in place in Wisconsin are sufficient to ensure that emissions in the State will not significantly contribute to nonattainment, or interfere with maintenance, in any downwind state, including Allegheny County, Pennsylvania, for the $PM_{2.5}$ NAAQS. The EPA proposal stated that Wisconsin's nearest point to the Liberty monitor is about 500 miles away, and therefore precursor emissions are likely to be thoroughly dispersed over that distance. Moreover, EPA and Wisconsin did quantify Wisconsin's $PM_{2.5}$ and $PM_{2.5}$ precursor emissions and demonstrated an overall declining trend. As a regional pollutant, the majority of $PM_{2.5}$ is formed via reactions in the atmosphere between $PM_{2.5}$ precursors, including SO_2 and Nitrogen Oxides (NO_X). As noted in both the Wisconsin submittal and the EPA proposal, a review of the National Emissions Inventory data for Wisconsin shows that SO_2 emissions decreased by 68% and NO_X decreased by 50% from 2002 to 2014 in the State. Moreover, the Wisconsin submission reports $PM_{2.5}$ design values decreased by around 37% on average in most of the State between 2001–2003 and 2015–2017. The reductions in $PM_{2.5}$ precursor emissions and monitored $PM_{2.5}$ concentrations resulted from the implementation of an array of permanent and enforceable control measures that apply to Wisconsin sources. Emission control

programs are implemented for each emission source sector for the $PM_{2.5}$ precursors, NO_X, Volatile Organic Carbons (VOCs), and SO_2, as well as direct $PM_{2.5}$. Some programs include Wisconsin NO_X Reasonably Available Control Technology (RACT), Federal NO_X transport rules, VOC RACT/Control Techniques Guidelines, National Emission Standards for Hazardous Air Pollutants, and Federal on-road mobile source control programs. Continued implementation of these measures will ensure that Wisconsin will not significantly contribute to any $PM_{2.5}$ nonattainment problems, or interfere with any maintenance problems, in other states.

Moreover, in its submittal, Wisconsin used modeling results to quantify the potential impact of Wisconsin's emissions on the Liberty monitor in Allegheny County, Pennsylvania. Wisconsin referenced the EPA modeling from previous $PM_{2.5}$ standards (1997 and 2006) to show past contributions have been under the one percent threshold. Specifically, Wisconsin examined the photochemical modeling results from EPA's original CSAPR analysis. In this modeling, EPA found that Wisconsin only contributed 0.10 $\mu g/m^3$ of the $PM_{2.5}$ at the Liberty monitor in 2012. This amounts to 0.83% of the 2012 $PM_{2.5}$ NAAQS, below the one percent contribution threshold used in CSAPR for the 1997 and 2006 $PM_{2.5}$ NAAQS. This contribution-based analysis almost certainly overestimates Wisconsin's contribution since $PM_{2.5}$ precursor emissions from Wisconsin sources decreased significantly from 2012 to 2017 as mentioned previously. This analysis is evidence that Wisconsin does not contribute to $PM_{2.5}$ concentrations at the Liberty monitor, and therefore that the State will not significantly contribute to nonattainment or interfere with maintenance at the monitor, even if it were considered a downwind receptor.

In conclusion, the current Wisconsin submittal meets the required infrastructure elements under CAA section 110(a)(2)(D)(i)(I), specifically prongs one and two, as proposed by EPA.

III. What action is EPA taking?

In this action, EPA is approving the portion of Wisconsin's November 26, 2018 submission certifying that the current Wisconsin SIP is sufficient to meet the required infrastructure requirements under CAA section 110(a)(2)(D)(i)(I), specifically prongs one and two, as set forth above.

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under CAA section 307(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 3, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: September 19, 2019.

Cathy Stepp,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. Section 52.2591 is amended by revising paragraph (h) and removing and reserving paragraph (k) to read as follows:

§ 52.2591 Section 110(a)(2) infrastructure requirements.

* * * * *

(h) *Approval.* In a July 13, 2015, submission, supplemented August 8, 2016, WDNR certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (H), and (J) through (M) for the 2012 $PM_{2.5}$ NAAQS. We are not taking action on the stationary source monitoring and reporting requirements of section 110(a)(2)(F). We will address these requirements in a separate action.

* * * * *

[FR Doc. 2019–21354 Filed 10–3–19; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 105–70

[FPMR Case 2019–101–1; Docket No. GSA–FPMR–2019–0010; Sequence No. 1]

RIN 3090–AK05

Program Fraud Civil Remedies Act of 1986, Civil Monetary Penalties Inflation Adjustment

AGENCY: Office of General Counsel, General Services Administration.

ACTION: Final rule.

SUMMARY: In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, this final rule incorporates the penalty inflation adjustments for the civil monetary penalties set forth in the United States Code, as codified in our regulations.

DATES: *Effective:* November 4, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Pound, Assistant General Counsel, General Law Division (LG), General Services Administration, 1800 F Street NW, Washington, DC 20405. Telephone Number 202–501–1460.

SUPPLEMENTARY INFORMATION:

I. The Debt Collection Improvement Act of 1996

To maintain the remedial impact of civil monetary penalties (CMPs) and to promote compliance with the law, the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410) was amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) to require Federal agencies to regularly adjust certain CMPs for inflation and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 (Sec. 701 of Pub. L. 114–74). As amended, the law requires each agency to make an initial inflationary adjustment for all applicable CMPs, and to make further adjustments at least once every year thereafter for these penalty amounts. The Debt Collection Improvement Act of 1996 further stipulates that any resulting increases in a CMP due to the calculated inflation adjustments shall apply only to violations which occur after the date the increase takes effect, *i.e.,* thirty (30) days after date of publication in the **Federal Register**. Pursuant to the 2015 Act, agencies are required to adjust the level of the CMP with an initial ''catch up'', and make subsequent annual adjustments for inflation. Catch up adjustments are based on the percent change between the Consumer Price Index for Urban Consumers (CPI–U) for the month of October for the year of the previous adjustment, and the October 2015 CPI–U. Annual inflation adjustments will be based on the percent change between the October CPI–U preceding the date of adjustment and the prior year's October CPI–U.

II. The Program Fraud Civil Remedies Act of 1986

In 1986, sections 6103 and 6104 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–501) set forth the Program Fraud Civil Remedies Act of 1986 (PFCRA). Specifically, this statute imposes a CMP and an assessment against any person who, with knowledge or reason to know, makes, submits, or presents a false, fictitious, or fraudulent claim or statement to the Government. The General Services Administration's regulations, published in the **Federal Register** (61 FR 246, December 20, 1996) and codified at 41 CFR part 105–70, set forth a CMP of up to $10,781 for each false claim or statement made to the agency. Based on the penalty amount inflation factor calculation, derived from originally dividing the June 2015 CPI by the June 1996 CPI and making the CPI-based annual adjustment thereafter, after rounding we are adjusting the maximum penalty amount for this CMP to $11,001 per violation.

III. Waiver of Proposed Rulemaking

In developing this final rule, we are waiving the usual notice of proposed rulemaking and public comment procedures set forth in the Administrative Procedure Act, 5 U.S.C. 553 (APA). The APA provides an exception to the notice and comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary or contrary to the public interest. We have determined that under 5 U.S.C. 553(b)(3)(B) good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures for this rule. Specifically, this rulemaking comports and is consistent with the statutory authority set forth in the Debt Collection Improvement Act of 1996, with no issues of policy discretion. Accordingly, we believe that opportunity for prior comment is unnecessary and contrary to the public interest, and we are issuing these revised regulations as a final rule that will apply to all future cases under this authority.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a not significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

The Office of Management and Budget (OMB) has reviewed this final rule in accordance with the provisions of E.O. 12866 and has determined that it does not meet the criteria for a significant regulatory action. As indicated above, the provisions contained in this final rulemaking set forth the inflation adjustments in compliance with the Debt Collection Improvement Act of 1996 for specific applicable CMPs. The great majority of individuals, organizations and entities addressed through these regulations do not engage in such prohibited conduct, and as a result, we believe that any aggregate economic impact of these revised regulations will be minimal, affecting only those limited few who may engage in prohibited conduct in violation of the statute. As such, this final rule and the inflation adjustment contained therein should have no effect on Federal or state expenditures.

V. Regulatory Flexibility Act

The Administrator of General Services certifies that this final rule will not have a significant economic impact on a substantial number of small business entities. While some penalties may have an impact on small business entities, it is the nature of the violation and not the size of the entity that will result in an action by the agency, and the aggregate economic impact of this rulemaking on small business entities should be minimal, affecting only those few who have engaged in prohibited conduct in violation of statutory intent.

VI. Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements necessitating clearance by OMB.

List of Subject in 41 CFR Part 105–70

Administrative hearing, Claims, Program fraud.

Dated: September 25, 2019.

Emily W. Murphy,

Administrator.

Accordingly, 41 CFR part 105–70 is amended as set forth below:

PART 105–70—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

■ 1. The authority citation for part 105–70 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 31 U.S.C. 3809.

* * * * *

§ 105–70.003 [Amended]

■ 2. Amend § 105–70.003 by removing from paragraphs (a)(1)(iv) and (b)(1)(ii) the amount ''$11,001'' and adding ''$11,282'' in its place.

[FR Doc. 2019–21465 Filed 10–3–19; 8:45 am]

BILLING CODE 6820–81–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 181210999–9239–02]

RIN 0648–XX016

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Mid-Atlantic Scallop Access Area to General Category Individual Fishing Quota Scallop Vessels

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the Mid-Atlantic Scallop Access Area is closed to Limited Access General Category Individual Fishing Quota scallop vessels for the remainder of the 2019 fishing year. No vessel issued a Limited Access General Category Individual Fishing Quota permit may fish for, possess, or land scallops from the Mid-Atlantic Scallop Access Area. Regulations require this action once it is projected that 100 percent of trips allocated to the Limited Access General Category Individual Fishing Quota scallop vessels for the Mid-Atlantic Scallop Access Area will be taken.

DATES: Effective 0001 hr local time, October 2, 2019, through March 31, 2020.

FOR FURTHER INFORMATION CONTACT: Travis Ford, Policy Analyst, (978) 281–9233.

SUPPLEMENTARY INFORMATION: Regulations governing fishing activity in the Sea Scallop Access Areas can be found in 50 CFR 648.59 and 648.60. These regulations authorize vessels issued a valid Limited Access General Category (LAGC) Individual Fishing Quota (IFQ) scallop permit to fish in the Mid-Atlantic Scallop Access Area under specific conditions, including a total of 1,713 trips that may be taken during the 2019 fishing year. Section 648.59(g)(3)(iii) requires the Mid-Atlantic Scallop Access Area to be closed to LAGC IFQ permitted vessels for the remainder of the fishing year once the NMFS Greater Atlantic Regional Administrator determines that the allocated number of trips for fishing year 2019 are projected to be taken.

Based on trip declarations by LAGC IFQ scallop vessels fishing in the Mid-Atlantic Scallop Access Area, analysis of fishing effort, and other information, NMFS projects that 1,713 trips will be taken as of October 2, 2019. Therefore, in accordance with § 648.59(g)(3)(iii), NMFS is closing the Mid-Atlantic Scallop Access Area to all LAGC IFQ scallop vessels as of October 2, 2019. No vessel issued an LAGC IFQ permit may fish for, possess, or land scallops in or from the Mid-Atlantic Scallop Access Area after 0001 local time, October 2, 2019. Any LAGC IFQ vessel that has declared into the Mid-Atlantic Access Area scallop fishery, complied with all trip notification and observer requirements, and crossed the VMS demarcation line on the way to the area before 0001, October 2, 2019, may complete its trip without being subject to this closure. This closure is in effect for the remainder of the 2019 scallop fishing year, through March 31, 2020.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866. NMFS finds good cause under to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest and impracticable. The Mid-Atlantic Scallop Access Area opened for the 2019 fishing year on April 1, 2019. The regulations at § 648.59(g)(3)(iii) require this closure to ensure that LAGC IFQ scallop vessels do not take more than their allocated number of trips in the area. The projected date on which the LAGC IFQ fleet will have taken all of its allocated trips in an Access Area becomes apparent only as trips into the area occur on a real-time basis and as activity trends begin to appear. As a result, NMFS can only make an accurate projection very close in time to when the fleet has taken all of its trips. To allow LAGC IFQ scallop vessels to continue to take trips in the Mid-Atlantic Scallop Access Area during the period necessary to publish and receive comments on a proposed rule would likely result in the vessels taking much more than the allowed number of trips in the Mid-Atlantic Scallop Access Area. Excessive trips and harvest from the Mid-Atlantic Scallop Access Area would result in excessive fishing effort in the area, where effort controls are critical, thereby undermining conservation objectives of the Atlantic Sea Scallop Fishery Management Plan and requiring more restrictive future management measures. Also, the public had prior notice and full opportunity to comment on this closure process when it was enacted. For these same reasons, NMFS further finds, under to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 1, 2019.

Jennifer M. Wallace,

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

[FR Doc. 2019–21636 Filed 10–1–19; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 84, No. 193
Friday, October 4, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 955

RIN 1903–AA11

Elemental Mercury Storage Fees

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Notice of proposed rulemaking and request for public comment.

SUMMARY: The Department of Energy publishes a proposed rule to establish a fee for long-term management and storage of elemental mercury in accordance with the Mercury Export Ban Act.

DATES: Written comments and information are requested and will be accepted on or before October 25, 2019. See section IV, ''Public Participation,'' for details.

ADDRESSES: Please direct comments to: *https://www.regulations.gov.* Follow the instructions for submitting comments.

Email: Send comments to David Haught at *mercury.mgt.fee@em.doe.gov.* Please submit comments in Microsoft™ Word, or PDF file format, and avoid the use of encryption.

Mail: Send to the following address: David Haught, U.S. Department of Energy, Office of Environmental Management, Office of Waste Disposal (EM–4.22), 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: David Haught, U.S. Department of Energy, Office of Environmental Management, Office of Waste Disposal (EM–4.22), 1000 Independence Avenue SW, Washington, DC 20585, Telephone: (202) 586–5000, Email: *mercury.mgt.fee@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Fee Basis
III. Regulatory Review
IV. Public Participation
V. Approval of the Secretary of Energy

I. Background

Section 5(a)(1) of the Mercury Export Ban Act, as amended (MEBA), 42 U.S.C. 6939f(a)(1), provides that the Department of Energy (DOE) shall designate a facility for the purpose of long-term management and storage of elemental mercury generated within the United States.[1] MEBA section 5(b)(1), 42 U.S.C. 6939f(b)(1), further provides that DOE shall assess and collect a fee at the time of delivery for providing such management and storage based on the pro rata cost of long-term management and storage of elemental mercury delivered to the facility. MEBA provides that the fee shall be made publicly available by October 1, 2018. MEBA section 5(b)(1)(B)(i), 42 U.S.C. 6939f(b)(1)(B)(i). The fee may be adjusted annually, and shall be set in an amount sufficient to cover costs described in MEBA section 5(b)(2), 42 U.S.C. 6939f(b)(2), subject to certain adjustments. MEBA section 5(b)(1)(B)(ii)-(iv), 42 U.S.C. 6939f(b)(1)(B)(ii)-(iv).

In accordance with MEBA section 5(b), 42 U.S.C. 6939f(b), DOE proposes to establish this fee after consultation with persons who are likely to deliver elemental mercury to a designated facility, and with other interested persons. DOE convened teleconferences during the summer of 2018 and held a meeting on August 1–2, 2018, in Washington, DC to discuss considerations for the basis of the fee for long-term management and storage of elemental mercury including length of time in storage, the cost of eventual treatment and disposal technology and different operational scenarios. Participants included representatives of generators producing elemental mercury incidentally from the beneficiation or processing of ore, or related pollution control activities. DOE also consulted with members of the Environmental Technology Council, a private organization whose members include persons likely to deliver elemental mercury to the designated DOE storage facility, on January 23, 2019. Through this proposed rule and request for comments, DOE requests further input in support of the requirement that DOE consult with persons who are likely to deliver elemental mercury to a designated facility, and with other interested persons.

This proposed rule would establish the fee for long-term management and storage of elemental mercury at the designated DOE storage facility as $55,100 per metric ton (MT)[2] plus a $3,250 fixed fee per shipment. In accordance with MEBA section 5(b)(1)(B)(ii), 42 U.S.C. 6939f(b)(1)(b)(ii), this fee may be adjusted annually according to the factors described in Section II, Discussion of Fee Basis.

II. Discussion of Fee Basis

The proposed fee is based on the present value of (1) elementary mercury storage for a finite period of time; (2) the cost of transporting elemental mercury from the storage facility to a treatment and disposal facility; and (3) the cost of treatment and disposal. While there is no current regulatory framework to treat and dispose of elemental mercury in the U.S., DOE is assuming a scenario in which there is treatment and disposal capacity for high-concentration elemental mercury waste in the future.

The proposed fee for long-term management and storage of elemental mercury is based on a scenario in which the elemental mercury is assumed to be stored for fifteen years and then transported in year sixteen to a treatment and disposal operation for disposal. The annual storage cost per metric ton-year is $810[3]/MT. This annual storage cost is increased by 3.5% each fiscal year for fifteen years to give a total cost per metric ton of $15,600. There is also a receiving charge of $3,250 per shipment charged by the storage facility upon receipt. There is a removal charge of $376/MT. This covers the administrative cost of removing

[1] Elemental mercury stored at the facility will be classified as a hazardous waste under the Resource Conservation and Recovery Act and its implementing regulations. MEBA Section 3 prohibits the sale, distribution or transfer of elemental mercury stored by DOE, and MEBA Sections 5(d)(1) and 5(g)(2)(B) require that the elemental mercury be stored at facilities having permits to manage RCRA hazardous waste (with the exception of waste elemental mercury generated by certain generators, and which is destined for the long-term storage facility as allowed by 42 U.S.C. 6939f(g)(2)(D)). Based on the description of elemental mercury that is destined for and stored at the DOE long-term storage facility, the RCRA hazardous waste code U151 applies (see 40 CFR 261.33(f)).

[2] One metric ton is 2,204.62 lbs.

[3] This annual cost is comprised of the following cost elements: storage/management cost, dedicated storage area lease cost, state taxes, and periodic audits by DOE.

elemental mercury from the storage facility, which is calculated based on the receiving charge, increased by 3.5% each fiscal year for sixteen years. The removal charge is then allocated on a pro rata basis using a 15 MT shipment capacity. These costs are all based on pricing from U.S. commercial vendors. The 3.5% escalation each fiscal year is based on pricing from a solicited offer to DOE by a U.S. commercial vendor. The proposed fee also includes the cost of transportation from the storage facility to a yet to be determined treatment and disposal operation ($1,230/MT) and eventual treatment and disposal ($37,900/MT). The cost of transportation is based on information received from entities responsible for the transportation of elemental mercury to long-term storage facilities and is representative of cost DOE could expect to incur for transportation of elemental mercury to a treatment facility. This cost is also escalated at 3.5% each fiscal year for sixteen years. The transportation cost is based on the current transportation cost of elemental mercury from generators' sites in Nevada to long-term RCRA-permitted storage facilities. DOE is using this information as a basis for developing its cost estimate assuming a transportation scenario that uses a similar number of miles traveled. The cost of treatment and disposal of elemental mercury is based on preliminary pricing from a U.S. commercial vendor and includes all DOE costs associated with treatment and disposal. This pricing includes DOE's cost for treatment, DOE's cost for transportation to a disposal site and DOE's cost for disposal. The transportation, treatment and disposal costs are escalated using the OMB Circular A–94 5 year real rate (1.3%). The cost of transportation, treatment and disposal are subject to adjustment using actual pricing when such pricing becomes available. The resulting cost per metric ton is $55,100/MT, plus the aforementioned $3,250 per shipment receiving charge.

In accordance with 42 U.S.C. 6939f(b)(1)(B), because the designated facility was not operational on January 1, 2019, the fee ultimately adopted by DOE after consideration of public comment shall be adjusted to subtract the cost of the temporary accumulation for those generators accumulating elemental mercury in a facility pursuant to 42 U.S.C. 6939f(g)(2)(B) and (D)(iv) during the period in which the designated facility is not operational. The subtraction will occur after receipt and approval of invoices outlining acceptable costs.

In accordance with 42 U.S.C. 6939f(b)(1)(B)(ii), the fee ultimately adopted by DOE after consideration of public comment may be adjusted annually. DOE will adjust the fee by adjusting the parameters used in calculating the fee. The parameters subject to adjustment are as follows:

- Annual cost to store 1 MT of elemental mercury.
- Number of years that elemental mercury will reside in storage at the DOE designated facility.
- Receiving charge.
- Removal charge.
- Cost of shipment from the elemental mercury storage facility to a treatment facility, and cost of shipment from a treatment facility to a disposal facility.
- Cost of treatment of elemental mercury, and disposal of the treated waste form.

III. Regulatory Review

A. Review Under Executive Order 12866

This proposed rule has been determined to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (February 26, 2002). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

B. Review Under the National Environmental Policy Act

In accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality regulations and the DOE regulations implementing NEPA, DOE prepared the following documents analyzing the potential environmental impacts of long-term management and storage of elemental mercury: *Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423, January 2011); *Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S1, September 2013); and *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–423–SA–01). The environmental impact statement (and the supplemental environmental impact statement) noted the relevant statutory provision regarding assessment and collection of a fee. The assessment and collection of the fee is part of the implementation of the proposed action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's website: *https://www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf.*

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has determined that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. In 2019, DOE published *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–423–SA–01) that updated the expected inventory during the next 40 years to 6,800 MT. DOE expects approximately 35—50 entities to pay the fee. DOE expects that the majority of the fees paid will be paid by less than 10 of these entities. The Nevada Mining Association (NMA) membership includes the generators of elemental mercury that are expected to deliver the majority of elemental mercury to the DOE facility. DOE contacted NMA for information to help determine how many of its membership qualify as small entities under NAICS codes 212221, 212222, 212234 and 212299. The information received showed that there are 31 entities that fall below the small business standards versus 2 entities that exceeded the standard. DOE has determined, however, that the rule will not result in a significant economic impact on a substantial number of these small entities. DOE estimates that the largest impact would be to entities engaged in mining that do not qualify as small entities under NAICS codes. This impact will vary based on ore grade and

price fluctuations in the precious metals market. Another impact would be to entities that have accepted elemental mercury for long-term storage awaiting the start of operations at the DOE facility. The largest of these impacts are likely be a one-time expense shortly after the start of operations at the DOE facility. DOE estimates that the impact would range from $55,100 up to as high as $4.7 million for two to three entities. A mining entity shipping approximately 15 MT per year would experience an impact of approximately $830,000 annually. As a result of MEBA, generators of elemental mercury have limited disposition options. Generators can either send elemental mercury that is being discarded to the DOE designated facility for long term management and storage or export for environmentally sound disposal those mercury compounds identified in or by 15 U.S.C. 2611(c)(7)(A)–(B) consistent with 15 U.S.C. 2611(c)(7)(D). However, export of mercury compounds for environmentally sound disposal in another country may also be subject to that country's obligations under the Basel Convention, if applicable, and that country's applicable domestic laws and regulations. Nonfederal generators may also consider domestic sales of elemental mercury;[4] however, international sales are prohibited by MEBA's export ban, 42 U.S.C. 2611(c)(1). Although domestic sale of elemental mercury is an alternative without a negative economic impact, it is likely that the supply would exceed demand and thus that option may not be viable for some nonfederal generators. As stated above, for those nonfederal generators for whom sale is not a viable option, the available options are sending the elemental mercury to the DOE designated facility or environmentally sound disposal of certain mercury compounds in accordance with 15 U.S.C. 2611(c)(7)(D). Since the cost of treatment and disposal in member countries of the OECD is comparable to the fee in this proposed rule, and generators choose this option if it is more cost effective for them, DOE has determined that this proposed rule does not have a significant economic impact on a substantial number of small entities.

[4] MEBA provides that ''no Federal agency shall convey, sell, or distribute . . . any elemental mercury under the control or jurisdiction of the Federal agency.'' 15 U.S.C. 2605(f). MEBA provides an exception for ''a transfer between Federal agencies of elemental mercury under the control or jurisdiction of the Federal agency.'' *Id.* at 2605(f)(2)(A).

D. Review Under the Paperwork Reduction Act

This rulemaking would impose no new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by States, tribal or local governments, in the aggregate, or by the private sector, of $100 million in any one year. The Act also requires Federal agencies to develop an effective process to permit timely input by elected officials of State, tribal, or local governments on a proposed significant intergovernmental mandate, and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that this proposed rule does not contain any Federal mandates exceeding $100 million in any one year affecting States, tribal, or local governments, or the private sector, and, thus, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' 61 FR 4779 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988, specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibility among the various levels of government. No further action is required by Executive Order 13132.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This proposed rule would

have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 13211

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

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

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

K. Review Under Executive Orders 13771

This proposed rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is considered to be a ''transfer rule.''

IV. Public Participation

Submission of Comments

DOE invites all interested partied to submit in writing by October 25, 2019 comments and information regarding this proposed rule.

Submitting comments via *http://www.regulations.gov.* The *http://www.regulations.gov* web page will require you to provide your name and contact information prior to submitting comments. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is

generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

V. Approval of the Secretary of Energy

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

List of Subjects in 10 CFR Part 955

Elemental mercury, Hazardous waste treatment, storage, and disposal, Reporting and recordkeeping requirements.

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

Dan Brouillette,

Deputy Secretary of Energy.

■ For the reasons set forth in the preamble, the Department of Energy proposes to add part 955 to title 10 of the Code of Federal Regulations to read as follows:

PART 955—FEE FOR LONG-TERM MANAGEMENT AND STORAGE OF ELEMENTAL MERCURY UNDER THE MERCURY EXPORT BAN ACT OF 2008, AS AMENDED

Sec.
955.1 Purpose.
955.2 Scope and applicability.
955.3 Definitions.
955.4 Payment of fees.
955.5 Schedule of fees.

Authority: 42 U.S.C. 6939f(b).

§ 955.1 Purpose.

This part establishes a fee for long-term management and storage of elemental mercury in accordance with the Mercury Export Ban Act of 2008, as amended, section 5(b), (42 U.S.C. 6939f(b)).

§ 955.2 Scope and applicability.

This part applies to persons who deliver elemental mercury to the U.S. Department of Energy (DOE) designated facility for long-term management and storage.

§ 955.3 Definitions.

The following definitions are provided for purposes of this part:

DOE means the U.S. Department of Energy.

Elemental mercury means the element with the chemical symbol Hg and atomic number 80 in its liquid form. The form acceptable to DOE is at least 99.5% elemental mercury by volume. DOE will not accept elemental mercury in environmental media or consumer products (fluorescent lamps, batteries, etc.) or elemental mercury in manufactured items (manometers, thermometers, switches, etc.).

Metric ton means 1,000 kilograms (approximately 2,204 lbs.).

§ 955.4 Payment of fees.

Fees are payable upon delivery of elemental mercury to the DOE facility. All fee payments are to be made payable to the U.S. Department of Energy. The payments are to be made in U.S. funds by electronic funds transfer such as ACH (Automated Clearing House) using E.D.I. (Electronic Data Interchange), check, draft, money order, or credit card.

§ 955.5 Schedule of fees.

(a) Persons delivering elemental mercury to the DOE facility for long-term management and storage of elemental mercury shall pay fees in accordance with paragraph (b) of this section.

(b) The sum of the receiving charge, the cost of storage per metric ton for the number of years escalating costs according to the published escalation rate in storage, the cost per metric ton to transport elemental mercury to a treatment facility in the year following the number of years stored and cost per metric ton to treat and dispose of elemental mercury in the year following the number of years stored. These values may be updated annually. These values are posted to the DOE Long-Term Management and Storage of Elemental Mercury website (*https://www.energy.gov/em/services/waste-management/waste-and-materials-disposition-information/long-term-management-and*). DOE will publish notice in the **Federal Register** when the values are updated to inform the public of the updates.

[FR Doc. 2019–21536 Filed 10–3–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0702; Product Identifier 2019–NM–118–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model DHC–8–400 series airplanes. This proposed AD was prompted by a report of a quality escape in the manufacturing of the advanced pneumatic detector (APD) switches, and the presence of contamination on the switch contact pin. This proposed AD would require identification and testing, and reidentification or replacement if necessary, of affected APDs. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 18, 2019.

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

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

For service information identified in this NPRM, contact De Havilland Aircraft of Canada Ltd., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd@dehavilland.com;* internet: *https://dehavilland.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0702; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0702; Product Identifier 2019–NM–118–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments, without change, to *http://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this NPRM.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2019–13, dated April 4, 2019 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model DHC–8–400, –401, and –402 airplanes. You may examine the MCAI in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0702.

This proposed AD was prompted by a report of a quality escape in the manufacturing of advanced pneumatic detector (APD) switches, and the presence of contamination on the switch contact pin. The FAA is proposing this AD to address such contamination that could insulate the contact pin from the diaphragm and result in undetected or late detection of a fire. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Service Bulletin 84–26–19, Revision 'A,' dated February 11, 2019. This service information describes procedures for identification and testing, and reidentification or replacement if necessary, of affected APDs.

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

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously. This proposed AD would also require returning failed APDs to the manufacturer.

Costs of Compliance

The FAA estimates that this proposed AD affects 65 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 10 work-hours × $85 per hour = Up to $850	$0	Up to $850	Up to $55,250.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need this on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS *

Labor cost	Parts cost	Cost per product
Up to 124 work-hours × $85 per hour = Up to $10,540	Up to $51,076	Up to $61,616.

* The FAA has received no definitive data to provide cost estimates for the on-condition return of parts.

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, The FAA has included all known costs in the cost estimate.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a

collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this NPRM is 2120–0056. The paperwork cost associated with this NPRM has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this NPRM is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW, Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2019–0702; Product Identifier 2019–NM–118–AD.

(a) Comments Due Date

The FAA must receive comments by November 18, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model DHC–8–400, –401, and –402 airplanes, certificated in any category, serial numbers 4001 and 4003 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire protection.

(e) Reason

This AD was prompted by a report of a quality escape in the manufacturing of advanced pneumatic detector (APD) switches, and the presence of contamination on the switch contact pin. The FAA is issuing this AD to address such contamination that could insulate the contact pin from the diaphragm and result in undetected or late detection of a fire.

(f) Compliance

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

(g) Affected APDs

For purposes of this AD, an affected APD is manufactured by Kidde (UTAS) and has a part number and serial number identified in paragraphs (g)(1) through (10) of this AD.

(1) Part number 10–1096 (all serial numbers).

(2) Part number 10–1096–01 (all serial numbers).

(3) Part number 10–1096–02 (serial numbers before AEM9907).

(4) Part number 10–1097 (all serial numbers).

(5) Part number 10–1097–01 (all serial numbers).

(6) Part number 10–1097–02 (serial numbers before 17–0005).

(7) Part number 10–1098 (all serial numbers).

(8) Part number 10–1098–01 (serial numbers before 17–0110).

(9) Part number 10–1099 (all serial numbers).

(10) Part number 10–1099–01 (serial numbers before 17–0009).

(h) APD Identification and Test

Within 8,000 flight hours or 48 months, whichever occurs first after the effective date of this AD: Do the applicable actions specified in paragraph (h)(1) and (2) of this AD, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 84–26–19, Revision 'A,' dated February 11, 2019.

(1) Determine whether any affected APD is installed on the engine nacelles or auxiliary power unit (APU) compartment.

(2) Do the on-aircraft test of all affected APDs.

(i) For any APD that passes the test: Before further flight, reidentify the APD.

(ii) For any APD that fails the test, before further flight, replace the APD with an unaffected APD, or one provided by Kidde that has been successfully tested and reidentified.

(i) Return of Failed APDs

For any APD that fails the test specified in paragraph (h)(2) of this AD: Return the APD at the applicable time specified in paragraph (i)(1) or (2) of this AD to Kidde Aerospace & Defense, 4200 Airport Dr NW, Building B, Wilson, NC 27896–8630, Attention Keith Fail, Supervisor, Service Center.

(1) If the test was done on or after the effective date of this AD: Send the APD within 30 days after completion of the test.

(2) If the test was done before the effective date of this AD: Send the APD within 30 days after the effective date of this AD.

(j) Parts Installation Limitation

As of the effective date of this AD, no person may install an affected APD, unless the APD has been successfully tested and reidentified in accordance with Bombardier Service Bulletin 84–26–19, Revision 'A,' dated February 11, 2019.

(k) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin 84–26–19, dated October 24, 2018.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW, Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2019–13, dated April 4, 2019, for related information. This MCAI may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0702.

(2) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(3) For service information identified in this AD, contact De Havilland Aircraft of Canada Ltd., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd@dehavilland.com;* internet: *https://dehavilland.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on September 24, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–21352 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0709; Product Identifier 2019–NM–127–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes. This proposed AD was prompted by reports of fuselage bottom skin exfoliation corrosion, fuselage skin bulging and cracking, and missing fastener heads. This proposed AD would require a detailed inspection of the fuselage bottom skin for corrosion, skin cracks or bulges, and missing, loose or broken fasteners, and, depending on the findings, accomplishment of applicable repair instructions, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 18, 2019.

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

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

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0709.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0709; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0709; Product Identifier 2019–NM–127–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments, without change, to *http://www.regulations.gov,* including any

personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this NPRM.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0162, dated July 10, 2019 (''EASA AD 2019–0162'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes.

This proposed AD was prompted by reports of fuselage bottom skin exfoliation corrosion, fuselage skin bulging and cracking, and missing fastener heads. The FAA is proposing this AD to address this condition which, if not corrected, could affect the structural integrity of the fuselage, possibly resulting in a decompression event. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0162 describes procedures for a one-time detailed inspection of the fuselage bottom skin for corrosion, skin cracks or bulges, and missing, loose or broken fasteners, and, depending on the findings, accomplishment of applicable repair instructions. EASA AD 2019–0162 also describes procedures for reporting all of the inspection results (both positive and negative). This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0162 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD. This proposed AD also would require sending the inspection results to Fokker Services.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. As a result, EASA AD 2019–0162 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0162 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2019–0162 that is required for compliance with EASA AD 2019–0162 will be available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0709 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 4 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$0	$85	$340

* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the proposed reporting requirement in this proposed AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $340, or $85 per product.

The FAA estimates the following costs to do any necessary on-condition action that would be required based on the results of any required action. The FAA has no way of determining the number of aircraft that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
2 work-hours × $85 per hour = $170	(*)	$170

* The FAA has received no definitive data that would enable us to provide parts cost estimates for the on-condition actions specified in this proposed AD.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this NPRM is 2120–0056. The paperwork cost associated with this NPRM has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this NPRM is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW, Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Fokker Services B.V.: Docket No. FAA–2019–0709; Product Identifier 2019–NM–127–AD.

(a) Comments Due Date

The FAA must receive comments by November 18, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by reports of fuselage bottom skin exfoliation corrosion, fuselage skin bulging and cracking, and missing fastener heads. The FAA is issuing this AD to address this condition which, if not corrected, could affect the structural integrity of the fuselage, possibly resulting in a decompression event.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with European Union Aviation Safety Agency (EASA) AD 2019–0162, dated July 10, 2019 (''EASA AD 2019–0162'').

(h) Exceptions to EASA AD 2019–0162

(1) For purposes of determining compliance with the requirements of this AD: Where EASA AD 2019–0162 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0162 does not apply to this AD.

(3) Paragraph (3) of EASA AD 2019–0162 specifies to report inspection results to Fokker within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(3) *Paperwork Reduction Act Burden Statement:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control

Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW, Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(j) Related Information

(1) For information about EASA AD 2019–0162, contact the EASA, at Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this EASA AD at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. EASA AD 2019–0162 may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0709.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

Issued in Des Moines, Washington, on September 24, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–21353 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0710; Product Identifier 2019–NM–060–AD]

RIN 2120–AA64

Airworthiness Directives; Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.; Canadair Limited) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Viking Air Limited Model CL–215–1A10 and CL–215–6B11 (CL–215T Variant) airplanes. This proposed AD was prompted by reports of cracks on the wing lower skin under the drag angle at a certain wing station (WS). This proposed AD would require a one-time inspection of the wing lower skin under the drag angle at a certain WS to determine if a certain repair or modification has been accomplished; repetitive visual inspections of certain fuselage structures; repetitive eddy current inspections of the front spar along a certain WS reference line, the drag angle, and all fastener holes; repetitive structural gap checks of a certain surface; and corrective actions if necessary. This proposed AD would also require replacing certain rivets with certain fasteners, and corrective actions if necessary. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 18, 2019.

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

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

For service information identified in this NPRM, contact Viking Air Limited, 1959 de Havilland Way, Sidney, British Columbia V8L 5V5, Canada; telephone +1–250–656–7227; fax +1–250–656–0673; email *acs-technical.publications@vikingair.com;* internet *http://www.vikingair.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0710; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Aziz Ahmed, Aerospace Engineer, Airframe and Propulsion Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7329; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0710; Product Identifier 2019–NM–060–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments, without change, to *http://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this NPRM.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2019–07, dated March 4, 2019 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Viking Air Limited Model CL–215–1A10 and CL–215–6B11 (CL–215T Variant) airplanes. You may examine the MCAI in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0710.

This proposed AD was prompted by reports of cracks on the wing lower skin under the drag angle at a certain wing station (WS). The FAA is proposing this AD to address this condition, which if not detected and corrected, may lead to widespread fatigue damage and wing structure failure. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

Viking has issued Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019. This service information describes procedures for a one-time inspection of the wing lower skin under the drag angle at a certain

WS to determine if a certain repair or modification has been accomplished; repetitive visual inspections of fastener installation for abnormal conditions (missed, sheared, distorted, deformed or loose fastener heads/collar/nuts, and corrosion) and corrective actions as necessary; repetitive visual inspections of the open fastener holes for cracks, burrs, elongation, double or mis-drilled holes, or corrosion, and corrective actions as necessary; repetitive visual inspections of drag angles, wing lower skin, lower stringers, spar lower caps/webs, and fuselage structures (internally and externally) where fasteners are removed for surface cracks or evidence of distortion and surface defects (scratches, gouges, nicks, scores, dents, surface pitting/corrosion, or other surface damage), and corrective actions as necessary; repetitive bolt hole eddy current (BHEC) inspections of all identified fastener holes (except reference holes) for cracks, and corrective actions as necessary; repetitive eddy current surface scans for surface defects and cracks of the drag angle (along the bending radius) and all fastener holes in which crack(s) indication is observed, and corrective actions as necessary; repetitive structural gap checks of the mating surface between the wing lower skin and the drag angles and corrective actions as necessary; and procedures for replacing certain rivets with certain fasteners, and corrective actions as necessary. Corrective actions include, among other things, repair, replacement, and oversizing any affected holes.

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

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously. This proposed AD also would require sending the inspection results to Viking.

Differences Between This Proposed AD and the MCAI or Service Information

Although Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019, allows, for certain airplanes, the installation of preventative Repair Engineering Order (REO) 215–57–V022, and the accomplishment of certain inspections as specified in that REO, this proposed AD would not allow those actions to be done using REO 215–57–V022. The FAA has determined that REO 215–57–V022 provides only generic instructions, not instructions tailored to the type of damage that might be found during the inspections required by this proposed AD.

Costs of Compliance

The FAA estimates that this proposed AD affects 4 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 48 work-hours × $85 per hour = Up to $4,080	$0	Up to $4,080	Up to $16,320.

* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the proposed reporting requirement in this proposed AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $340, or $85 per product.

The FAA has received no definitive data that would enable the agency to provide cost estimates for the on-condition actions specified in this proposed AD.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this NPRM is 2120–0056. The paperwork cost associated with this NPRM has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this NPRM is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW, Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Viking Air Limited (Type Certificate Previously Held by Bombardier, Inc.; Canadair Limited): Docket No. FAA–2019–0710; Product Identifier 2019–NM–060–AD.

(a) Comments Due Date

The FAA must receive comments by November 18, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Viking Air Limited (Type Certificate previously held by Bombardier, Inc.; Canadair Limited) airplanes, certificated in any category, identified in paragraphs (c)(1) and (2) of this AD.

(1) Model CL–215–1A10 airplanes, serial numbers 1001 through 1125 inclusive.

(2) Model CL–215–6B11 (CL–215T Variant) airplanes, serial numbers 1001 through 1125 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Reason

This proposed AD was prompted by reports of cracks on the wing lower skin under the drag angle at a certain wing station (WS). The FAA is issuing this AD to address this condition, which if not detected and corrected, may lead to widespread fatigue damage and wing structure failure.

(f) Compliance

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

(g) Reporting of Existing Repairs

(1) Within 10 months after the effective date of this AD: Perform a one-time inspection to identify existing standard structural repair manual (SRM) repairs and non-standard repairs on the wing box between WS 355L and WS 355R in accordance with the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019. A review of airplane maintenance records is acceptable in lieu of this inspection if accomplishment of the repair or modification can be conclusively determined from that review. For the purposes of this AD, replacement of damaged wing box primary structural member is considered a ''repair.''

(2) If, during the inspection required by paragraph (g)(1) of this AD, a repair or modification of the wing box between WS 355L and WS 355R is found: Within 11 months after the effective date of this AD: Submit an Inspection Reply Form with details of the repair or modification to Viking Air Limited via email at *technical.support@vikingair.com* or via fax at 1–403–295–8888, and request inspection instructions for the repaired or modified structure in accordance with the procedures specified in paragraph (o)(2) of this AD.

(h) Record Keeping

Beginning no later than 30 days after the effective date of this AD: Record all water landings, land landings, and water drops, and use this data to determine compliance times for the inspections required by paragraph (i) of this AD. For the purposes of this AD, total operation cycles equals water drops plus water landings (non-water scooping/dropping operations) plus land landings. If there are no records of water landings, determine total operation cycles using only land landings and water drops.

(i) Repetitive Actions

Except as specified in paragraph (m) of this AD, at the earliest of the times specified in figure 1 to paragraphs (i), (l), and (m) of this AD: Do the actions specified in paragraphs (i)(1) through (6) of this AD. Repeat the actions thereafter at intervals not to exceed the earliest of the times specified in figure 2 to paragraphs (i) and (m) of this AD.

(1) Perform a visual inspection of the fastener installation for abnormal conditions (missed, sheared, distorted, deformed or loose fastener heads/collar/nuts, and corrosion) in accordance with Section II.A.1. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(2) Perform a visual inspection of the open fastener holes for cracks, burrs, elongation, double or mis-drilled holes, and corrosion in accordance with Section II.A.1. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(3) Perform a visual inspection of the drag angles, wing lower skin, lower stringers, spar lower caps/webs, and fuselage structures (internally and externally) where fasteners are removed for surface cracks or evidence of distortion and surface defects in accordance with Section II.A.2. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(4) Perform a bolt hole eddy current (BHEC) inspection of all identified fastener holes (except reference holes) specified in Figure 1 of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019, for any cracks in accordance with Section II.A.3. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(5) Perform an eddy current surface scan for surface defects and cracks of the drag angle (along the bending radius) and all fastener holes in which crack(s) indication have been observed in accordance with Section II.A.4. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(6) Perform a structural gap check between the drag angles and the wing lower skin in accordance with Section II.A.5. of the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

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Figure 1 to paragraphs (i), (l), and (m) – *Initial compliance times*

Description	Total Flight Hours as of the Effective Date of this AD	Total Water Drops as of the Effective Date of this AD	Total Operation Cycles as of the Effective Date of this AD
Initial Inspection Threshold	7,500	10,000	12,000

Figure 2 to paragraph (i) and (m) – *Repetitive compliance times*

Description	Flight Hours	Water Drops	Total Operation Cycles
Repetitive Inspection	3,750	5,000	6,000

(j) Corrective Actions

If any of the findings identified in paragraphs (j)(1) through (6) of this AD are found, before further flight, repair using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Viking Air Limited's TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(1) If, during any inspection required by paragraph (i)(1) of this AD, any abnormal condition is found.

(2) If, during any inspection required by paragraph (i)(2) of this AD, any cracks, burrs, elongation, double or mis-drilled holes, or corrosion are found.

(3) If, during any inspection required by paragraph (i)(3) of this AD, any surface cracks or evidence of distortion or surface defects are found.

(4) If, during any inspection required by paragraph (i)(4) of this AD, any cracks are found.

(5) If, during any inspection required by paragraph (i)(5) of this AD, any surface defects or cracks are found.

(6) If, during any structural gap check required by paragraph (i)(6) of this AD, any gaps are found.

(k) Exception to Service Information

Where Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019, specifies that preventative Repair Engineering Order (REO) 215–57–V022 may be installed and certain inspections may be done as specified in that REO, this AD does not allow the use of that REO for compliance with this AD.

(l) Replace Rivets

For airplanes on which the actions specified in Viking Alert Service Bulletin 215–A568, Revision 3, dated June 15, 2016, or earlier, have been accomplished: At the earliest of the times specified in figure 1 to paragraphs (i), (l), and (m) of this AD, perform a one-time replacement of installed NAS1242AD rivets with Titanium Hi-Lite fasteners and do a BHEC inspection of the open holes for cracks in accordance with the Accomplishment Instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019. If any crack is found, before further flight, repair using a method approved by the Manager, New York ACO Branch, FAA; or TCCA; or Viking Air Limited's TCCA DAO. If approved by the DAO, the approval must include the DAO-authorized signature.

(m) Initial Compliance Time for Certain Airplanes

(1) For airplanes on which the actions specified in Viking Alert Service Bulletin 215–A568, Revision 3, dated June 15, 2016, or earlier, have not been accomplished: At the times specified in figure 3 to paragraph (m)(1) of this AD, accomplish the actions required by paragraph (i) of this AD. Repeat the actions thereafter at the times specified in figure 2 to paragraphs (i) and (m) of this AD. For the purposes of this AD, the earliest compliance time applies if the accumulated airplane flight times (flight hours, water drops, or total operation cycles) meet multiple criteria.

Figure 3 to paragraph (m)(1) – *Initial compliance times for airplanes on which the actions specified in Viking Alert Service Bulletin 215-A568, Revision 3, dated June 15, 2016, or earlier, have not been accomplished*

Total Flight Hours as of the Effective Date of this AD	Total Water Drops as of the Effective Date of this AD	Total Operation Cycles as of the Effective Date of this AD	Compliance Time
7,500 or more	Or 22,001 or more	Or 26,401 or more	Within 4 months after the effective date of this AD
7,500 or more	Or 20,001 to 22,000	Or 24,001 to 26,400	Within 8 months after the effective date of this AD
7,500 or more	Or 10,000 to 20,000	Or 12,000 to 24,000	Within 18 months after the effective date of this AD
Less than 7,500	And less than 10,000	And less than 12,000	At or before the initial inspection time in figure 1 to paragraphs (i), (l), and (m) of this AD, or within 18 months after the effective date of this AD, whichever occurs later

(2) For airplanes on which the actions specified in Viking Alert Service Bulletin 215–A568, Revision 3, dated June 15, 2016, or earlier, have been accomplished: At the times specified in figure 4 to paragraph (m)(2) of this AD, accomplish the actions required by paragraph (i) of this AD. Repeat the actions thereafter at the times specified in figure 2 to paragraphs (i) and (m) of this AD. For the purposes of this AD, the earliest compliance time applies if the accumulated airplane flight times (flight hours, water drops, or total operation cycles) meet multiple criteria.

Figure 4 to paragraph (m)(2) –*Initial compliance times for airplanes on which the actions specified in Viking Alert Service Bulletin 215-A568, Revision 3, dated June 15, 2016, or earlier, have been accomplished*

Total Flight Hours as of the Effective Date of this AD	Total Water Drops as of the Effective Date of this AD	Total Operation Cycles as of the Effective Date of this AD	Compliance Time
7,500 or more	Or 20,001 or more	Or 24,001 or more	Within 12 months after the effective date of this AD
7,500 or more	Or 10,000 to 20,000	Or 12,000 to 24,000	Within 18 months after the effective date of this AD
Less than 7,500	And less than 10,000	And less than 12,000	At or before the initial inspection time in figure 1 to paragraphs (i), (l), and (m) of this AD, or within 18 months after the effective date of this AD, whichever occurs later

(n) Reporting

At the applicable time specified in paragraph (n)(1) or (2) of this AD: Report the results of the actions required by paragraph (i) of this AD to Viking Air Limited via email at *technicalsupport@vikingair.com* or fax at 1–403–295–8888 in accordance with the instructions of Viking Alert Service Bulletin 215–A568, Revision 4, dated January 22, 2019.

(1) If the action was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the action was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(o) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or TCCA; or Viking Air Limited's TCCA DAO. If approved by the DAO, the approval must include the DAO-authorized signature.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW, Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(p) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2019–07, dated March 4, 2019, for related information. This MCAI may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0710.

(2) For more information about this AD, contact Aziz Ahmed, Aerospace Engineer, Airframe and Propulsion Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7329; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(3) For service information identified in this AD, contact Viking Air Limited, 1959 de Havilland Way, Sidney, British Columbia V8L 5V5, Canada; telephone +1–250–656–7227; fax +1–250–656–0673; email *acs-technical.publications@vikingair.com;* internet *http://www.vikingair.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued in Des Moines, Washington, on September 24, 2019.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–21384 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0614; Product Identifier 2019–NE–14–AD]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2019–11–08, which applies to all International Aero Engines, LLC (IAE) PW1133G–JM, PW1133GA–JM, PW1130G–JM, PW1129G–JM, PW1127G–JM, PW1127GA–JM, PW1127G1–JM, PW1124G–JM, PW1124G1–JM, and PW1122G–JM model turbofan engines. AD 2019–11–08 requires the removal of the main gearbox (MGB) assembly and electronic engine control (EEC) software and the installation of a part and software version eligible for installation for engines that operate on extended operations (ETOPS) flights. The actions in AD 2019–11–08 were interim and only addressed engines that operate on 180-minute or 120-minute ETOPS flights. The FAA now proposes to supersede AD 2019–11–08 to require removal and replacement of the MGB assembly on all affected engines, including engines that do not operate on 180-minute or 120-minute ETOPS flights. This proposed AD would retain all requirements of AD 2019–11–08 for ETOPS engines, and would also require replacement of the affected MGB assembly and EEC software at the next engine shop visit after the effective date of this AD for engines that do not operate on ETOPS flights. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 18, 2019.

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

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

For service information identified in this NPRM, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: 800–565–0140; email: *help24@pw.utc.com;* internet: *http://fleetcare.pw.utc.com.* You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0614; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kevin M. Clark, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7088; fax: 781–238–7199; email: *kevin.m.clark@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0614; Product Identifier 2019–NE–14–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to *http://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this proposed AD.

Discussion

The FAA issued AD 2019–11–08, Amendment 39–19654 (84 FR 27511, June 13, 2019), (''AD 2019–11–08''), for all IAE PW1133G–JM, PW1133GA–JM, PW1130G–JM, PW1129G–JM, PW1127G–JM, PW1127GA–JM, PW1127G1–JM, PW1124G–JM, PW1124G1–JM, and PW1122G–JM model turbofan engines. AD 2019–11–08 requires the removal of the MGB assembly and EEC software and the installation of a part and software version eligible for installation for engines that operate on ETOPS flights. AD 2019–11–08 resulted from multiple reports of in-flight engine shutdowns (IFSDs) as the result of high-cycle fatigue causing fracture of certain parts of the MGB assembly. The FAA issued AD 2019–11–08 to prevent failure of the MGB assembly.

Actions Since AD 2019–11–08 Was Issued

The actions in AD 2019–11–08 were interim and only addressed engines that operate on 180-minute or 120-minute ETOPS flights. The FAA now proposes to supersede AD 2019–11–08 to require removal and replacement of the MGB assembly on all affected engines, including engines that do not operate on 180-minute or 120-minute ETOPS flights.

The FAA also determined the required actions should be revised to update the required compliance times for engines that operate on 180-minute ETOPS flights to ''before further flight,'' because the FAA expects that all engines that operate on ETOPS flights have complied with the required actions of AD 2019–11–08.

Related Service Information

The FAA reviewed PW Service Bulletin (SB) PW1000G–C–72–00–0129–00A–930A–D, Original Issue, dated April 18, 2019, and PW SB PW1000G–C–73–00–0037–00A–930A–D, Original Issue, dated May 28, 2019. PW SB PW1000G–C–72–00–0129–00A–930A–D, Original Issue, dated April 18, 2019, describes procedures for replacing the IDG oil pump drive gearshaft assembly in the MGB assembly. PW SB PW1000G–C–73–00–0037–00A–930A–D, Original Issue, dated May 28, 2019, describes procedures for replacing the EEC software to incorporate FCS 5.0 software.

FAA's Determination

The FAA is proposing this AD because it evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain certain requirements of AD 2019–11–08. For engines that operate on 180-minute ETOPS flights, this proposed AD would require replacement of the affected MGB assembly before further flight. For engines that operate on 120-minute ETOPS flights, this proposed AD would require replacement of the affected MGB assembly within 120 days after June 28, 2019 (the effective date of AD 2019–11–08). This proposed AD would require replacement of the affected MGB assembly at the next engine shop visit after the effective date of this AD for engines that do not operate on ETOPS flights. This proposed AD would also retain the replacement requirement of EEC software within 120 days after June 28, 2019 (the effective date of AD 2019–11–08).

Costs of Compliance

The FAA estimates that this proposed AD affects 72 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace the MGB assembly	13 work-hours × $85 per hour = $1,105	$75,000	$76,105	$5,479,560
Replace the EEC software	3 work-hours × $85 per hour = $255	0	255	18,360

The new requirements of this proposed AD add no additional economic burden.

Authority for This Rulemaking

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

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2019–11–08, Amendment 39–19654 (84 FR 27511, June 13, 2019), and adding the following new AD:

International Aero Engines: Docket No. FAA–2019–0614; Product Identifier 2019–NE–14–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by November 18, 2019.

(b) Affected ADs

This AD replaces AD 2019–11–08, Amendment 39–19654 (84 FR 27511, June 13, 2019).

(c) Applicability

This AD applies to all International Aero Engines, LLC (IAE) PW1133G–JM, PW1133GA–JM, PW1130G–JM, PW1129G–JM, PW1127G–JM, PW1127GA–JM, PW1127G1–JM, PW1124G–JM, PW1124G1–JM, and PW1122G–JM model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7260, Turbine Engine Accessory Drive.

(e) Unsafe Condition

This AD was prompted by multiple reports of in-flight engine shutdowns as the result of high-cycle fatigue causing fracture of certain parts of the main gearbox (MGB) assembly. The FAA is issuing this AD to prevent failure of the MGB assembly. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Remove the MGB assembly, part number (P/N) 5322505, and install a part eligible for installation as follows:

(i) For engines that operate on 180-minute extended operations (ETOPS) flights, before further flight after the effective date of this AD;

(ii) For engines that operate on 120-minute ETOPS flights, within 120 days from June 28, 2019 (the effective date of AD 2019–11–08), or before further flight after the effective date of this AD, whichever occurs later;

(iii) For engines that do not operate on ETOPS flights, at the next engine shop visit after the effective date of this AD.

(2) For engines with MGB assembly P/N 5322505, within 120 days from June 28, 2019 (the effective date of AD 2019–11–08), or before further flight after the effective date of this AD, whichever occurs later, remove

electronic engine control (EEC) software earlier than FCS 5.0 from the engine and install EEC software that is eligible for installation.

(h) Installation Prohibition

(1) After the effective date of this AD, do not install integrated drive generator (IDG) oil pump drive gearshaft assembly, P/N 5322630–01, into an MGB assembly.

(2) After the effective date of this AD, do not load EEC software earlier than FCS 5.0 on any engine identified in paragraph (c) of this AD with an MGB assembly, P/N 5322505.

(i) Definitions

(1) For the purpose of this AD, a ''part eligible for installation'' is an MGB assembly with an IDG oil pump drive gearshaft assembly other than P/N 5322630–01.

(2) For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges, except that the separation of engine flanges solely for the purposes of transportation of the engine without subsequent engine maintenance does not constitute an engine shop visit.

(3) For the purpose of this AD, ''EEC software that is eligible for installation'' is EEC software FCS 5.0 and later.

(j) Alternative Methods of Compliance (AMOCs)

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

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

(k) Related Information

(1) For more information about this AD, contact Kevin M. Clark, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7088; fax: 781–238–7199; email: *kevin.m.clark@faa.gov.*

(2) For service information identified in this AD, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: 800–565–0140; email: *help24@pw.utc.com;* internet: *http://fleetcare.pw.utc.com.* You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued in Burlington, Massachusetts, on October 1, 2019.

Robert J. Ganley,

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

[FR Doc. 2019–21618 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–13–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4003

RIN 1212–AB35

Administrative Review of Agency Decisions

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: The Pension Benefit Guaranty Corporation is amending its regulation on Rules for Administrative Review of Agency Decisions. The proposed rule would clarify and make changes to the review process for certain agency determinations and the procedures for requesting administrative review.

DATES: Comments must be submitted on or before December 3, 2019 to be assured of consideration.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: reg.comments@pbgc.gov.* Refer to RIN–1212–AB35 in the subject line.
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026.

All submissions must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and the RIN for this rulemaking (RIN 1212–AB35). All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026. For more information on how to submit a written request, please call 202–326–4040 during normal business hours. (TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Karen B. Levin (*levin.karen@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–326–4400, extension 3559. (TTY users may call the Federal Relay Service toll-free at 800–877–8339 and ask to be connected to 202–326–4400, extension 3559.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose and Authority

This proposed rule would amend PBGC's regulation on rules for administrative review of agency decisions to clarify, simplify, and make other editorial changes to the language, and codify PBGC practices.

PBGC's legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA.

Major Provisions

The proposed rulemaking would:

- Subject all coverage determinations to appeal.
- Subject all determinations concerning the allocation of a trusteed plan's assets upon plan termination to appeal, except for determinations concerning the distribution of residual assets, which would remain subject to reconsideration.
- Clarify that, consistent with PBGC's long-standing practice, when PBGC makes an initial determination effective on the date of issuance, a person aggrieved by the initial determination has no right to request reconsideration or appeal of the determination.
- Clarify where to send requests for extensions on appeals and extensions for reconsideration.
- Clarify that persons seeking administrative review may request information in PBGC's possession by using PBGC's procedures for requests under the Freedom of Information Act and the Privacy Act.

Background

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA): A single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. The amendments proposed in this rulemaking only apply to the single-employer program.

PBGC is committed to the ongoing retrospective review of its regulations.

This practice ensures that PBGC provides clear and helpful guidance, minimizes burdens and maximizes benefits, and addresses ineffective and outdated rules. In the course of PBGC's regulatory review, PBGC has identified opportunities to improve its regulation on Rules for Administrative Review of Agency Decisions (29 CFR part 4003) by making it more transparent, simplifying language, and codifying policies. The proposed rule also makes clarifications and other editorial changes to part 4003.

A detailed discussion of the proposed regulatory changes follows. PBGC invites comments on these proposals.

Review Process for Agency Determinations

PBGC's administrative review regulation provides procedures so that persons who are aggrieved by PBGC determinations have an opportunity to present their positions to PBGC before a final decision is made by the agency. When PBGC first promulgated its rules on administrative review of agency decisions in 1979 (the ''1979 rule''), it emphasized the competing interests of providing ''fair and effective administrative review'' and ''keep[ing] to a minimum the time and cost entailed in obtaining PBGC review of its decisions.'' [1] To balance these interests, PBGC developed an administrative review system with two separate processes: Reconsideration and appeal.

Under reconsideration, aggrieved persons generally raise their concerns and make their cases directly to a higher-level official within the same department that issued the initial determination. Most requests for reconsideration are filed by the designated payor [2] under § 4003.1(b)(2) and relate to premiums, interest, and late payment penalties.

Under the appeals process, the decisionmaker reviewing the initial determination is not within the same department that issued the initial determination. Rather, the PBGC Appeals Board, which is located within the Office of the General Counsel, provides an independent review of the initial determination. Decisions by the Appeals Board may be made either by a three-member panel or by an individual member. Originally, a decision on appeal was always decided by a three-member PBGC Appeals Board. The appeals process changed in 2002 when the administrative review regulation was amended to expedite the appeals process, authorizing a single member of the PBGC Appeals Board to decide routine appeals instead of the three-member PBGC Appeals Board.[3] All non-routine appeals are decided by a three-member panel. Most appeals are filed by individuals (participants, beneficiaries, and alternate payees) in connection with benefit entitlement or amounts, although sponsors can, and sometimes do, file appeals of termination liability assessments and coverage denials.

Subpart A of the regulation provides a list of initial determinations made by PBGC, with each determination subject to either the reconsideration procedures described in subpart C or the appeals procedures described in subpart D. PBGC proposes to reorganize the list in § 4003.1(b) into two new paragraphs by moving and reorganizing the list of initial determinations subject to reconsideration to § 4003.1(d) and the list of initial determinations subject to appeal to § 4003.1(e). These changes would simplify references to the types of determinations subject to each type of administrative review and improve the readability of this section.

Subpart B of the regulation provides rules for the form and contents of initial determinations and specifies that initial determinations will not become effective until the time for filing a request for reconsideration under subpart C or an appeal under subpart D has elapsed.

Under an exception in § 4003.22(b), PBGC may in its discretion order that an initial determination is effective on the date of issuance. As an example, when PBGC makes an initial determination under section 4042 of ERISA that the statutory criteria for termination are met, the initial determination states that it is effective on the date of issuance. When PBGC makes an order that an initial determination is effective on the date of issuance, any person aggrieved by the initial determination has exhausted all available administrative remedies and may seek judicial review of PBGC's determination in an appropriate court under section 4003(f)(2) of ERISA.

PBGC proposes to clarify the exception under § 4003.22(b) by providing that the exception does not apply to initial determinations related to a participant's or beneficiary's benefit entitlement and the amount of benefit payable under a covered plan, to whether a domestic relations order is or is not qualified, and to whether benefits are payable under section 4050 of ERISA and part 4050, as listed respectively in proposed § 4003.1(e)(2), (3), and (6). PBGC proposes to further clarify § 4003.22(b) by providing that when PBGC issues an order making an initial determination effective on the date of issuance, a person aggrieved by the initial determination has no right to request review under subparts C and D, consistent with PBGC's long-standing practice, and has exhausted all administrative remedies.

Coverage Determinations

PBGC insures plans described in section 4021(a) of ERISA that do not fall within one of the exemptions from coverage listed in section 4021(b)(1)–(13) of ERISA. If a question arises about whether a plan is covered under title IV, PBGC may make a coverage determination.

The current language in the administrative review regulation provides that coverage determinations under section 4021 of ERISA are subject to different review procedures. An initial determination that a plan is covered under section 4021 is subject to reconsideration by the PBGC department that issued the original determination. An initial determination that a plan is not covered is subject to appeal to the PBGC Appeals Board. Based on internal data gathered by PBGC from fiscal years 2013 through 2017, there were few requests for reconsideration of coverage determinations (a total of 18) and even fewer requests for appeal of coverage determinations (one in 2017). The data indicates that the total amount of time and agency resources used to close requests for reconsideration and appeals of coverage determinations are similar.

As originally designed, case resolution under the appeals process generally took longer and put a greater burden on PBGC's administrative resources than the reconsideration process. The movement to single member decisions for routine cases and other process improvements have largely mitigated these issues. In light of these improvements, for the sake of consistency, PBGC is proposing to make all coverage determinations subject to appeal to the PBGC Appeals Board. In cases in which the Appeals Board is considering granting a plan sponsor's appeal by finding that a plan is not covered, the Appeals Board would make reasonable efforts to notify plan participants of the decision under consideration and permit them an opportunity to present matters as a potential aggrieved party to the appeal under § 4003.57(a). PBGC proposes to remove the current § 4003.1(b)(1) and proposes additional language in new

[1] *See* 44 FR 42181, 42181 (July 19, 1979).

[2] *See* section 4007 of ERISA (designated payor is defined as a contributing sponsor or plan administrator in the case of a single-employer plan).

[3] *See* 67 FR 47694, 47694 (July 22, 2002).

§ 4003.1(e)(1), to subject all coverage determinations to the appeals process.

Asset Allocation Determinations

Section 4044 of ERISA requires that when an underfunded pension plan terminates, PBGC must assign benefits payable to each participant to one or more of six priority categories and allocate the plan's assets to the benefits in each category in a prescribed sequential order (*i.e.,* priority categories 1 through 6). To accomplish the allocation process in a terminated plan, PBGC first values the benefits in each of a terminated plan's six priority categories and the terminated plan's assets as of the plan's termination date. After valuing the benefits and assets, PBGC allocates the assets available to pay benefits to the benefits assigned to each priority category, beginning with the highest priority category, *i.e.,* priority category 1, and continuing in sequential order until the assets satisfy all benefits in all priority categories or until the assets are insufficient to pay all benefits within a particular category.

In substantially all plans that terminate in a distress or involuntary (PBGC-initiated) termination, the plan's assets do not satisfy all benefits assigned to the six priority categories and the assets will be insufficient to satisfy all benefit liabilities, as defined under section 4001(a)(16) of ERISA. PBGC typically becomes the statutory trustee of these plans and pays guaranteed benefits to participants and beneficiaries up to statutory limits. Some participants may receive more than their statutorily guaranteed benefit depending upon the priority category to which their benefit is assigned and the extent to which (if any) assets are sufficient to pay all benefits in that category. Such plans rarely have residual assets.

In an employer-initiated standard termination of a sufficient plan, a plan's assets must satisfy and may exceed all benefit liabilities under the plan. Section 4044(d) of ERISA describes the circumstances under which any residual assets of a single-employer plan may be distributed to the employer or participants and beneficiaries.

The current language in the administrative review regulation provides that PBGC's asset allocation determinations are subject to the reconsideration process, describing them in § 4003.1(b)(4) as ''determinations with respect to allocation of assets under section 4044 of ERISA, including distribution of excess assets under section 4044(d).'' [4] This language could be read to imply that PBGC issues standalone determinations with respect to asset allocations. Although PBGC's processing of a trusteed plan includes an allocation of the plan's assets available to pay benefits under section 4044 of ERISA, determinations on allocating assets to benefits in the six priority categories depend on the value of benefits in each priority category and the plan assets available to pay benefits in a particular priority category in the prescribed sequence. Such determinations are incorporated into other benefit-specific determinations that PBGC regularly issues that are subject to the appeals process, such as those issued under § 4003.1(b)(7) (determinations under section 4022(a) or (c) of ERISA with respect to benefit entitlement of participants and beneficiaries under covered plans) and § 4003.1(b)(8) (determinations under section 4022(b) or (c) or section 4022B of ERISA of the amount of benefits payable to participants and beneficiaries under covered plans).

Participants and their beneficiaries may appeal the initial determinations of their benefit entitlements and amounts of benefits payable, as provided in their individual benefit determinations. Determinations of benefit entitlements and amounts of benefits payable depend on PBGC's assignment and valuation of benefits and the allocation of assets available to pay benefits to the priority categories to which those benefits are assigned and the extent to which assets are allocated to non-guaranteed benefits in certain priority categories pursuant to section 4044(a) of ERISA and PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044).

Consistent with PBGC's long-standing practice, PBGC proposes to clarify in new § 4003.1(e)(2) that the right to appeal an individual benefit determination necessarily includes the right to appeal a participant's or beneficiary's benefit entitlement and the amount of benefit payable based on the value of the benefits assigned to specific priority categories and PBGC's allocation of assets available to pay benefits to those categories under the method prescribed by section 4044(a) of ERISA. PBGC proposes to remove the current § 4003.1(b)(4) and create a new § 4003.1(d)(2)(iv), to continue to subject determinations involving the distribution of residual assets under section 4044(d) of ERISA to the reconsideration process. PBGC also proposes to revise the description of individual benefit determinations subject to appeal in current § 4003.1(b)(7) and (8) and reorganize these provisions in new § 4003.1(e)(2) and (3).

Administrative Review Procedures

Assistance With Obtaining Information

Section 4003.3 of the administrative review regulation provides that a person may request PBGC's assistance in obtaining relevant information in the possession of a third party. The regulation is silent about obtaining information in PBGC's possession. The preamble to the 1979 rule explains that this omission was intentional because ''a party to an appeal who wishes to examine PBGC documents need only file a request pursuant to [PBGC's FOIA regulation].'' [5]

It has come to PBGC's attention through the Office of the PBGC Participant and Plan Sponsor Advocate that participants seeking administrative review are often unaware of their ability to request relevant information under the FOIA and Privacy Act by using PBGC procedures at 29 CFR parts 4901 and 4902, respectively. While parts 4901 and 4902 provide straightforward processes for requesting and obtaining such materials from PBGC's Disclosure Division, some participants learn of them only after contacting another PBGC office and ultimately being referred to the Disclosure Division and instructed to follow such procedures. PBGC aims to avoid confusing participants in their efforts to identify the appropriate point of contact and steps to obtain relevant information.

To make the information-gathering process more efficient and transparent for persons seeking administrative review, PBGC proposes to reorganize § 4003.3 and to clarify that persons may request information using PBGC's procedures for FOIA and Privacy Act requests. Paragraph (a) would contain the section's scope, paragraph (b) would provide a description concerning information not in the possession of PBGC, and paragraph (c) would provide a description concerning information in the possession of PBGC including a cross-reference to PBGC's FOIA and Privacy Act regulations.

PBGC proposes additional language in § 4003.3(b) concerning a request for PBGC's assistance in obtaining materials not in the possession of PBGC to clarify that such a request must be submitted to the Appeals Board or the department responsible for reviewing the initial determination. The section refers persons requesting PBGC's assistance

[4] Note, section 4044(d) of ERISA uses the word ''residual'' instead of ''excess.''

[5] *See* 44 FR 42181, 42185 (July 19, 1979) and 29 CFR part 4901.

with a reconsideration to § 4003.33 and with an appeal to § 4003.54.

Extension of Time

PBGC proposes deleting § 4003.4(b) concerning requests for extensions of time related to disaster relief and reorganizing the section to contain a single paragraph concerning a request for an extension of time when a document is required to be filed within a certain period. PBGC published a notice describing how it changed its announcement of relief from filing deadlines and penalties when a disaster occurs and that PBGC's disaster relief will be available at the same time the Internal Revenue Service issues disaster relief to taxpayers.[6]

PBGC proposes including language that provides that requests for extension of time for the submission of appeals should be sent to the Appeals Board while requests for extension of the submission of requests for reconsideration should be sent to the department that issued the initial determination.

Form and Contents of Request for Reconsideration

PBGC proposes to reorganize § 4003.34 to clarify the form and content requirements that a request for reconsideration must include.

Decision on Request for Reconsideration

The proposed rule would add new § 4003.35(c) to clarify that a decision on a request for reconsideration constitutes a final PBGC action, which is binding on all persons who participated in the request. This language is consistent with the language in § 4003.59(b) that a decision of the Appeals Board constitutes final agency action by PBGC.

Applicability

The amendments in this proposed rule would be applicable to initial determinations that are subject to this part and issued after December 3, 2019.

Compliance With Rulemaking Guidelines

Executive Orders 12866, 13563, and 13771

PBGC has determined that this rulemaking is not a ''significant regulatory action'' under Executive Order 12866 and Executive Order 13771. Accordingly, this proposed rule is exempt from Executive Order 13771, and the Office of Management and Budget has not reviewed the proposed rule under Executive Order 12866.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic implications of this proposed rule and has concluded that there will be no significant economic impact as a result of the proposed amendments to PBGC's regulation. Most of the proposed amendments merely clarify existing PBGC practices and neither the public nor PBGC is likely to assume any additional costs due to these amendments and revisions.

Section 6 of Executive Order 13563 requires agencies to rethink existing regulations by periodically reviewing their regulatory program for rules that ''may be outmoded, ineffective, insufficient, or excessively burdensome.'' These rules should be modified, streamlined, expanded, or repealed as appropriate. PBGC has identified the proposed amendments to the administrative review regulation and the clarifications and improvements to this regulation as consistent with the principles for review under Executive Order 13563. PBGC believes this provides clearer guidance to the public.

Regulatory Flexibility Act

The Regulatory Flexibility Act[7] imposes certain requirements with respect to rules that are subject to the notice-and-comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seek public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Small Entities

For purposes of the Regulatory Flexibility Act requirements with respect to this proposed rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations[8] and is consistent with certain requirements in title I of ERISA[9] and the Internal Revenue Code (Code),[10] as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.[11]

Thus, PBGC believes that assessing the impact of the final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration[12] under the Small Business Act. Therefore, PBGC requests comments on the appropriateness of the size standard used in evaluating the impact of small entities of the amendments in this proposed rule on small entities.

Based on its proposed definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. The amendments clarify existing PBGC practices and will have a neutral cost impact. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

Paperwork Reduction Act

PBGC's Form 723, Request for Additional time to file an Appeal of a PBGC Benefit Termination and Form 724, Appeal of a PBGC Benefit Determination, are used by aggrieved persons to assist them with filing an appeal. The collection of information with respect to administrative appeals is approved under control number 1212–0061 (expires August 31, 2019).

The proposed rule would not require changes to the forms used for appeals. The proposed rule would eliminate the requirement for an appellant to provide the names and addresses of persons who

[6] *See* 83 FR 30991, 30991 (July 2, 2018).

[7] 5 U.S.C. 601 *et seq.*

[8] *See, e.g.,* special rules for small plans under part 4007 (Payment of premiums).

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

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

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

[12] *See,* 13 CFR 121.201.

the appellant believes may be aggrieved if PBGC provides the relief sought. As few, if any, appellants provide this information, PBGC does not expect that this proposed change would impact the hour burden and cost burden for the information collection with respect to appeals.

The administrative review regulation requires that a request for reconsideration include specified information. The collection of information with respect to filings for reconsideration is approved under control number 1212–0063 (expires September 30, 2019).

The proposed rule would make clarifications to the information required to be submitted for a request for reconsideration, including copies of any documentation that supports the requestor's claim or assertions concerning the request. PBGC expects that this proposed clarification would make the process more efficient and would not impact the hour burden and cost burden for the information collection with respect to reconsideration.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

List of Subjects in 29 CFR Part 4003

Administrative practice and procedure, Organization and functions (Government agencies), Pension insurance.

In consideration of the foregoing, PBGC proposes to amend 29 CFR part 4003 as follows.

PART 4003—RULES FOR ADMINISTRATIVE REVIEW OF AGENCY DECISIONS

■ 1. The authority citation for part 4003 continues to read as follows:

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

■ 2. Amend § 4003.1 by:

■ a. Removing the phrase ''paragraph (b)'' and adding in its place ''paragraphs (d) and (e)'' in the first sentence of paragraph (a);

■ b. Removing the phrase ''paragraphs (b)(1) through (b)(5)'' and adding in its place ''paragraph (d)'' in the fourth sentence of paragraph (a);

■ c. Removing the phrase ''paragraphs (b)(6) through (b)(11)'' and adding in its place ''paragraph (e)'' in the fifth sentence of paragraph (a);

■ d. Revising paragraph (b); and

■ e. Adding paragraphs (d) and (e).

The revision and additions read as follows:

§ 4003.1 Purpose and scope.

* * * * *

(b) *Scope.* This part applies to the initial determinations made by PBGC that are listed in paragraphs (d) and (e) of this section.

* * * * *

(d) *Determinations subject to reconsideration.* Any person aggrieved by an initial determination of PBGC listed in this paragraph (d) may request reconsideration, subject to the terms of this part.

(1) Determinations with respect to premiums, interest and late payment penalties pursuant to section 4007 of ERISA;

(2) Determinations with respect to voluntary terminations under section 4041 of ERISA, including any of the following:

(i) A determination that a notice requirement or a certification requirement under section 4041 of ERISA has not been met,

(ii) A determination that the requirements for demonstrating distress under section 4041(c)(2)(B) of ERISA have not been met,

(iii) A determination with respect to the sufficiency of plan assets for benefit liabilities or for guaranteed benefits, and

(iv) A determination with respect to a plan terminating under section 4041(b) of ERISA or with respect to the distribution of residual assets under section 4044(d) of ERISA;

(3) Determinations with respect to penalties under section 4071 of ERISA.

(e) *Determinations subject to appeal.* Any person aggrieved by an initial determination of PBGC listed in this paragraph (e) may file an appeal, subject to the terms of this part.

(1) Determinations that a plan is or is not covered under section 4021 of ERISA;

(2) Determinations of a participant's or beneficiary's benefit entitlement and the amount of benefit payable under a covered plan under sections 4022, 4022B, and 4044 of ERISA (other than a determination described in paragraph (d)(2)(iv) of this section);

(3) Determinations that a domestic relations order is or is not a qualified domestic relations order under section 206(d)(3) of ERISA and section 414(p) of the Code;

(4) Determinations of the amount of money subject to recapture pursuant to section 4045 of ERISA;

(5) Determinations of the amount of liability under sections 4062(b)(1), 4063, or 4064 of ERISA;

(6) Determinations with respect to benefits payable by PBGC under section 4050 of ERISA and part 4050 of this chapter.

■ 3. Revise § 4003.3 to read as follows:

§ 4003.3 PBGC assistance in obtaining information.

(a) *General.* A person may request PBGC's assistance in obtaining information if the person lacks information necessary—

(1) To file a request for review pursuant to subpart C or D of this part, or to decide whether to seek review; or

(2) To participate in an appeal pursuant to § 4003.57, or to decide whether to participate in an appeal.

(b) *Information not in PBGC's possession.* A person may request PBGC's assistance in obtaining information in the possession of a party other than PBGC. The request must —

(1) Be in writing;

(2) State or describe the missing information, the reason why the person needs the information, and the reason why the person needs the assistance of PBGC in obtaining the information; and

(3) Be submitted to the Appeals Board or the department that is responsible for reviewing the initial determination under this part. If the determination is subject to reconsideration, see § 4003.33 for information on where to submit the request for assistance. If the determination is subject to review by appeal, see § 4003.53 for information on where to submit the request.

(c) *Information in the possession of PBGC.* A person may request information in the possession of PBGC pursuant to the Freedom of Information Act and part 4901 of this chapter or the Privacy Act and part 4902 of this chapter, as applicable. See parts 4901 and 4902 of this chapter for additional information. Nothing in this paragraph 4003.3(c) limits or amends the requirements under parts 4901 or 4902 of this chapter.

■ 4. Revise § 4003.4 to read as follows:

§ 4003.4 Extension of time.

When a document is required under this part to be filed within a prescribed period of time, an extension of time to file will be granted only upon good cause shown and only when the request for an extension is made before the expiration of the time prescribed. The request for an extension must be in writing and state why additional time is needed and the amount of additional time requested. The filing of a request for an extension will stop the running of the prescribed period of time. Requests for extension of the time to submit an appeal should be sent to the Appeals Board; requests for extension of the time to submit a request for reconsideration should be sent to the department that issued the initial

determination. When a request for an extension is granted, PBGC will notify the person requesting the extension, in writing, of the amount of additional time granted. When a request for an extension is denied, PBGC will notify the person requesting the extension in writing, and the prescribed period of time will resume running from the date of denial.

§ 4003.7 [Amended]

■ 5. Amend § 4003.7 by removing ''a determination'' and adding in its place ''an initial determination''.

§ 4003.21 [Amended]

■ 6. Amend § 4003.21 by adding ''initial'' before ''determinations'' and removing ''of the ''determination'' and adding in its place ''of the initial determination''.

■ 7. Amend § 4003.22 by removing ''a determination'' and adding in its place ''an initial determination'' in the second sentence of paragraph (a) and revising paragraph (b).

The revision reads as follows:

§ 4003.22 Effective date of determinations.

* * * * *

(b) *Exception.* Except for initial determinations listed in § 4003.1(e)(2), (3), and (6), PBGC may, in its discretion, order that the initial determination in a case is effective on the date it is issued. When PBGC makes such an order, the initial determination will state that it constitutes the final agency action effective on the date of issuance, there is no right to request review under subpart C and subpart D, and any person aggrieved by the initial determination has exhausted all administrative remedies.

§ 4003.31 [Amended]

■ 8. Amend § 4003.31 by adding ''initial'' before ''determination'' at the end of the section.

§ 4003.33 [Amended]

■ 9. Amend § 4003.33 by removing ''reconsideration of a determination described in § 4003.1(b)(3)(ii)'' and adding in its place ''reconsideration of an initial determination described in § 4003.1(d)(2)(ii)''.

■ 10. Revise § 4003.34 to read as follows:

§ 4003.34 Contents of request for reconsideration.

A request for reconsideration must—

(a) Be in writing;

(b) Be clearly designated as a request for reconsideration;

(c) Specifically explain why PBGC's determination is wrong and the result the requestor is seeking;

(d) Describe the relevant information the requestor believes is known by PBGC and summarize any other information that is relevant to the request for reconsideration; and

(e) Include copies of any documentation that supports the requestor's claim or assertions.

■ 11. Amend § 4003.35 by:

■ a. Revising the section heading;

■ b. Removing ''Department Director'' wherever it appears and adding in its place ''Director of a department'', removing ''final'' before ''decision'', and removing ''a determination other than one described in § 4003.1(b)(3)(ii)'' and adding in its place ''an initial determination other than one described in § 4003.1(d)(2)(ii)'' in paragraph (a)(1);

■ c. Removing ''final decision'' and adding in its place ''decision'' and removing ''a determination described in § 4003.1(b)(3)(ii)'' and adding in its place ''an initial determination described in § 4003.1(d)(2)(ii)'' in paragraph (a)(2);

■ d. Removing ''final decision'' and adding in its place ''decision'' in paragraph (b); and

■ e. Adding paragraph (c).

The revision and addition read as follows:

§ 4003.35 Decision on request for reconsideration.

* * * * *

(c) The decision on a request for reconsideration constitutes the final agency action by PBGC with respect to the initial determination that was the subject of the request for reconsideration and is binding on all persons who participated in the request for reconsideration.

§ 4003.55 [Amended]

■ 12. Amend § 4003.55 by removing ''1200 K Street NW, Washington, DC 20005–4026'' and adding in its place ''as listed on PBGC's website, *www.pbgc.gov*'' in paragraph (c).

§ 4003.57 [Amended]

■ 13. Amend § 4003.57 by adding ''initial'' before ''determination'' in paragraph (a)(6).

§ 4003.58 [Amended]

■ 14. Amend § 4003.58 by adding ''initial'' before ''determination'' in the last sentence of paragraph (b) introductory text and adding ''initial'' before ''determination'' in paragraph (b)(1)(ii).

§ 4003.59 [Amended]

■ 15. Amend § 4003.59 by adding ''initial'' before ''determination'' in paragraph (b).

§ § 4003.1, 4003.2, 4003.5, 4003.6, 4003.7, 4003.8, 4003.9, 4003.10, 4003.22, 4003.31, 4003.33, 4003.35, 4003.54, 4003.55, 4003.57, 4003.59, and 4003.60 [Amended]

■ 16. Remove the words ''the PBGC'' and add, in their place, the word ''PBGC'' in the following sections:

■ a. § 4003.1(a) and (c);
■ b. § 4003.2;
■ c. § 4003.5;
■ d. § 4003.6;
■ e. § 4003.7;
■ f. § 4003.8;
■ g. § 4003.9;
■ h. § 4003.10;
■ i. § 4003.22(a);
■ j. § 4003.31;
■ k. § 4003.33;
■ l. § 4003.35(a);
■ m. § 4003.54(b);
■ n. § 4003.55(c);
■ o. § 4003.57(a)(6);
■ p. § 4003.59(b); and
■ q. § 4003.60.

§ § 4003.32 and 4003.52 [Amended]

■ 17. Remove the words ''the PBGC's'' and add in their place the word ''PBGC's'' wherever they occur in §§ 4003.32 and 4003.52.

§ § 4003.2, 4003.21, 4003.22, 4003.56, 4003.57, 4003.58, 4003.59, and 4003.60 [Amended]

■ 18. Remove the word ''shall'' and add in its place the word ''will'' wherever it occurs in the following sections:

■ a. § 4003.2;
■ b. § 4003.21;
■ c. § 4003.22(a);
■ d. § 4003.56(c);
■ e. § 4003.57(a);
■ f. § 4003.58(b);
■ g. § 4003.59(a) and (c); and
■ h. § 4003.60.

§ § 4003.6, 4003.8, 4003.33, 4003.53, and 4003.54 [Amended]

■ 19. Remove the word ''shall'' and add in its place the word ''must'' wherever it occurs in the following sections:

■ a. § 4003.6;
■ b. § 4003.8;
■ c. § 4003.33;
■ d. § 4003.53; and
■ e. § 4003.54(a) and (b).

Issued in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2019–21495 Filed 10–3–19; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2019–0019]

RIN 0651–AD38

Patent Term Adjustment Reductions in View of the Federal Circuit Decision in *Supernus Pharm., Inc.* v. *Iancu*

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (Office) is proposing to revise the rules of practice pertaining to patent term adjustment in view of the decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Supernus Pharm., Inc.* v. *Iancu* (*Supernus*). The Federal Circuit in *Supernus* held that a reduction of patent term adjustment must be equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application. The Office is proposing to revise the provisions pertaining to reduction of patent term adjustment for alignment with the Federal Circuit decision in *Supernus.*

DATES: Written comments must be received on or before December 3, 2019.

ADDRESSES: Comments should be sent by electronic mail message over the internet addressed to: *AD38.comments@uspto.gov.* Comments also may be submitted by postal mail addressed to: Mail Stop Comments-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kery Fries, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy.

Comments further may be sent by electronic mail message over the internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal website (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail message over the internet because sharing comments with the public is more easily accomplished. Electronic comments submitted in plain text are preferred, but may be submitted in ADOBE® portable document format or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient digital scanning into ADOBE® portable document format.

Comments will be available for viewing via the Office's internet website (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Kery Fries, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, at telephone number 571–272–7757.

SUPPLEMENTARY INFORMATION:

Executive Summary: Purpose: The Office is proposing to revise the rules of practice pertaining to the patent term adjustment provisions of 35 U.S.C. 154(b) in view of the decision by the Federal Circuit in *Supernus Pharm., Inc.* v. *Iancu,* 913 F.3d 1351 (Fed. Cir. 2019). The Federal Circuit in *Supernus* held that a reduction of patent term adjustment under 35 U.S.C. 154(b)(2)(C) must be equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application. The regulations pertaining to a reduction of patent term adjustment due to a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application are set forth in 37 CFR 1.704. Several provisions in 37 CFR 1.704 specify a period of reduction corresponding to the consequences to the Office of applicant's failure to engage in reasonable efforts to conclude prosecution *i.e.,* 37 CFR 1.703(c)(2), (c)(3), (c)(6), (c)(9), and (c)(10) rather than ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution'' as provided for in *Supernus.* 913 F.3d at 1359. Therefore, the Office is proposing to revise these provisions of 37 CFR 1.704 for consistency with the Federal Circuit's decision in *Supernus.*

Summary of Major Provisions: This rulemaking pertains to the patent term adjustment regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application and resulting reduction of any patent term adjustment (37 CFR 1.704). This rulemaking specifically proposes to revise the period of reduction of patent term adjustment in the provisions of 37 CFR 1.704 pertaining to deferral of issuance of a patent (37 CFR 1.704(c)(2)), abandonment of an application (37 CFR 1.704(c)(3)), submission of a preliminary amendment (37 CFR 1.704(c)(6)), submission of papers after a decision by the Patent Trial and Appeal Board or by a Federal court (37 CFR 1.704(c)(9)), and submission of papers after a notice of allowance under 35 U.S.C. 151 (37 CFR 1.704(c)(10)) to specify a period of reduction corresponding to ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution'' (rather than corresponding to the consequences to the Office of applicant's failure to engage in reasonable efforts to conclude prosecution) for consistency with the Federal Circuit's decision in *Supernus.* 913 F.3d at 1359.

Costs and Benefits: This rulemaking is not economically significant under Executive Order 12866 (Sept. 30, 1993).

Background: The American Inventors Protection Act of 1999 or AIPA (Pub. L. 106–113, 113 Stat. 1501, 1501A–552 through 1501A–591 (1999)) amended 35 U.S.C. 154(b) to provide for patent term adjustment if issuance of the patent is delayed due to one or more of the enumerated administrative delays listed in 35 U.S.C. 154(b)(1). Generally, under the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, an applicant is entitled to patent term adjustment for the following reasons: (1) If the Office fails to take certain actions during the examination and issue process within specified time frames (35 U.S.C. 154(b)(1)(A)) (known as ''A'' delays); (2) if the Office fails to issue a patent within three years of the actual filing date of the application (35 U.S.C. 154(b)(1)(B)) (known as ''B'' delays); and (3) for delays due to interference (and now derivation), secrecy order, or successful appellate review (35 U.S.C. 154(b)(1)(C)) (known as ''C'' delays). *See* 35 U.S.C. 154(b)(1). The AIPA, however, sets forth a number of conditions and limitations on any patent term adjustment accrued under 35 U.S.C. 154(b)(1). *See* 35 U.S.C. 154(b)(2). 35 U.S.C. 154(b)(2)(C) sets forth one such limitation, providing, in part, that ''[t]he period of adjustment of the term of a patent under [35 U.S.C. 154(b)(1)] shall be reduced by a period equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application'' and that ''[t]he Director shall prescribe regulations establishing the circumstances that constitute a failure of

an applicant to engage in reasonable efforts to conclude processing or examination of an application.'' 35 U.S.C. 154(b)(2)(C)(i) and (iii). The Office implemented the AIPA patent term adjustment provisions of 35 U.S.C. 154(b), including setting forth circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application and resulting in a reduction of any patent term adjustment, in a final rule published in September of 2000. *See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term,* 65 FR 56365 (Sept. 18, 2000) (AIPA patent term adjustment final rule). The regulations establishing the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application and resulting reduction of any patent term adjustment are set forth in 37 CFR 1.704.

In January 2019, the Federal Circuit issued a decision in *Supernus* pertaining to the patent term adjustment provisions of 35 U.S.C. 154(b)(2)(C). The Federal Circuit confirmed that 37 CFR 1.704(c)(8) '' 'is a reasonable interpretation of the [patent term adjustment] statute' insofar as it includes 'not only applicant conduct or behavior that result in actual delay, but also those having the potential to result in delay irrespective of whether such delay actually occurred.' '' *Supernus,* 913 F.3d at 1356 (quoting *Gilead Scis., Inc.* v. *Lee,* 778 F.3d 1341, 1349–50 (Fed. Cir. 2015)). The Federal Circuit, however, held that the Office may not reduce patent term adjustment by a period that exceeds the ''time during which the applicant failed to engage in reasonable efforts'' to conclude prosecution, specifically stating that ''[o]n the basis of the plain language of [35 U.S.C. 154(b)(2)(C)(i),] the USPTO may not count as applicant delay a period of time during which there was no action that the applicant could take to conclude prosecution of the patent.'' *Id.* at 1358. The Federal Circuit specifically stated that—

> Thus, the statutory period of PTA reduction must be the same number of days as the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution. PTA cannot be reduced by a period of time during which there is no identifiable effort in which the applicant could have engaged to conclude prosecution because such time would not be ''equal to'' and would instead exceed the time during which an applicant failed to engage in reasonable efforts.

Id. at 1359.

37 CFR 1.704(c)(1) through (c)(14) set forth: (1) The exemplary circumstances prescribed by the Office ''that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application'' pursuant to 35 U.S.C. 154(b)(2)(C)(iii) and (2) resulting period of reduction of any patent term adjustment. The Federal Circuit decision in *Supernus* involved a reduction to patent term adjustment under the provisions of 37 CFR 1.704(c)(8). The period of reduction of patent term adjustment in 37 CFR 1.704(c)(8) is as follows: ''the number of days, if any, beginning on the day after the date the initial reply was filed and ending on the date that the supplemental reply or other such paper was filed.'' 37 CFR 1.704(c)(8). This period corresponds to ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution,'' except in the rare situation in which such period includes ''a period of time during which there is no identifiable effort in which the applicant could have engaged to conclude prosecution.'' *Supernus,* 913 F.3d at 1359. The Office published a notice in May of 2019 setting out its implementation of *Supernus* with respect to the provisions of 37 CFR 1.704(c)(8) or other provision of 37 CFR 1.704(c) that includes ''a period of time during which there is no identifiable effort in which the applicant could have engaged to conclude prosecution.'' *See Patent Term Adjustment Procedures in View of the Federal Circuit Decision in Supernus Pharm., Inc.* v. *Iancu,* 84 FR 20343 (May 9, 2019).

While the Federal Circuit decision in *Supernus* involved 37 CFR 1.704(c)(8), there are several provisions in 37 CFR 1.704(c)(1) through (c)(14) whose period of reduction corresponds to or includes the consequences to the Office of applicant's failure to engage in reasonable efforts to conclude prosecution, rather than ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution.'' *Supernus,* 913 F.3d at 1359. Therefore, the Office is proposing changes to 37 CFR 1.704 to revise the periods of reduction of patent term adjustment in 37 CFR 1.704(c) for consistency with the Federal Circuit's decision in *Supernus.*

Discussion of Specific Rules

The following is a discussion of amendments to title 37 of the Code of Federal Regulations, part 1:

Section 1.704(c)(2) is proposed to be amended to change ''the date the patent was issued'' to ''the earlier of the date a request to terminate the deferral was filed or the date the patent was issued.'' The period of reduction of patent term adjustment in § 1.704(c)(2) would be as follows: ''the number of days, if any, beginning on the date a request for deferral of issuance of a patent under § 1.314 was filed and ending on the earlier of the date a request to terminate the deferral was filed or the date the patent was issued.''

Section 1.704(c)(3) is proposed to be amended to change ''the earlier of: (i) The date of mailing of the decision reviving the application or accepting late payment of the issue fee; or (ii) The date that is four months after the date the grantable petition to revive the application or accept late payment of the issue fee was filed'' to ''the date the grantable petition to revive the application or accept late payment of the issue fee was filed.'' The period of reduction of patent term adjustment in § 1.704(c)(3) would be as follows: ''the number of days, if any, beginning on the date of abandonment or the date after the date the issue fee was due and ending on the date the grantable petition to revive the application or accept late payment of the issue fee was filed.''

Section 1.704(c)(6) is proposed to be amended to change ''the lesser of: (i) The number of days, if any, beginning on the day after the mailing date of the original Office action or notice of allowance and ending on the date of mailing of the supplemental Office action or notice of allowance; or (ii) Four months'' to ''the number of days, if any, beginning on the day after the date that is eight months from either the date on which the application was filed under 35 U.S.C. 111(a) or the date of commencement of the national stage under 35 U.S.C. 371(b) or (f) in an international application and ending on the date the preliminary amendment or other preliminary paper was filed.'' *See Changes to Implement the Patent Law Treaty,* 78 FR 62367, 62385 (Oct. 21, 2013) (an application is expected to be in condition for examination no later than eight months from its filing date (or date of commencement of the national stage in an international application)). The period of reduction of patent term adjustment in § 1.704(c)(6) would be as follows: ''the number of days, if any, beginning on the day after the date that is eight months from either the date on which the application was filed under 35 U.S.C. 111(a) or the date of commencement of the national stage under 35 U.S.C. 371(b) or (f) in an international application and ending on

the date the preliminary amendment or other preliminary paper was filed.''

Section 1.704(c)(9) is proposed to be amended to change ''the lesser of: (i) The number of days, if any, beginning on the day after the mailing date of the original Office action or notice of allowance and ending on the mailing date of the supplemental Office action or notice of allowance; or (ii) Four months'' to ''the number of days, if any, beginning on the day after the date of the decision by the Patent Trial and Appeal Board or by a Federal court and ending on date the amendment or other paper was filed.'' The period of reduction of patent term adjustment in § 1.704(c)(9) would be as follows: ''the number of days, if any, beginning on the day after the date of the decision by the Patent Trial and Appeal Board or by a Federal court and ending on date the amendment or other paper was filed.''

Section 1.704(c)(10) is proposed to be amended to change ''the lesser of: (i) The number of days, if any, beginning on the date the amendment under § 1.312 or other paper was filed and ending on the mailing date of the Office action or notice in response to the amendment under § 1.312 or such other paper; or (ii) Four months'' to ''the number of days, if any, beginning on the day after the mailing date of the notice of allowance under 35 U.S.C. 151 and ending on the date the amendment under § 1.312 or other paper was filed.'' The period of reduction of patent term adjustment in § 1.704(c)(10) would be as follows: ''the number of days, if any, beginning on the day after the mailing date of the notice of allowance under 35 U.S.C. 151 and ending on the date the amendment under § 1.312 or other paper was filed.''

Rulemaking Considerations

A. Administrative Procedure Act: The changes proposed by this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. *See Perez* v. *Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1204 (2015) (Interpretive rules ''advise the public of the agency's construction of the statutes and rules which it administers.'' (citation and internal quotation marks omitted)); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (Rule that clarifies interpretation of a statute is interpretive.); *Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (Rules governing an application process are procedural under the Administrative Procedure Act.); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (Rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims.). Specifically, this rulemaking proposes to revise Office rules that interpret certain statutory provisions pertaining to patent term adjustment. The proposed revisions specify a period of reduction corresponding to ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution'' (rather than to the consequences to the Office of applicant's failure to engage in reasonable efforts to conclude prosecution) for consistency with the Federal Circuit's decision in *Supernus.* 913 F.3d at 1359.

Accordingly, prior notice and opportunity for public comment for the changes proposed by this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Perez,* 135 S. Ct. at 1206 (Notice-and-comment procedures are required neither when an agency ''issue[s] an initial interpretive rule'' nor ''when it amends or repeals that interpretive rule.''); *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A))). However, the Office has chosen to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act: For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

This rulemaking does not propose to impose any additional requirements or fees on applicants. This rulemaking also does not propose to change the circumstances defined as constituting a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application (35 U.S.C. 154(b)(2)(C)(iii)). This rulemaking implements the Federal Circuit's ruling on the provisions of 35 U.S.C. 154(b)(2)(C)(i) in *Supernus* to reflect the applicable period of reduction in the event that there is a failure of an applicant to engage in reasonable efforts to conclude processing or examination. This rulemaking specifically proposes to revise the period of reduction of patent term adjustment in the provisions of 37 CFR 1.704 pertaining to deferral of issuance of a patent (37 CFR 1.704(c)(2)), abandonment of an application (37 CFR 1.704(c)(3)), submission of a preliminary amendment (37 CFR 1.704(c)(6)), submission of papers after a decision by the Patent Trial and Appeal Board or by a Federal court (37 CFR 1.704(c)(9)), and submission of papers after a notice of allowance under 35 U.S.C. 151 (37 CFR 1.704(c)(10)) to specify a period of reduction corresponding to ''the period from the beginning to the end of the applicant's failure to engage in reasonable efforts to conclude prosecution'' (rather than to the consequences to the Office of applicant's failure to engage in reasonable efforts to conclude prosecution) for consistency with the Federal Circuit's decision in *Supernus.* 913 F.3d at 1359. The changes proposed in this rulemaking will not have a significant economic impact on a substantial number of small entities because applicants are not entitled to patent term adjustment that have not been reduced by a period equal to the period of the applicant's failure to engage in reasonable efforts to conclude processing or examination (35 U.S.C. 154(b)(2)(C)(i) and 37 CFR 1.704(a)), and because applicants may avoid adverse patent term adjustment consequences by refraining from actions or inactions defined as constituting a failure of an applicant to engage in reasonable efforts to conclude processing or examination. For the foregoing reasons, the changes proposed in this notice will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided on-

line access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across Government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs): This proposed rule is not expected to be an Executive Order 13771 (Jan. 30, 2017) regulatory action because this proposed rule is not significant under Executive Order 12866 (Sept. 30, 1993).

F. Executive Order 13132 (Federalism): This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

G. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

H. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

I. Executive Order 13783 (Promoting Energy Independence and Economic Growth): This rulemaking does not potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources under Executive Order 13783 (Mar. 28, 2017).

J. Executive Order 13772 (Core Principles for Regulating the United States Financial System): This rulemaking does not involve regulation of the United States financial system under Executive Order 13772 (Feb. 3, 2017).

K. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

L. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

M. Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

N. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801–808), the United States Patent and Trademark Office will submit a report containing any final rule resulting from this rulemaking and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the Government Accountability Office.

O. Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

P. National Environmental Policy Act: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

Q. National Technology Transfer and Advancement Act: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

R. Paperwork Reduction Act: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. The rules of practice pertaining to patent term adjustment and extension have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under OMB control number 0651–0020.

This rulemaking does not impose any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the Office is not resubmitting information collection packages to OMB for its review and approval because the changes in this rulemaking do not affect the information collection requirements associated with the information collections approved under OMB control number 0651–0020 or any other information collections.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and record keeping requirements, Small businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. Section 1.704 is amended by revising paragraphs (c)(2), (3), (6), (9) and (c)(10) to read as follows:

§ 1.704 Reduction of Period of Adjustment of Patent Term.

* * * * *

(c) * * *

(2) Deferral of issuance of a patent under § 1.314, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the date a request for deferral of issuance of a patent under § 1.314 was filed and ending on the earlier of the date a request to terminate the deferral was filed or the date the patent was issued;

(3) Abandonment of the application or late payment of the issue fee, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the date of abandonment or the date after the date the issue fee was due and ending on the date the grantable petition to revive the application or accept late payment of the issue fee was filed;

* * * * *

(6) Submission of a preliminary amendment or other preliminary paper less than one month before the mailing of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 that requires the mailing of a supplemental Office action or notice of allowance, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date that is eight months from either the date on which the application was filed under 35 U.S.C. 111(a) or the date of commencement of the national stage under 35 U.S.C. 371(b) or (f) in an international application and ending on the date the preliminary amendment or other preliminary paper was filed;

* * * * *

(9) Submission of an amendment or other paper after a decision by the Patent Trial and Appeal Board, other than a decision designated as containing a new ground of rejection under § 41.50(b) of this title or statement under § 41.50(c) of this title, or a decision by a Federal court, less than one month before the mailing of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 that requires the mailing of a supplemental Office action or supplemental notice of allowance, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date of the decision by the Patent Trial and Appeal Board or by a Federal court and ending on date the amendment or other paper was filed;

(10) Submission of an amendment under § 1.312 or other paper, other than a request for continued examination in compliance with § 1.114, after a notice of allowance has been given or mailed, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the mailing date of the notice of allowance under 35 U.S.C. 151 and ending on the date the amendment under § 1.312 or other paper was filed;

* * * * *

Andrei Iancu,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2019–21271 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–16–P

SURFACE TRANSPORTATION BOARD

49 CFR Chapter X

[Docket No. EP 664 (Sub-No. 4)]

Revisions to the Board's Methodology for Determining the Railroad Industry's Cost of Capital

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Board proposes to incorporate an additional model to complement its use of the Morningstar/Ibbotson Multi-Stage Discounted Cash Flow Model (MSDCF) and the Capital Asset Pricing Model (CAPM) in determining the cost-of-equity component of the cost of capital.

DATES: Comments on the proposed rule are due by November 5, 2019. Reply comments are due by December 4, 2019.

ADDRESSES: Comments and replies must be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 664 (Sub-No. 4), 395 E Street SW, Washington, DC 20423–0001. Written comments and replies will be posted to the Board's website at *www.stb.gov.*

FOR FURTHER INFORMATION CONTACT: Nathaniel Bawcombe at (202) 245–0376. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Each year, the Board determines the railroad industry's cost of capital and then uses this figure in a variety of regulatory proceedings, including the annual determination of railroad revenue adequacy, rate reasonableness cases, feeder line applications, rail line abandonments, trackage rights cases, and rail merger reviews. The annual cost-of-capital figure is also used as an input in the Uniform Railroad Costing System, the Board's general purpose costing system.

The Board calculates the cost of capital as the weighted average of the cost of debt and the cost of equity. *See Methodology to be Employed in Determining the R.R. Indus.'s Cost of Capital,* EP 664, slip op. at 3 (STB served Jan. 17, 2008). While the cost of debt is observable and readily available, the cost of equity (the expected return that equity investors require) can only be estimated.[1] *Id.* Thus, ''estimating the cost of equity requires relying on appropriate finance models.'' *Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the R.R. Indus.'s Cost of Equity Capital,* EP 664 (Sub-No. 2), slip op. at 2 (STB served Oct. 31, 2016).

In 2009, the Board moved from a cost-of-equity estimate based solely on CAPM to a cost-of-equity estimate based on a simple average of the estimates produced by CAPM and Morningstar/Ibbotson MSDCF. *See Use of a Multi-Stage Discounted Cash Flow Model in Determining the R.R. Indus.'s Cost of Capital,* EP 664 (Sub-No. 1), slip op. at 15 (STB served Jan. 28, 2009). In that decision, the Board cited to the Federal Reserve Board's testimony in *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital,* Docket No. EP 664, which stated that the use of multiple models ''will improve estimation techniques when each model provides new information.'' *Use of a Multi-Stage Discounted Cash Flow Model,* EP 664 (Sub-No. 1), slip op. at 15. Furthermore, the Board stated that ''there is robust economic literature confirming that, in many cases, combining forecasts from different models is more accurate than relying on a single model.''[2]

Under CAPM, the cost of equity is equal to RF + β×RP, where RF is the risk-free rate of interest,[3] RP is the market-risk premium, and β (or beta) is the measure of systematic, non-diversifiable risk. Under CAPM, the Board calculates the risk-free rate based on the average yield to maturity for a 20-year U.S. Treasury Bond. The estimate for the market-risk premium is based on returns experienced by the S&P 500 since 1926. Lastly, beta is calculated by using a portfolio of weekly, merger-adjusted railroad stock returns for the prior five years.

Under Morningstar/Ibbotson MSDCF, the cost of equity is the discount rate that equates a firm's market value to the present value of the expected stream of cash flows. Morningstar/Ibbotson MSDCF calculates growth of earnings in three stages. In the first stage (years one

[1] The Board must make ''an adequate and continuing effort to assist those carriers in attaining revenue levels,'' which should, among other objectives, ''permit the raising of needed equity capital.'' 49 U.S.C. 10704(a)(2).

[2] *Use of a Multi-Stage Discounted Cash Flow Model,* EP 664 (Sub-No. 1), slip op. at 15 (citing David F. Hendry & Michael P. Clements, *Pooling of Forecasts,* VII Econometrics Journal 1 (2004); J.M. Bates & C.W.J. Granger, *The Combination of Forecasts* in *Essays in Econometrics: Collected Papers of Clive W.J. Granger, Vol. I: Spectral Analysis, Seasonality, Nonlinearity, Methodology, & Forecasting* 391–410 (Eric Ghysels, Norman R. Swanson, & Mark W. Watson, eds., 2001); Spyros Makridakis & Robert L. Winkler, *Averages of Forecasts: Some Empirical Results,* XXIX Management Science 987 (1983)).

[3] The risk-free rate of interest is an exogenously determined interest rate at which investors may borrow or lend without fear of default.

through five), the qualifying railroad's [4] annual earnings growth rate is assumed to be the median value of its three- to five-year growth rate estimates, as determined by railroad industry analysts and published by the Institutional Brokers Estimate System.[5] In the second stage (years six through 10), the growth rate is the simple average of all of the qualifying railroads' median three- to five-year growth rate estimates in stage one. In the third stage (years 11 and onwards), the growth rate is the long-run nominal growth rate of the U.S. economy. This long-run nominal growth rate is estimated by using the historical growth in real Gross Domestic Product plus the long-run expected inflation rate.

Proposed Rule

The Board proposes to add an additional model, which the Board will refer to as ''Step MSDCF'' to the cost-of-capital calculation, as described below.[6] Consistent with the Board's present methodology, in which CAPM and MSDCF approaches each comprise 50% of the cost-of-equity estimate, the Board proposes to calculate the cost of capital by using the weighted average of the three models, with CAPM weighted at 50%, Morningstar/Ibbotson MSDCF weighted at 25%, and Step MSDCF weighted at 25%.

As the Board has stated previously, there is no single simple or correct way to estimate the cost of equity for the railroad industry, and many model options are available. *Use of a Multi-Stage Discounted Cash Flow Model,* EP 664 (Sub-No. 1), slip op. at 15; *see also Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 2, 20 (STB served Oct. 31, 2016). The Board has acknowledged that ''by using multiple models that are based on different perspectives and rely on different inputs, the Board benefits because anomalies affecting one model are less likely to affect the other.'' *Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 3 (STB served Apr. 28, 2017). The Board has previously determined that a methodology that uses multiple models is more robust than a methodology that utilizes only one model, not because one model is ''conceptually or pragmatically superior to the other,'' but rather because each has different strengths and weaknesses. *Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 11 (STB served Oct. 31, 2016). Accordingly, the Board finds that its cost-of-capital determinations could be strengthened by the addition of a new model to improve the robustness of its calculations.

Since 2009, the Board has found that the simple average of CAPM and Morningstar/Ibbotson MSDCF has produced a reasonable estimate of the cost of equity used to gauge the financial health of the railroad industry. Most recently, in *Railroad Cost of Capital—2018,* EP 558 (Sub-No. 22), slip op. at 2–3 (STB served Aug. 6, 2019), discussed in more detail below, the Board once again affirmed this established methodology as reasonable. However, in that decision, the Board also noted that, when appropriate, the Board has undertaken an examination of whether changes to its cost-of-capital methodology may be warranted, and stated that it expected to open a proceeding to further explore whether modifications to its cost-of-capital methodology may be appropriate. *Id.* at 3.

In the proceeding to update the railroad industry's cost of capital for 2018, the Board received comments from the Association of American Railroads (AAR) providing the information used to make the annual cost-of-capital determination. *See generally* AAR Comments, Apr. 22, 2019, *R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22). The supporting data submitted with AAR's filing reflected a significant increase in growth rates [7] and the cost of capital. Specifically, the 2018 cost of capital (12.22%) is 2.18 percentage points higher than the 2017 cost of capital (10.04%). According to AAR, lower tax rates and rail operating changes, among other factors, contributed to analysts' higher growth expectations.[8] At present, three of the four qualifying railroads included in the Board's cost-of-capital calculations have implemented some form of operating changes, which are generally referred to as ''precision scheduled railroading.'' [9]

Significant operating changes that occur over a relatively short period of time can have a unique effect on the Board's annual cost-of-capital determination, particularly if they are neither one-time events [10] nor expected to cause permanent changes in the industry's growth rates. Once significant operating changes are fully implemented, any rate of growth that accompanied the operating changes may not continue to increase at the same level. Because the operating changes will, and future railroad changes that are currently unknown could, have a significant impact on the Board's cost-of-capital determination, the Board finds that now is an appropriate time to consider the addition of a model that could improve its methodology for estimating the cost-of-equity component of the cost of capital.

As described in more detail below, the Board finds that the addition of Step MSDCF, when used in combination with the current Morningstar/Ibbotson MSDCF and CAPM, could enhance the robustness of the resulting cost-of-equity estimate during periods, like the present one, in which certain railroads are undertaking significant operating changes. Furthermore, consistent with the Board's previous finding, supported by extensive economic literature, that averaging multiple models—based on different perspectives, relying on different inputs, and with different strengths and weaknesses—would produce estimates that are more robust

[4] The Board determines the railroad industry's cost of capital for a ''composite railroad,'' which is based on data from Class I carriers that meet certain criteria developed in *Railroad Cost of Capital—1984,* 1 I.C.C.2d 989 (1985), as modified by *Revisions to the Cost-of-Capital Composite Railroad Criteria,* EP 664 (Sub-No. 3) (STB served Oct. 25, 2017).

[5] This data can be retrieved from Refinitiv (formerly Thomson ONE Investment Management). *See Railroad Cost of Capital—2018,* EP 558 (Sub-No. 22), slip op. at 9 (STB served Aug. 6, 2019).

[6] Step MSDCF is similar to the model presented in Aswath Damodaran, *Investment Valuation: Tools & Techniques for Determining the Value of Any Asset* 317 (3d ed. 2012).

[7] The second stage growth rate estimate produced by Morningstar/Ibbotson MSDCF (*i.e.,* the average of the qualifying railroads' individual three- to five-year median growth rates) produced a value of 19.88%, which is significantly higher than the second stage growth rate value of 13.55% reflected in the 2017 cost-of-capital decision. *See R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22), slip op. at 17; *R.R. Cost of Capital—2017,* EP 558 (Sub-No. 21), slip op. at 18 (STB served Dec. 6, 2018). Likewise, CSX Corporation's first stage growth rate rose significantly from 15.66% in 2017 to 27.43% in 2018. *See R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22), slip op. at 17; *R.R. Cost of Capital—2017,* EP 558 (Sub-No. 21), slip op. at 18.

[8] *See* AAR Comments, V.S. John Gray 45–46, Apr. 22, 2019, *R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22) (''Based on train-miles reported in Annual Report Form R–1, 2015 and 2016 were recession years for the railroad industry, and train-miles have not yet recovered to 2014 levels—even if unit trains (mostly coal) are excluded. Thus, it is not surprising that analysts now have higher growth expectations, especially when considering other factors such as lower tax rates and the implementation of precision scheduled railroading.'').

[9] *See* Letter from E. Hunter Harrison, then-Chairman & Chief Exec. Officer, CSX Corp., in response to August 14, 2017 letter from Board Members, at 1, *www.stb.gov* (open ''Rail Service Data'' under ''Quick Links'' and select ''CSX Response, Service Outlook and Milestones, August 24, 2017'' hyperlink); *see also,* U.S. Dept. of Agric. Grain Transp. Report 2 (Dec. 20, 2018), *http://dx.doi.org/10.9752/TS056.120-20-2018.*

[10] For example, significant operating changes like precision scheduled railroading are not like the enactment of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054 (2017), which was a one-time occurrence that merited a one-time adjustment to the cost of capital. *See R.R. Revenue Adequacy—2017 Determination,* EP 552 (Sub-No. 22) et al., slip op. at 1–3 (STB served Dec. 6, 2018).

when averaged together,[11] the addition of Step MSDCF would improve the cost-of-capital determination, including during periods of significant operating changes.

Like Morningstar/Ibbotson MSDCF, Step MSDCF proposed here would continue to calculate growth of earnings in three stages. The first and third stages would be identical to those of Morningstar/Ibbotson MSDCF. In the first stage (years one through five), the qualifying railroad's annual earnings growth rate would be the median value of its three- to five-year growth rate estimates and, in the third stage (years 11 and onwards), the growth rate would be the long-run nominal growth rate of the U.S. economy. The growth rate of the second stage (years six through 10) would be a gradual transition between the first and third stages. The transition would begin at year six and step down or up in equal increments each year towards the terminal growth rate (or third stage). The algebraic formula for Step MSDCF is described in full in Appendix A.

The Board proposes to add Step MSDCF to its cost-of-capital methodology based in part on input from commenters in prior proceedings. Since the Board's adoption of its current hybrid methodology in 2009, Western Coal Traffic League (WCTL) has opposed the Board's use of Morningstar/Ibbotson MSDCF in its cost-of-equity calculation. One of WCTL's primary criticisms has been that using the average of all of the qualifying railroads' median growth rates in stage one as the growth rate in stage two is unreasonable because three- to five-year forecasts of earnings growth will not likely be accurate for ten years. *See Use of a Multi-Stage Discounted Cash Flow Model,* EP 664 (Sub-No. 1), slip op. at 8–9. Additionally, WCTL has argued that Morningstar/Ibbotson MSDCF lacks a transition mechanism, which prevents smooth transitions between stages. *See Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 9 (STB served Oct. 31, 2016).

In affirming the reasonableness of Morningstar/Ibbotson MSDCF's second-stage growth rate, the Board has noted that (1) the returns of individual firms should revert to the industry average over time, (2) it is not realistic to predict growth for individual companies beyond five years, and (3) attempting to create smoother transitions between the stages would add more complexity to the model but would not guarantee more precision, in part, because the cost of equity cannot ever be truly known. *See Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 13 (STB served Oct. 31, 2016). The Board continues to believe that Morningstar/Ibbotson MSDCF is reasonable. At the same time, there are other reasonable models based on different perspectives, relying on different inputs, and with different strengths and weaknesses. Forecasting growth rates in years six through 10 is inherently imprecise, and it is not possible to predict whether one model will better reflect future events, particularly when those events must be judged over decades of differing market characteristics. The Board's proposal to incorporate another model to improve the robustness of its overall cost-of-equity estimate implies neither that the Board expects to achieve perfect precision across models nor that the Board's existing models are inadequate. The Board finds it is reasonable to continue to rely on Morningstar/Ibbotson MSDCF as one aspect of its cost-of-capital methodology.

Even so, the Board recognizes that the significant operating changes undertaken by certain individual railroads have given those railroads a significant increase in growth rates that flows through to the second stage of Morningstar/Ibbotson MSDCF, and it is always possible that future railroad changes could have a similar effect. Specifically, because the second-stage growth rate in Morningstar/Ibbotson MSDCF uses the simple average of all qualifying railroads' three- to five-year median growth rate estimates from the first stage, the growth rates in the middle horizon (years six through 10) will be similar to the averages of growth rates in the short term (three- to five-year estimates). By drawing upon the three- to five-year growth rate estimates twice, Morningstar/Ibbotson MSDCF is more sensitive to growth rate changes in the short term, which may involve anomalous increases or decreases, relative to a model with a gradual transition between the first and third stages. While reasonable, Morningstar/Ibbotson MSDCF may not capture information relevant to the middle horizon in the same way as other models.[12] Therefore, the Board's cost-of-equity estimate could yet be made more robust by adding a model, like Step MSDCF, that reflects a different perspective for the middle horizon.[13]

The Board proposes to retain the same CAPM that it has used to calculate the cost of capital since 2008. *See Methodology to be Employed in Determining the R.R. Indus.'s Cost of Capital,* EP 664, slip op. at 2. The Board's current methods for determining the railroad industry's beta and estimating market-risk premium are reasonable. Furthermore, recent operating changes have not demonstrated similar issues in the cost-of-equity estimates produced by CAPM as they have for Morningstar/Ibbotson MSDCF. Accordingly, the Board proposes that to reduce the impact of short-term operating changes on the cost of capital, it is not necessary for the Board to modify CAPM.

CAPM, generally, is a backward-looking model while MSDCF is more forward-looking, each looking at different market data. *R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22), slip op. at 3. To maintain an equal balance between forward-looking and backward-looking models, the Board proposes to use a weighted average of the three models in its cost-of-equity calculation, with CAPM weighted at 50%, Morningstar/Ibbotson MSDCF weighted at 25%, and Step MSDCF weighted at 25%. Furthermore, because the Board has not found that MSDCF is superior to CAPM, or vice versa, it is reasonable to use a weighted average of the three models that allows both model types to continue to contribute equally to the cost of equity.

When applied over a 10-year historical analysis period, the weighted average of the three models results in a lower variance than a forecast relying on

[11] *See Pet. of the W. Coal Traffic League,* EP 664 (Sub-No. 2), slip op. at 11 (STB served Oct. 31, 2016).

[12] The Board has repeatedly rejected WCTL's argument that Morningstar/Ibbotson MSDCF should be abandoned due to what WCTL argues is its flawed second-stage growth rate, but the Board has not previously considered how a MSDCF variation with a different second-stage growth rate could supplement Morningstar/Ibbotson MSDCF. The Board proposes that Step MSDCF could be useful as a supplement, rather than a replacement, for Morningstar/Ibbotson MSDCF because, while Step MSDCF adds a different perspective with respect to growth rates, Step MSDCF may not necessarily be more reasonable than Morningstar/Ibbotson MSDCF in certain periods or over the long term.

[13] In comments submitted for the 2018 cost-of-capital proceeding, AAR stated that Morningstar/Ibbotson MSDCF ''assumes 'that over a middle horizon, growth of any particular company will lie more in line with the industry as a whole,'' which means that ''other companies 'catch' their industry growth leaders, or the leaders fall back to the rate of the slower growth railroads.'' Accordingly, AAR argued that ''[a]ny attempt to change the second stage to a transition stage is corrupting the intent of the model.'' AAR Comments, V.S. John Gray 45, Apr. 22, 2019, *R.R. Cost of Capital—2018,* EP 558 (Sub-No. 22). The Board does not propose to modify Morningstar/Ibbotson MSDCF in this decision. Instead, the Board proposes to add a new model that relies on different assumptions to be used alongside Morningstar/Ibbotson MSDCF. This approach allows the Board to introduce a model that will have a moderating influence on Morningstar/Ibbotson MSDCF while also maintaining the integrity of Morningstar/Ibbotson MSDCF.

the average of CAPM and Morningstar/Ibbotson MSDCF alone. For the period 2009 through 2018, the average of CAPM and Morningstar/Ibbotson MSDCF produces a cost of equity ranging from 10.31% to 13.86% with a standard deviation of 1.18. Over the same period, the weighted average of the three models produces estimates between 10.25% and 13.46% with a standard deviation of 1.09. *See* Appendix B.

Adding Step MSDCF to the Board's current methodology for calculating the cost of capital is consistent with the Rail Transportation Policy. 49 U.S.C. 10101. For instance, having a methodology that more robustly estimates the cost-of-equity component of the cost of capital would better ensure that rail carriers are allowed to earn adequate revenues. Section 10101(3); *see also Standards for R.R. Revenue Adequacy,* 364 I.C.C. 803, 811 (1981), *aff'd sub nom. Bessemer & Lake Erie R.R.* v. *ICC,* 691 F.2d 1104 (3d Cir. 1982) (concluding that ''the only revenue adequacy standard consistent with the requirements of [The Staggers Rail Act of 1980] is one that uses a rate of return equal to the cost of capital''). As noted, Morningstar/Ibbotson MSDCF is more sensitive to growth rate changes in the short term relative to Step MSDCF, and Step MSDCF may be better suited for some periods, or even over the long run.

Interested parties are invited to comment on the proposed use of Step MSDCF described above in conjunction with CAPM and Morningstar/Ibbotson MSDCF currently used by the Board. Parties are encouraged to address issues such as the most appropriate way to integrate the three models into the cost-of-capital calculation, including the particular weighting that each model should have.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. Sections 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The Board certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities as defined by the RFA. Cost of capital is calculated for those Class I carriers that meet certain criteria developed in *Railroad Cost of Capital—1984,* 1 I.C.C.2d 989 (1985), and modified in *Revisions to the Cost-of-Capital Composite Railroad Criteria,* EP 664 (Sub-No. 3) (STB served Oct. 25, 2017). Therefore, the Board's proposed methodology will apply only to Class I rail carriers, and there will be no impact on small railroads. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Additional information supporting the Board's revised proposal is contained in the Board's decision (including appendices) served on August 4, 2016. To obtain a copy of this decision, visit the Board's website at *http://www.stb.gov.*

It is ordered:

1. The Board proposes to revise its methodology for determining the railroad industry's cost of capital as set forth in this decision. Notice of this decision will be published in the **Federal Register**.

2. Comments are due by November 5, 2019. Reply comments are due by December 4, 2019.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

4. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2019–21590 Filed 10–3–19; 8:45 am]

BILLING CODE 4915–01–P

Notices

Federal Register

Vol. 84, No. 193

Friday, October 4, 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

Agricultural Marketing Service

[Doc. No. AMS–SC–19–0080; SC19–930–2 N]

Tart Cherries; Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intent to request an extension for and revision to a currently approved information collection for Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, pursuant to Marketing Order No. 930.

DATES: Comments on this notice must be received by December 3, 2019 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: *www.regulations.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *www.regulations.gov*. All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Andrew Hatch, Chief, Rulemaking Services Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Room 1406–S, Washington, DC 20250–0237; Telephone: (202)720–6862, Fax: (202)720–8938, or Email: *andrew.hatch@usda.gov*.

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

SUPPLEMENTARY INFORMATION:

Title: Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Marketing Order No. 930 (7 CFR part 930).

OMB Number: 0581–0177.

Expiration Date of Approval: January 31, 2020.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: Marketing order programs provide an opportunity for producers of fresh fruits, vegetables, and specialty crops, in a specified production area, to work together to solve marketing problems that cannot be solved individually. Marketing order regulations help ensure adequate supplies of high quality product and adequate returns to producers. Marketing orders are authorized under the Agricultural Marketing Agreement Act of 1937 (Act), as amended (7 U.S.C. 601–674). The Secretary of Agriculture oversees these operations and issues regulations recommended by a committee of representatives from the respective commodity industry.

The information collection requirements in this request are essential to carry out the intent of the AMAA and to administer the program, which has operated since 1996.

The Federal marketing order for tart cherries (7 CFR part 930) regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The marketing order authorizes volume regulations that provide for a reserve pool in times of heavy cherry supplies. The marketing order also provides for minimum grade and size regulations, and market research and development projects, including paid advertising. These provisions are not currently in use.

The marketing order, and rules and regulations issued thereunder, authorizes the Cherry Industry Administrative Board (Board), the agency responsible for local administration of the marketing order, to require handlers and growers to submit certain information. Much of this information is compiled in aggregate and provided to the Board to assist in carrying out marketing decisions.

The Board has developed 11 forms as a means for persons to file the required and minimum necessary reports with the Board, such as tart cherry inventories, shipments, diversions, and background data. All the information provided is needed to effectively carry out the requirements of the marketing order and fulfill the intent of the AMAA as expressed in the marketing order. Since this marketing order regulates canned and frozen forms of tart cherries, reporting requirements will be in effect all year.

Eleven U.S. Department of Agriculture (USDA) forms are also included in this request. Tart cherry growers and handlers nominated by their peers to serve as representatives on the Board must submit nomination forms to the USDA. Formal rulemaking amendments to the marketing order must be approved in grower referenda authorized and conducted by the USDA. In addition, USDA may conduct a referendum to determine industry support for continuation of the marketing order. Finally, handlers are asked to sign an agreement to indicate their willingness to comply with the provisions of the marketing order if the order is amended. A standardized background form and combined Acceptance Statement for nominees to multiple committees is included in OMB No. 0581–0177.

The information collected is used only by authorized representatives of the USDA, including AMS, Specialty Crops Programs' regional and headquarters staff, and authorized Board

employees. Authorized Board employees and the industry are the primary users of the information, and AMS is the secondary user.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .227 hours per response.

Respondents: Tart cherry growers and for-profit businesses handling fresh and processed tart cherries produced in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

Estimated Number of Respondents: 642.

Estimated Number of Responses: 3,258.

Estimated Number of Responses per Respondent: 5.07.

Estimated Total Annual Burden on Respondents: 740 hours.

Comments are invited on: (1) Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on those who respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference this docket number and be sent to the USDA in care of the Docket Clerk at the address above. All comments received within the provided comment period will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

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

A 60-day comment period is provided to allow interested persons to respond to the notice.

Dated: September 30, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–21568 Filed 10–3–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0039]

Determination of Regulatory Review Period for Purposes of Patent Extension; Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has determined the regulatory review period for Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin and is publishing this notice of that determination as required by law. We have made this determination in response to the submission of an application to the Commissioner for Patents, Department of Commerce, for the extension of a patent that claims that veterinary biologic.

DATES: We will consider all requests for revision of the regulatory review period determination that we receive on or before November 4, 2019. We will consider all due diligence petitions that we receive on or before April 1, 2020.

ADDRESSES: You may submit revision requests and due diligence petitions by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0039.*
- *Postal Mail/Commercial Delivery:* Please send your request or petition to Docket No. APHIS–2019–0039, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

A copy of the regulatory review period determination and any revision requests or due diligence petitions that we receive on this determination may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0039* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Barbara J. Sheppard, Senior Staff Veterinary Medical Officer, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, USDA, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; (515) 337–6100.

SUPPLEMENTARY INFORMATION: The provisions of 35 U.S.C. 156, ''Extension of patent term,'' provide, generally, that a patent for a product may be extended for a period of up to 5 years as long as the patent claims a product that, among other things, was subject to a regulatory review period before its commercial marketing or use. (The term ''product'' is defined in that section as ''a drug product'' [which includes veterinary biological products] or ''any medical device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act.'') A product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

The regulations in 9 CFR part 124, ''Patent Term Restoration'' (referred to below as the regulations), set forth procedures and requirements for the Animal and Plant Health Inspection Service's (APHIS') review of applications for the extension of the term of certain patents for veterinary biological products pursuant to 35 U.S.C. 156. As identified in the regulations, the responsibilities of APHIS include:

- Assisting the U.S. Patent and Trademark Office of the U.S. Department of Commerce in determining eligibility for patent term restoration;
- Determining the length of a product's regulatory review period;
- If petitioned, reviewing and ruling on due diligence challenges to APHIS' regulatory review period determinations; and
- Conducting hearings to review initial APHIS findings on due diligence challenges.

The regulations are designed to be used in conjunction with regulations issued by the U.S. Patent and Trademark Office concerning patent term extension, which may be found at 37 CFR 1.710 through 1.791.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For veterinary biologics, the testing phase begins on the date the authorization to prepare an experimental veterinary biologic became effective and runs until the approval phase begins. The approval phase begins on the date an application for a license was initially submitted for approval and ends on the date such license was issued. Although only a portion of a regulatory review period

may count toward the actual amount of extension that the Commissioner for Patents may award, APHIS' determination of the length of a regulatory review period for a veterinary biologic will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(5)(B).

APHIS recently licensed for production and marketing the veterinary biologic Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin. Subsequent to this approval, the U.S. Patent and Trademark Office received a patent term restoration application for Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin (U.S. Patent No. 9,585,951) from Zoetis, Inc., and the U.S. Patent and Trademark Office requested APHIS' assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 1, 2018, APHIS advised the U.S. Patent and Trademark Office that this veterinary biologic had undergone a regulatory review period and that the approval of Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin represented the first permitted commercial licensing or use of the product. Subsequently, the U.S. Patent and Trademark Office requested that APHIS determine the product's regulatory review period.

APHIS has determined that the applicable regulatory review period for Porcine Circovirus Vaccine, Type 1-Type 2 Chimera, Killed Virus, Mycoplasma Hyopneumoniae Bacterin is 1,376 days. Of this time, 0 days occurred during the testing phase of the regulatory review period, and 1,376 days occurred during the approval phase. These periods were derived from the following dates:

1. *The date the application for a license was initially submitted for approval under the Virus-Serum-Toxin Act:* April 28, 2014. APHIS has verified the applicant's claim that the application was initially submitted on April 28, 2014.

2. *The date the license was issued:* February 1, 2018. APHIS has verified the applicant's claim that the license for the commercial marketing of the vaccine was issued on February 1, 2018.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,376 days of patent term extension.

Section 124.22 of the regulations provides that any interested person may request a revision of the regulatory review period determination within 30 days of the date of this notice (see **DATES** above). The request must specify the following:

- The identity of the product;
- The identity of the applicant for patent term restoration;
- The docket number of this notice; and
- The basis for the request for revision, including any documentary evidence.

Further, under § 124.30 of the regulations, any interested person may file a petition with APHIS, no later than 180 days after the date of this notice (see **DATES** above), alleging that a license applicant did not act with due diligence in seeking APHIS approval of the product during the regulatory review period. The filing, format, and content of a petition must be as described in the regulations in ''Subpart D—Due Diligence Petitions'' (§§ 124.30 through 124.33).

Authority: 35 U.S.C. 156; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 30th day of September 2019.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2019–21677 Filed 10–3–19; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Information Collection Request; Organic Certification Cost Share Program

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) is requesting comments from all interested individuals and organizations on a revision and an extension of a current information collection request associated with the Organic Certification Cost Share Program (OCCSP). OCCSP provides cost share assistance to producers and handlers of agricultural products who are obtaining or renewing their certification under the National Organic Program (NOP). Certified operations may receive up to 75 percent of their certification costs paid. Certain State agencies also submit applications to FSA to administer OCCSP in their States.

DATES: We will consider comments that we receive by December 3, 2019.

ADDRESSES: We invite you to submit comments on the notice. In your comments, include date, OMB control number, volume, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Farm Service Agency, USDA, Tona Huggins, 1400 Independence Avenue SW, Mail Stop 0517, Washington, DC 20250–0517.

You may also send comments to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Copies of the information collection may be obtained from Tona Huggins at the above address.

FOR FURTHER INFORMATION CONTACT: Tona Huggins, (202) 205–9847; email: *tona.huggins@usda.gov.* Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Description of Information Collection

Title: Organic Certification Cost Share Program.

OMB Number: 0560–0289.

Expiration Date of Approval: 03/31/2020.

Type of Request: Extension.

Abstract: FSA is requesting comments from all interested individuals and organizations on a revision and an extension of a currently approved information collection request associated with OCCSP. Producers and handlers will apply for cost share payments, and State Agencies will establish agreements to get funds and to disburse payments to qualified producers or handlers.

The burden hours increased by 21,290 hours since the last OMB approval. The reason for the increase is due to increased participation in the NOP. The travel times have been removed from the request. The respondents may submit applications by mail and many respondents go to the county offices to do regular and customary business with FSA for other FSA programs; this means no travel time is required specifically for the information collection and therefore, it is no longer included in the burden hour reporting.

For the following estimated total annual burden on respondents, the

formula used to calculate the total burden hour is the estimated average time per responses hours multiplied by the estimated total annual responses.

Estimate of Annual Burden: Public reporting burden for this collection of information is estimated to average 1.0015 hours per response.

Type of Respondents: Individuals, and State.

Estimated Number of Respondents: 15,565.

Estimated Annual Number of Responses per Respondent: 5.0455.

Estimated Total Annual of Responses: 78,533.

Estimated Average Time per Responses: 1.0015 hours.

Estimated Total Annual Burden on Respondents: 78,650 hours.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected;

(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.

All responses to this notice, including names and addresses when provided, will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Richard Fordyce,

Administrator, Farm Service Agency.

[FR Doc. 2019–21573 Filed 10–3–19; 8:45 am]

BILLING CODE 3410–05–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Arizona Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of public meeting on Subminimum Wages for Disabled Persons in Arizona.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a meetings of the Arizona Advisory Committee (Committee) to the Commission will be held at 9:30 a.m. to 3:00 p.m. (Mountain Time) Friday, October 18, 2019. The purpose of the briefing is for the Committee to receive testimony regarding Subminimum Wages for Disabled Persons.

DATES: The meeting will be held on Friday, October 18, 2019 at 9:30 a.m. to 3:30 p.m. MT.

ADDRESSES: Arizona State University, Sandra Day O'Connor College of Law; Room 544, 111 E. Taylor Street, Phoenix, AZ 85004.

FOR FURTHER INFORMATION CONTACT: David Barreras (DFO) at *dbarreras@usccr.gov* or (312) 353–8311.

SUPPLEMENTARY INFORMATION: Members of the public are entitled to make comments during the open period at the end of the meetings. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Midwestern Regional Office, U.S. Commission on Civil Rights, 230 S Dearborn Street, Suite 2120, Chicago, IL 60604. They may be faxed to the Commission at (312) 353–8311, or emailed David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meetings at *https://facadatabase.gov/committee/meetings.aspx?cid=235.* Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

Opening Remarks and Introductions (9:30 a.m.–9:45 a.m.)
Panel 1: Government Perspectives (9:45 a.m.–10:45 a.m.)
Panel 2: Education, Research and Advocacy Perspectives (10:45 a.m.–11:30 a.m.)
Panel 3: Employer Perspectives (11:30 a.m.–12:15 p.m.)
Panel 4: Service Provider Perspectives (1:00 p.m.–1:45 p.m.)
Panel 5: Parent Perspectives (1:45 p.m.–2:30 p.m.)
Public Comments (2:30 p.m.–3:00 p.m.)
Adjournment

Dated: September 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–21614 Filed 10–3–19; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the North Dakota Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the North Dakota Advisory Committee to the Commission will by teleconference at 12:00 p.m. (CDT) on Wednesday, October 23, 2019. The purpose of the meeting is to plan next steps for its hate crimes project.

DATES: Wednesday, October 23, 2019, at 12:00 p.m. CDT.

Public Call-In Information: Conference call-in number: 1–800–367–2403 and conference call 5151020.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ebohor@usccr.gov* or by phone at 303–866–1040.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–800–367–2403 and conference call 5151020. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call-in number: 1–800–367–2403 and conference call 5151020.

Members of the public are invited to make statements during the open

comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Rocky Mountain Regional Office, U.S. Commission on Civil Rights, 1961 Stout Street, Suite 13–201, Denver, CO 80294, faxed to (303) 866–1040, or emailed to Evelyn Bohor at *ebohor@usccr.gov*. Persons who desire additional information may contact the Rocky Mountain Regional Office at (303) 866–1040.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://gsageo.force.com/FACA/apex/FACAPublicCommittee?id=a10t0000001gzl9AAA*; click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Rocky Mountain Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Rocky Mountain Regional Office at the above phone numbers, email or street address.

Agenda: Wednesday, October 23, 2019, 12:00 p.m. (CDT)

- Roll call
- Discuss Hate Crimes Project
- Open Comment
- Adjourn

Dated: September 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–21613 Filed 10–3–19; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Wyoming Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the meeting of the Wyoming Advisory Committee (Committee) to the Commission will be held at 1:00 p.m. (MDT) Friday, October 18, 2019. The purpose of this meeting is for the Committee to discuss additional details on their hearing on hate crimes.

DATES: Friday, October 18, 2019 at 1:00 p.m. MDT.

Public Call Information:
Dial: 800–367–2403.
Conference ID: 7532665.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes (DFO) at *afortes@usccr.gov* or (213) 894–3437.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 800–367–2403, conference ID number: 7532665. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. They may be faxed to the Commission at (213) 894–0508, or emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (213) 894–3437.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meetings at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzliAAA.*

Please click on ''Committee Meetings'' tab. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Discuss Briefing Agenda
III. Briefing Logistics
IV. Public Comment
V. Adjournment

Dated: September 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–21612 Filed 10–3–19; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Rhode Island Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Rhode Island State Advisory Committee to the Commission will convene by conference call, on Tuesday, November 5, 2019 at 11:00 a.m. (EDT). The purpose of the meeting is to review of Statement of Concern on Payday Lending and continue planning on licensing project.

DATES: Tuesday, November 5, 2019 at 11:00 a.m. (EDT).

Public Call-In Information: Conference call number: 1–800–353–6461 and conference call ID: 5097312.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–800–353–6461 and conference call ID: 5097312. Please be advised that before placing them into the conference call, the conference call operator may ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number herein.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call number: 1–800–353–6461 and conference call ID: 5097312.

Members of the public are invited to submit written comments; the comments must be received in the regional office approximately 30 days after each scheduled meeting. Written

comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, or emailed to Evelyn Bohor at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://gsageo.force.com/FACA/apex/FACAPublicCommittee?id=a10t0000001gzm4AAA;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda: Tuesday, November 5, 2019 at 11:00 a.m. (EDT).

I. Roll Call
II. Review Statement of Concern on Payday Lending
III. Project Planning on Licensing
IV. Open Comment
V. Adjournment

Dated: September 30, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–21615 Filed 10–3–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Office of the Secretary

Estimates of the Voting Age Population for 2018

AGENCY: Office of the Secretary, Commerce.

ACTION: General notice announcing population estimates.

SUMMARY: This notice announces the voting age population estimates as of July 1, 2018, for each state and the District of Columbia. We are providing this notice in accordance with the 1976 amendment to the Federal Election Campaign Act. In addition, the data have been available online at the Census Bureau's website since December 2018 at: *https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html.*

FOR FURTHER INFORMATION CONTACT: Karen Battle, Chief, Population Division, U.S. Census Bureau, Room HQ–6H174, Washington, DC 20233, at 301–763–2071, or at *karen.battle@census.gov.*

SUPPLEMENTARY INFORMATION: Under the requirements of the 1976 amendment to the Federal Election Campaign Act, Title 52, United States Code, Section 30116(e), I hereby give notice that the estimates of the voting age population for July 1, 2018, for each state and the District of Columbia are as shown in the following table.

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2018

Area	Population 18 and over
United States	253,768,092
Alabama	3,798,031
Alaska	553,622
Arizona	5,528,989
Arkansas	2,310,645
California	30,567,090
Colorado	4,430,329
Connecticut	2,837,472
Delaware	763,555
District of Columbia	574,961
Florida	17,070,244
Georgia	8,013,724
Hawaii	1,117,077
Idaho	1,307,236
Illinois	9,883,814
Indiana	5,123,748
Iowa	2,425,378
Kansas	2,205,544
Kentucky	3,459,573
Louisiana	3,564,062
Maine	1,088,000
Maryland	4,702,570
Massachusetts	5,535,291
Michigan	7,831,247
Minnesota	4,308,564
Mississippi	2,280,389
Missouri	4,749,622
Montana	832,871
Nebraska	1,452,427
Nevada	2,345,395
New Hampshire	1,098,288
New Jersey	6,954,877
New Mexico	1,613,275
New York	15,474,107
North Carolina	8,082,975
North Dakota	581,379
Ohio	9,096,117
Oklahoma	2,986,593
Oregon	3,317,146
Pennsylvania	10,158,149
Rhode Island	852,102
South Carolina	3,978,182
South Dakota	664,629
Tennessee	5,263,790
Texas	21,303,746
Utah	2,228,643
Vermont	510,326
Virginia	6,647,893
Washington	5,872,306
West Virginia	1,441,672
Wisconsin	4,537,465

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2018—Continued

Area	Population 18 and over
Wyoming	442,962

Source: U.S. Census Bureau, Population Division, Vintage 2018 Population Estimates.

I have certified these estimates for the Federal Election Commission.

Dated: May 30, 2019.

Wilbur Ross,

Secretary, U.S. Department of Commerce.

Editorial note: This document was received for publication by the Office of the Federal Register on October 1, 2019.

[FR Doc. 2019–21663 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–60–2019]

Foreign-Trade Zone (FTZ) 23—Buffalo, New York; Notification of Proposed Production Activity; Panasonic Solar North America (Crystalline Silicon Photovoltaic Solar Panels/Modules and Cells); Buffalo, New York

Panasonic Solar North America (PSNA, formerly Panasonic Eco Solutions Solar New York America) submitted a notification of proposed production activity to the FTZ Board for its facility in Buffalo, New York. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on September 26, 2019.

PSNA already has authority to produce crystalline silicon photovoltaic (CSPV) cells and solar panels/modules within Subzone 23E. The current request would add a foreign-status material/component to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status component described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt PSNA from customs duty payments on the foreign-status material/component used in export production. On its domestic sales, for the foreign-status organic surface-active agents (texture additives) (duty rate, 3.7%), PSNA would be able to choose the duty rate during customs entry procedures that applies to CSPV cells and solar

panels/modules (duty free). PSNA would be able to avoid duty on the foreign-status material/component which becomes scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The request indicates that the foreign-status component/material is subject to special duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is November 13, 2019.

A copy of the notification will be available for public inspection in the ''Reading Room'' section of the Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: October 1, 2019.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2019–21671 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Marine Recreational Information Program Fishing Effort Survey

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 December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Rob Andrews, NOAA Fisheries, Office of Science and Technology, 301–427–8105, *rob.andrews@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Marine recreational anglers are surveyed to collect catch and effort data, fish biology data, and angler socioeconomic characteristics. These data are required to carry out provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), as amended, regarding conservation and management of fishery resources.

Marine recreational fishing catch and effort data are collected through a combination of mail surveys, telephone surveys and on-site intercept surveys with recreational anglers. The Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES) is a self-administered, household mail survey that samples from a residential address frame to collect data on the number of recreational anglers and the number of recreational fishing trips. The survey estimates marine recreational fishing activity for all coastal states from Maine through Mississippi, as well as Hawaii and Puerto Rico.

FES estimates are combined with estimates derived from complementary surveys of fishing trips, the Access-Point Angler Intercept Survey, to estimate total, state-level fishing catch, by species. These estimates are used in the development, implementation, and monitoring of fishery management programs by NOAA Fisheries, regional fishery management councils, interstate marine fisheries commissions, and state fishery agencies.

II. Method of Collection

Information will be collected through self-administered mail surveys.

III. Data

OMB Control Number: 0648–0652.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 125,791.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 10,826 hours.

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. 2019–21623 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–XR054]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice; availability of a Hatchery and Genetic Management Plan for public comment.

SUMMARY: Notice is hereby given that NMFS has received a Hatchery and Genetic Management Plan (HGMP) outlining a program rearing and releasing Type-N coho salmon in the Columbia River Estuary, operated by the Washington Department of Fish and Wildlife (WDFW), pursuant to Limit 5 of

the NMFS Endangered Species Act (ESA) Section 4(d) Rule for salmon and steelhead. This document serves to notify the public of the availability and opportunity to comment on the HGMP.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) no later than 5 p.m. Pacific time on November 4, 2019. Comments received after this date may not be considered.

ADDRESSES: Written comments should be addressed to the NMFS Sustainable Fisheries Division, 1201 NE Lloyd Blvd., Portland, OR 97232. Comments may be submitted by email. The mailbox address for providing email comments is: *Hatcheries.Public.Comment@noaa.gov*. Include in the subject line of the email comment the following identifier: Comments on Elochoman/Beaver Creek Hatchery program.

FOR FURTHER INFORMATION CONTACT: James Archibald at (503) 230–5425 or by email at *james.archibald@noaa.gov*.

SUPPLEMENTARY INFORMATION:

ESA-Listed Species Covered in This Notice

- Lower Columbia River Chinook Salmon (*Oncorhynchus tshawytscha*): threatened, naturally and artificially propagated;
- Lower Columbia River Coho (*Oncorhynchus kisutch*): threatened, naturally and artificially propagated;
- Lower Columbia River Steelhead (*Oncorhynchus mykiss*): threatened, naturally and artificially propagated;
- Lower Columbia River Chum (*Oncorhynchus keta*): endangered, naturally and artificially propagated.

Background

Section 9 of the ESA and Federal regulations prohibit the ''taking'' of a species listed as endangered or threatened. The term ''take'' is defined under the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may make exceptions to the take prohibitions in section 9 of the ESA for hatchery programs that are approved by NMFS under Limit 5 of section 4(d) of the ESA (50 CFR 223.203(b)).

The operator, WDFW, submitted an HGMP to NMFS pursuant to NMFS' 4(d) Rule for salmon and steelhead for the Elochoman Type-N coho salmon hatchery program in the Columbia River Estuary.

NMFS has evaluated the operations of this proposed coho salmon program for its effects on ESA-listed salmon and steelhead populations in the Columbia River, as part of its 2017 Mitchell Act Biological Opinion, and found that the operations of the program would not jeopardize listed species or adversely modify their designated critical habitat.

Approving the HGMP under Limit 5 of the 4(d) rule would limit application of take prohibitions for ESA-listed salmon and steelhead associated with the operation of the program. Prior to HGMP approval and the drafting of a decision memo, NOAA Fisheries is seeking public review and comment on the HGMP.

The program is intended to contribute to the survival and recovery of Lower Columbia River coho salmon in the Columbia River Estuary, and enhance fishing opportunity for tribal, commercial, and recreational fisheries.

Authority: 16 U.S.C. 1531–1543; 16 U.S.C. 1361 *et seq.*

Dated: September 30, 2019.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–21589 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Electronic Monitoring Systems for Atlantic Highly Migratory Species (HMS)

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 December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Ian Miller, phone 301–427–8503, or email *ian.miller@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Vessel monitoring systems (VMS) and other electronic monitoring systems collect important information on fishing effort, catch, and the geographic location of fishing effort and catch for certain sectors of the Atlantic HMS fleet. Data collected through these systems are used in both domestic and international fisheries management, including for law enforcement, stock assessments, and quota management purposes. Atlantic HMS vessels required to use VMS are pelagic longline, purse seine, bottom longline (directed shark permit holders in North Carolina, South Carolina, and Virginia), and gillnet (directed shark permit holders consistent with the requirements of the Atlantic large whale take reduction plan requirements at 50 CFR 229.39.(h)) vessels. In addition to VMS, pelagic longline vessels are also required to have electronic monitoring systems to monitor catch and account for bluefin tuna interactions.

The National Marine Fisheries Service (NMFS) Office of Law Enforcement monitors fleet adherence to gear- and time-area restrictions with VMS position location data. Gear restricted areas and time-area closures are important tools for Atlantic HMS management that have been implemented to reduce bycatch of juvenile swordfish, sea turtles, and bluefin tuna, among other species. Electronic monitoring data from the pelagic longline fleet are used by NMFS to accurately monitor bluefin tuna catch by the pelagic longline fleet, to ensure compliance with Individual Bluefin Quota (IBQ) limits and requirements, and to ensure that the Longline category bluefin tuna quota is not over-harvested. Additionally, electronic monitoring is used to verify disposition of retained shortfin mako sharks, consistent with binding international agreements. VMS reporting of bluefin tuna catch is used to monitor IBQ allocations in real-time.

Atlantic HMS fisheries are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Atlantic Tunas Conservation Act (ATCA). Under the

MSA, management measures must be consistent with ten National Standards, and fisheries must be managed to maintain optimum yield, rebuild overfished fisheries, and prevent overfishing. Under ATCA, the Secretary of Commerce shall promulgate regulations, as necessary and appropriate, to implement measures adopted by the International Commission for the Conservation of Atlantic Tunas (ICCAT).

II. Method of Collection

First-time VMS respondents must install a VMS unit and submit an activation checklist to NMFS via mail. Hail-out, hail-in, hourly position reports, and bluefin tuna catch reports must be submitted to NMFS electronically via the VMS communication system. First-time electronic monitoring respondents must have an electronic monitoring system installed by a NMFS contractor. Electronic monitoring data must be submitted after each pelagic longline trip via mail.

III. Data

OMB Control Number: 0648–0372.
Form Number(s): None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 311.
Estimated Time per Response: 4 hours for initial VMS installation; 5 minutes per VMS initial activation checklist; 2 minutes per hail-out/hail-in declaration; 6 hours for initial electronic monitoring installation; 5 minutes for pelagic longline bluefin tuna catch records; 15 minutes for purse seine bluefin tuna catch records; 1 minute for dockside review of bluefin tuna catch records; 2 hours for electronic monitoring data retrieval.
Estimated Total Annual Burden Hours: 6,420.
Estimated Total Annual Cost to Public: $422,329.

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. 2019–21620 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska American Fisheries Act (AFA) Permits

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 December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Gabrielle Aberle, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668. Telephone (907) 586–7228.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

The American Fisheries Act (AFA) was signed into law in October 1998. The purpose of the AFA was to tighten U.S. ownership standards that had been exploited under the Anti-reflagging Act, and to provide the Bering Sea and Aleutian Islands (BSAI) pollock fleet the opportunity to conduct their fishery in a more rational manner while protecting non-AFA participants in the other fisheries. The AFA established sector allocations in the BSAI pollock fishery, determined eligible vessels and processors, allowed the formation of cooperatives, set limits on the participation of AFA vessels in other fisheries, and imposed special catch weighing and monitoring requirements on AFA vessels.

Any vessel used to engage in directed fishing for a non-western Alaska community development quota (non-CDQ) allocation of pollock in the Bering Sea and any shoreside processor, stationary floating processor, or mothership that receives pollock harvested in a non-CDQ directed pollock fishery in the Bering Sea must have a valid AFA permit on board the vessel or at the facility location at all times while non-CDQ pollock is being harvested or processed.

Permanent AFA permits (AFA catcher vessel, AFA catcher/processor, AFA mothership, and AFA inshore processor) for the BSAI pollock fishery had a one-time application deadline of December 1, 2000, and were issued with an indefinite expiration date. Therefore, except for participants that require annual or replacement permits, all AFA entities required to have a permit are already permitted.

This information collection contains the following AFA permitting and reporting requirements:

- The AFA Permit: Rebuilt, Replacement, or Removed Vessel Application is submitted by an owner of an AFA vessel to notify NMFS the vessel has been rebuilt; to request an AFA permit for a replacement catcher vessel, catcher/processor, or mothership; or to request removal of an AFA catcher vessel that is a member of an inshore cooperative and assign its catch history to another vessel or vessels in the same cooperative.
- The Application for AFA Inshore Catcher Vessel Cooperative Permit is submitted annually by each AFA inshore catcher vessel cooperative to obtain an AFA Inshore Catcher Vessel Cooperative Permit and identify the vessels and processors that will be

participating in the BSAI pollock fishery prior to the start of each fishing year.

• The AFA Inshore Vessel Contract Fishing Notification is submitted by an AFA inshore cooperative that intends to contract with a non-member vessel to harvest a portion of the cooperative's annual pollock allocation to notify NMFS of vessels that might be reporting with an alternative cooperative ID.

• The Application for Approval as an Entity to Receive Transferable Chinook Salmon PSC Allocation is submitted by an entity representing the catcher/processor sector or the mothership sector to request approval to receive transferable Chinook salmon PSC allocations on behalf of members of the sector. Once approved, an entity is not required to reapply for or renew its status. Entities sometimes submit amendments to update contact and other information related to the entity and its members.

• The Application for Transfer of Bering Sea Chinook Salmon PSC Allocations is submitted by an authorized representative of the catcher/processor sector, the mothership sector, an inshore cooperative, or a CDQ group to transfer Chinook salmon PSC allocations to another entity's account.

II. Method of Collection

All may be submitted to NMFS by mail, fax, or delivery except the AFA Inshore Vessel Contract Fishing Notification, which is not accepted by fax. The Application for Transfer of Bering Sea Chinook Salmon PSC Allocations and the Approval as an Entity to Receive Transferable Chinook Salmon PSC Application may be submitted online through eFISH on the NMFS Alaska Region website at *https://alaskafisheries.noaa.gov/webapps/efish/login.*

III. Data

OMB Control Number: 0648–0393.

Form Number(s): None.

Type of Review: Regular Submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations; Individuals or households.

Estimated Number of Respondents: 27.

Estimated Time per Response: 1 hour each for AFA Permit: Rebuilt, Replacement, or Removed Vessel Application and Application for Transfer of Bering Sea Chinook Salmon PSC Allocations; 2 hours for Application for AFA Inshore Catcher Vessel Cooperative Permit; 4 hours for AFA Inshore Vessel Contract Fishing Notification; 8 hours for Application for Approval as an Entity to Receive Transferable Chinook Salmon PSC Allocation.

Estimated Total Annual Burden Hours: 135 hours.

Estimated Total Annual Cost to Public: $155 in recordkeeping and reporting costs.

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. 2019–21619 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV094

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 60 In-person Workshop for South Atlantic Red Porgy.

SUMMARY: The SEDAR 60 assessment of the South Atlantic stock of Red Porgy will consist of a series of workshops and webinars: An In-person Workshop to address data and assessment needs, and Assessment Webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 60 In-person Workshop will be held on December 10, 2019, from 9 a.m. to 6 p.m.; December 11, 2019, from 8:30 a.m. to 6 p.m.; and December 12, 2019, from 8:30 a.m. to 1 p.m. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The SEDAR 60 In-person Workshop will be held at the Beaufort Hotel, 2440 Lennoxville Road, Beaufort, NC 28516; phone: (252)728–3000.

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *Kathleen.howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists,

and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The SEDAR 60 In-person Workshop is being held to address both data and assessment concerns. The items for discussion could include:

1. Participants could evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery independent and fishery dependent measures of stock abundance, as specified in the Terms of Reference for the workshop, to develop an assessment data set and associated documentation.

2. Participants might then consider methods and configuration options for models, recommend assessment methods (*i.e.,* model types) to pursue for potential base model configuration, identify likely issues to be addressed and evaluated in developing the base model, review base model alternatives and recommend a base model approach and configuration. Participants could also, recommend sensitivities and uncertainty evaluations, review continuity, sensitivities and uncertainty evaluations, recommend projection approaches and configuration and review projection results.

The In person Workshop is open to the public. Additional information about SEDAR 60, including a public comment form is available from the SEDAR website at: *http://sedarweb.org/sedar-60.*

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21653 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Pacific Coast Groundfish Trawl Rationalization Program Permit and License Information Collection

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 December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jahnava Duryea, National Marine Fisheries Service, California Central Valley Office, 650 Capital Mall, Suite 5–100, Sacramento, CA 95814, (916) 930–3725 or via email at *jahnava.duryea@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS) requests comments on the extension of a currently approved information collection for the West Coast Region's Pacific Coast Groundfish Trawl Rationalization Program.

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.,* provides that the Secretary of Commerce is responsible for the conservation and management of marine fisheries resources in the Exclusive Economic Zone (3–200 miles) of the United States. NMFS West Coast Region manages the Pacific Coast Groundfish Fishery in the Exclusive Economic Zone (EEZ) off the coasts of Washington, Oregon, and California under the Pacific Coast Groundfish Fishery Management Plan (FMP).

In January 2011, NMFS implemented a trawl rationalization program, which is a catch share program, for the Pacific Coast Groundfish Limited Entry Trawl Fishery. The program was implemented through Amendments 20 and 21 to the Pacific Coast Groundfish FMP and the corresponding implementing regulations at 50 CFR part 660. Amendment 20 established the trawl rationalization program that consists of an individual fishing quota (IFQ) program for the shorebased trawl fleet (including whiting and nonwhiting sectors) and cooperative programs for the at-sea mothership and catcher/processor trawl fleets (whiting only). Amendment 21 set long-term allocations for the limited entry trawl sectors of certain groundfish species.

Under the trawl rationalization program, new permits, accounts, endorsements and licenses were established. These consist of: Quota share (QS) permits/accounts, vessel accounts, first receiver site licenses, mothership endorsements on certain limited entry trawl permits, mothership catcher vessel endorsements on certain limited entry trawl permits, catcher/processor endorsements on certain limited entry trawl permits, a mothership cooperative permit, and a catcher/processor cooperative permit. NMFS collects information from program participants required to: (1) Establish new permits, accounts, and licenses; (2) renew permits, accounts, and licenses; (3) allow trading of QS percentages and quota pounds (QP) in online QS and vessel accounts, and allow transfer of catch history assignments between limited entry trawl permits; (4) track compliance with program control limits; and (5) implement other features of the regulations pertaining to permits and licenses.

As part of its fishery management responsibilities, NMFS requires this information to determine whether a respondent complies with regulations that pertain to the issuance, renewal,

and transfer and use of quota. Identification of the participants of the trawl rationalization program, their gear types, descriptions of their vessels, and activity levels are needed to control and determine the extent of fishing and to track inseason quota use. Collection of this information also allows NMFS to equitably manage annual shorebased trawl allocations for the fishery and enforce control limits such that no person may own or control, or have a controlling influence over, quota for any individual species that exceeds the Shorebased IFQ Program accumulation limits. NMFS requests comments on the extension of these permit information collections.

II. Method of Collection

Information is collected by mail and electronically.

The following information is collected by mail: QS permit application forms; late QS permit renewals; vessel account registration requests; late vessel account renewals; trawl identification of ownership interest forms for new applicants, mothership catcher vessel endorsed limited entry permit owners, and mothership permit owners; first receiver site license application forms; mothership permit renewal forms; mothership permit change of vessel registration, permit owner, or vessel owner application forms; mothership cooperative permit application forms; change of mothership catcher vessel endorsement and catch history assignment registration forms; mutual agreement exception forms; mothership withdrawal forms; catcher/processor cooperative permit application forms; material change forms; and QS abandonment requests.

The following information is collected electronically: QS permit renewals; QS percent transfers; QP transfers from a QS account to a vessel account; vessel account renewals; QP transfers from a vessel account to another vessel account; and trawl identification of ownership interest forms for online QS and vessel account renewals.

III. Data

OMB Control Number: 0648–0620.

Form Number(s): None.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations; non-profit institutions; State, local, or tribal government.

Estimated Number of Respondents: 410.

Estimated Time per Response: QS permit/account application form—30 minutes; QS permit/account online renewal—10 minutes; QS permit/account late renewal form—15 minutes; QS transfer—10 minutes; QP transfer from QS account to vessel account—8 minutes; vessel account registration request—15 minutes; vessel account online renewal—10 minutes; vessel account late renewal form—15 minutes; QP transfer from vessel account to another vessel account—8 minutes; trawl identification of ownership interest form for new entrants—45 minutes; trawl identification of ownership interest form for renewals—5 minutes; first receiver site license application form for new entrants—210 minutes; first receiver site license application form for re-registering license holders—110 minutes; mothership permit renewal form—20 minutes; mothership permit change of vessel registration, permit owner, or vessel owner application form—45 minutes; mothership cooperative permit application form—240 minutes; change of mothership catcher vessel endorsement and catch history assignment registration form—45 minutes; mutual agreement exception—60 minutes; mothership withdrawal—120 minutes; catcher/processor cooperative permit application form—120 minutes; QS abandonment request—10 minutes.

Estimated Total Annual Burden Hours: 640.

Estimated Total Annual Cost to Public: $12,475.

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. 2019–21622 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV092

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 Joint Scallop Advisory Panel and Plan Development Team 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, October 23, 2019 at 9 a.m.

ADDRESSES: The meeting will be held at the New Bedford Harbor Hotel, 222 Union Street, New Bedford, MA 02740; phone: (508) 999–1292.

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 Joint Scallop Advisory Panel and Plan Development Team will review Framework (FW) 32 alternatives and analyses. The primary focus of this meeting will be to provide input on the range of specification alternatives. FW 32 will set specifications including ABC/ACLs, days-at-sea, access area allocations, total allowable catch for the Northern Gulf of Maine (NGOM) management area, targets for General Category incidental catch, and set-asides for the observer and research programs for fishing year 2019 and default specifications for fishing year 2020. Management measures in FW 32

include: Measures to mitigate impacts on Georges Bank yellowtail flounder.

The group will also review the progress toward 2019 work items, make recommendations on 2020 scallop work priorities, and consider approaches for moving priorities forward (AP only). If time allows, review progress on Amendment 21 to the Scallop FMP. Other business may be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21648 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV093

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, October 24, 2019 at 8:30 a.m.

ADDRESSES: The meeting will be held at the New Bedford Harbor Hotel, 222 Union Street, New Bedford, MA 02740; phone: (508) 999–1292.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Committee will review Framework (FW) 32 alternatives and analyses. The primary focus of this meeting will be to provide input on the range of specification alternatives. FW 32 will set specifications including ABC/ACLs, days-at-sea, access area allocations, total allowable catch for the Northern Gulf of Maine (NGOM) management area, targets for General Category incidental catch, and set-asides for the observer and research programs for fishing year 2019 and default specifications for fishing year 2020. Management measures in FW 32 include: Measures to mitigate impacts on Georges Bank yellowtail flounder. The group will also review the progress toward 2019 work items, make recommendations on 2020 scallop work priorities, and consider approaches for moving priorities forward. If time allows, review progress on Amendment 21 to the Scallop FMP. Other business may be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21649 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 170718681–9471–01]

RIN 0648–XF575

Endangered and Threatened Wildlife and Plants; Endangered Species Act Listing Determination for Alewife and Blueback Herring; Correction

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

ACTION: Notice; correction.

SUMMARY: We, NMFS, published in the **Federal Register** of June 19, 2019, a ''not warranted'' 12-month finding under the Endangered Species Act (ESA) for alewife (*Alosa pseudoharengus*), four alewife distinct population segments (DPS), blueback herring (*Alosa aestivalis*), and three blueback herring DPSs. This document corrects our significant portion of its range (SPR) analyses for blueback herring.

DATES: This finding was made on June 19, 2019.

ADDRESSES: The status review document for alewife and blueback herring is available electronically at: *https://www.fisheries.noaa.gov/action/not-warranted-listing-determination-alewife-and-blueback-herring.* You may also obtain a copy by submitting a request to the Protected Resources Division, NMFS GARFO, 55 Great Republic Drive, Gloucester, MA 01930, Attention: Alewife and Blueback Herring 12-month Finding.

FOR FURTHER INFORMATION CONTACT: Jean Higgins, NMFS Greater Atlantic Regional Fisheries Office, 978–281–9345.

SUPPLEMENTARY INFORMATION: On June 19, 2019, we issued a ''not warranted'' finding for alewife (*Alosa pseudoharengus*), four alewife distinct population segments (DPS), blueback herring (*Alosa aestivalis*), and three blueback herring DPSs (84 FR 28630). In making that finding, we determined that neither blueback herring nor any of the

DPSs, specifically the Bb-Canada/Northern New England, Bb-Mid-Atlantic, and Bb-Southern Atlantic DPSs, were threatened or endangered throughout all or a significant portion of their ranges. In the June 19, 2019 Notice (hereafter Notice), we inadvertently omitted information related to the Status Review Team's (SRT) application of the SPR Policy (79 FR 37578; July 1, 2014) to the blueback herring DPSs and our subsequent findings. Consistent with the SRT's application of the SPR Policy to the alewife rangewide and to the alewife DPSs, which is described in the Notice, the SRT also applied the SPR Policy to the blueback herring population rangewide and to the blueback herring DPSs. The Notice provides a thorough discussion of the SPR Policy as applied to the blueback herring rangewide and our additional considerations, independent of the definition of ''significant'' in the policy given that the threshold for ''significance'' had recently been invalidated. In the Notice, however, we failed to include a discussion of the SRT's SPR analyses for the Bb-Canada/Northern New England, Bb-Mid-Atlantic, and Bb-Southern Atlantic DPSs, through which they found no evidence of a heightened risk of extinction now or in the foreseeable future in any portion of the ranges of these DPSs. Furthermore, we failed to state that we agreed with the SRT's analyses. Here, we provide corrections to our 12-month finding and provide notice that these analyses have also been included in the Status Review Report.

Additionally, in the SPR section of the Notice, within the rangewide analysis for blueback herring, our discussion of the Long Island Sound portion of the range requires clarification. Here, we clarify that the Long Island Sound portion of the range overlaps the Bb-Southern New England stock complex and the Bb-Mid-Atlantic DPS. As described in the Notice, some of the rivers in this portion occur within the Bb-Southern New England stock complex (the Gilbert-Stuart and Monument Rivers (Reid *et al.* 2018)), while other rivers are found in the Bb-Mid-Atlantic DPS (the Connecticut River and Mianus Rivers (Reid *et al.* 2018)). This clarifies that this portion does not exist solely within the Bb-Mid-Atlantic DPS.

Corrections

In the **Federal Register** of June 19, 2019 in FR Doc. 2019–12908, beginning on page 28663, in the preamble section, make the following corrections:

1. On page 28663, in the second column, in the first full paragraph, the first sentence is corrected to read:

Additionally, because in 2011, the petitioner identified the Long Island Sound portion of the range as a potential DPS, the SRT considered if this portion, which overlaps the Bb-Southern New England stock complex and the Mid-Atlantic DPS, would be considered ''significant'' under the SPR Policy.

2. On page 28663, in the second column, in the second full paragraph, the second sentence is corrected to read:

Notably, this area is found partially within the Bb-Mid-Atlantic DPS (discussed above and reviewed in Evaluation of Threats), and any information that may differ in the Long Island Sound portion of the range from other portions of the blueback herring range is expressed in the above descriptions with additional detail provided in the Status Review Report (NMFS 2019).

3. On page 28665, in the second column, after the first full paragraph, is corrected by adding the following paragraphs to read:

The SRT then applied the SPR Policy to each blueback herring DPS. In other words, the SRT evaluated whether there is substantial information indicating that any portions of any singular DPS may have a concentration of threats and should be further evaluated under the SPR Policy. After reviewing the best available data, the SRT found no information to suggest that any portion of the Bb-Canada/Northern New England, Bb-Mid-Atlantic, or Bb-Southern Atlantic DPSs stood out as having a heightened risk of extinction now or in the foreseeable future, and the SRT found no reason to further evaluate areas of any particular blueback herring DPS under the SPR Policy.

After reviewing the SRT's findings, we agree that there is no evidence to suggest that blueback herring are at heightened risk of extinction, now or in the foreseeable future, in any particular area of a DPS. Thus, we find no evidence that a significant portion of one of the blueback herring DPSs is threatened or endangered and accordingly, consistent with the SPR Policy, we do not reach the second question identified in the SPR Policy of whether a portion of any blueback herring DPS is biologically significant.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: October 1, 2019.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2019–21698 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Tilefish Individual Fishing Quota Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

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 December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or internet at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Douglas Potts, (978) 281–9341 or *Douglas.Potts@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

National Marine Fisheries Service (NMFS) Greater Atlantic Region manages the golden tilefish fishery of the Exclusive Economic Zone (EEZ) of the Northeastern United States, through the Tilefish Fishery Management Plan (FMP). The Mid-Atlantic Fishery Management Council prepared the FMP pursuant to the Magnuson-Stevens

Fishery Conservation and Management Act (Magnuson-Stevens Act). The regulations implementing the FMP are specified at 50 CFR part 648 subpart N.

The recordkeeping and reporting requirements at § 648.294 form the basis for this collection of information. NMFS requests information from tilefish individual fishing quota (IFQ) permit holders to process applications that ensure IFQ allocation holders are provided a statement of their annual catch quota, and for enforcement purposes, to ensure vessels are not exceeding an individual quota allocation. In conjunction with the application, NMFS also collects IFQ share accumulation information to ensure that IFQ allocation holders do not acquire an excessive share of the total limited access privileges, as required by section 303A(d)(5)(C) of the Magnuson-Stevens Act.

NMFS requests transfer application information to process and track requests from allocation holders to transfer quota allocation (permanent and temporary) to another entity. NMFS also collects information for cost recovery purposes as required under the Magnuson-Stevens Act. Cost recovery is used to collect fees to recover the costs directly related to management, data collection and analysis, and enforcement of IFQ programs. Lastly, NMFS collects landings information to ensure that the amounts of tilefish landed and ex-vessel prices are properly recorded for quota monitoring purposes and the calculation of IFQ fees. Having this information results in an increasingly more efficient and accurate database for management and monitoring of fisheries of the Northeastern U.S. EEZ.

II. Method of Collection

The IFQ Allocation permit application, IFQ holder cap form, and the IFQ transfer form are all paper applications. These applications can be filled out online, but must be printed and signed to complete. The IFQ cost recovery process is entirely online at *www.pay.gov.*

III. Data

OMB Number: 0648–0590.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 12.

Estimated Time per Response: IFQ Allocation Permit Application, 30 minutes; IFQ Holder Cap Form, 5 minutes; IFQ Transfer Form, 5 minutes; IFQ Cost Recovery, 2 hours.

Estimated Total Annual Burden Hours: 42.

Estimated Total Annual Cost to Public: $45.

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. 2019–21628 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV091

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 64 Assessment Webinar III for Southeastern U.S. yellowtail snapper.

SUMMARY: The SEDAR 64 stock assessment process for Southeastern U.S. yellowtail snapper will consist of a Data Workshop, a series of assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR 64 Assessment Webinar III will be held November 4, 2019, from 11 a.m. to 1 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 Assessment Webinar are as follows:

1. Using datasets and initial assessment analysis recommended from the data workshop, panelists will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions.

2. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

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: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21652 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Electronic Logbook for the Commercial Shrimp Fishery in the Gulf of Mexico

AGENCY: National Marine Fisheries Service (NMFS), 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 by December 3, 2019.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Adam Bailey, National Marine Fisheries Service, Southeast Regional Office, Sustainable Fisheries Division, 263 13th Ave S, St. Petersburg, FL 33701, 727–824–8305, or *adam.bailey@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes the Gulf of Mexico Fishery Management Council (Council) to prepare and amend fishery management plans for any fishery in waters under its jurisdiction. NMFS manages the commercial shrimp fishery in Federal waters of the Gulf of Mexico (Gulf) under the Fishery Management Plan for the Shrimp Fishery of the Gulf.

The electronic logbook (ELB) regulations for the Gulf shrimp fishery may be found at 50 CFR 622.51(a)(2). These regulations require vessel owners or operators issued a Federal commercial permit for Gulf shrimp to participate in the NMFS-sponsored ELB reporting program. As of July 15, 2019, there are approximately 1,412 valid or renewable Federal permits to commercially harvest shrimp from Federal waters in the Gulf. Reporting through a vessel's ELB, such owners or operators must provide information regarding the size and number of shrimp trawls deployed, and the type of bycatch reduction device and turtle excluder device used for each trip. Compliance with the ELB reporting requirements is required to renew the Gulf shrimp permit.

Monitoring shrimp vessels is challenging when they operate together with many other fishing vessels of differing sizes, gears types, and fishing capabilities. Monitoring is made even more challenging by seasonal variability in shrimp abundance and price, and the broad geographic distribution of the fleet. ELBs provide a precise means of estimating the amount of shrimp fishing effort. Using ELBs to estimate fishing effort serves an important role to help estimate bycatch in the Gulf shrimp fleet.

II. Method of Collection

The current ELB unit automatically collects fishing effort data and transmits those data via a cellular phone connection activated when the vessel is within non-roaming cellular range.

III. Data

OMB Control Number: 0648–0543.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,412.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 4,236.

Estimated Total Annual Cost to Public: $338,880.

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. 2019–21621 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR053

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of availability; request for comments.

SUMMARY: NMFS advises interested parties that the Deschutes Basin Board of Control (DBBC) and the City of Prineville, Oregon (applicants) applied for an incidental take permit, pursuant to the Endangered Species Act (ESA) of 1973, as amended. The DBBC is composed of eight irrigation districts including Arnold, Swalley, Central Oregon, Tumalo, Lone Pine, Three Sisters, Ochoco and North Unit. The permit, if issued, would authorize take of five species under NMFS and U.S. Fish and Wildlife Service (USFWS) jurisdiction. These species are the federally listed Middle Columbia River steelhead (*Oncorhynchus mykiss*), non-listed spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and non-listed sockeye salmon (*Oncorhynchus nerka*), species under NMFS jurisdiction; and the federally listed bull trout (*Salvelinus confluentus*) and federally listed Oregon spotted frog (*Rana pretiosa*), species under USFWS jurisdiction. The permit application addresses incidental take related to irrigation activity including the storage, release, diversion and return of water by the DBBC districts; and groundwater withdrawals and effluent discharge by the City of Prineville. The applicants developed the proposed Deschutes Basin Habitat Conservation Plan (DBHCP) in support of their application and have requested a permit term of 30 years. The USFWS prepared a draft environmental impact statement (EIS) in compliance with the National Environmental Policy Act (NEPA). NMFS is a cooperating agency under NEPA for this action. NMFS is furnishing this notice in order to allow the public and other agencies an opportunity to review and comment on the proposed DBHCP and the USFWS' EIS.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) no later than 11:59 p.m. Eastern time on November 18, 2019. Comments received after this date may not be accepted.

Public Meetings: During the open comment period, the USFWS will host two public meetings at the following times and locations:

- October 15, 2019, from 6 p.m. to 8 p.m., Mount Bachelor Village Resort and Event Center, 19717 Mt. Bachelor Drive, Bend, Oregon 97702.
- October 16, 2019, from 6 p.m. to 8 p.m., Carey Foster Hall, Crook County Fairgrounds, 1280 Main Street, Prineville, Oregon 97754.

ADDRESSES: Copies of the proposed DBHCP are available for public inspection online at *https://www.fisheries.noaa.gov/action/proposed-deschutes-basin-habitat-conservation-plan.* The draft EIS (and the proposed DBHCP) can be viewed online at *http://www.regulations.gov,* Docket No. FWS–R1–ES–2019–0091. The draft EIS and proposed DBHCP are also available at *https://www.fws.gov/Oregonfwo/articles.cfm?id=149489716.*

You may submit comments by the following methods:

- *Electronic Submission: http://www.regulations.gov.* Follow instructions for submitting comments on Docket No. FWS–R1–ES–2019–0091.
- *Public Meetings:* The USFWS will provide computers at the public meetings (see **DATES**) to allow attendees to submit comments.
- *Hard Copy:* Submit by U.S. mail or hand delivery to Public Comments Processing, Attn: Docket No. FWS–R1–ES–2019–0091, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: JAO/1N, Falls Church, VA 22041–3803.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will 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: Scott Carlon, NMFS (503) 231–2379 or by email at *scott.carlon@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Authority

Section 9 of the ESA prohibits the taking of any listed species. The definition of ''take'' under the ESA (16 U.S.C. 1532(19)) includes to harass, harm, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activity. Section 10(a) of the ESA and implementing regulations specify requirements for the issuance of incidental take permits (ITP) to non-Federal entities for the take of endangered and threatened species. NMFS regulations governing permits for threatened and endangered species are at 50 CFR 222.307. Any proposed take must be incidental to otherwise lawful activities, not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and minimize and mitigate the impacts of such take to the maximum extent practicable. In addition, the applicant must prepare an habitat conservation plan describing the impact that will likely result from such taking, the strategy for minimizing and mitigating the take, the funding available to implement such steps, alternatives to such taking, and the reason such alternatives are not being implemented.

Background

The NMFS and USFWS received an incidental take permit application from the applicants on August 30, 2019. The eight DBBC-member districts are quasi-municipal organizations formed and operated according to Oregon state law to distribute water to irrigators within designated geographic boundaries. Collectively, the districts serve over 7,653 patrons and provide water for approximately 151,000 acres. The City of Prineville operates City-owned infrastructure and provides essential services to over 9,000 residents including municipal water supply, sewage treatment and public safety.

The application included the proposed DBHCP, which describes how impacts to steelhead, spring-run Chinook salmon, sockeye salmon, bull trout and Oregon spotted frog (hereafter covered species) would be minimized and mitigated. The proposed DBHCP also describes the estimated potential impact on covered species' populations, adaptive management, monitoring, and mitigation measures.

The various activities carried out by the applicants modify the quantity and quality of flow in the Deschutes River and its tributaries through the storage, release, diversion and return of irrigation water and the release of treated municipal sewage. The proposed DBHCP would modify covered activities to reduce the negative effects on the covered species aquatic habitat.

Middle Columbia River Steelhead

The Middle Columbia River (MCR) steelhead covered by the proposed DBHCP are part of a larger distinct population segment (DPS). This DPS was listed under the ESA as threatened on March 25, 1999 and its status was reaffirmed on January 5, 2005 (71 FR 834). This DPS includes all naturally spawned steelhead populations originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Wind and Hood Rivers (exclusive) to and including the Yakima River; excluding steelhead originating from the Snake River Basin. This DPS also includes steelhead from seven artificial propagation programs.

As a requirement of a new federal license for the Pelton Round Butte Hydroelectric Project on the Deschutes River, Portland General Electric and the Confederated Tribes of the Warm Spring Reservation of Oregon initiated reintroduction of MCR steelhead, non-listed spring-run Chinook salmon and non-listed sockeye salmon upstream of the project. On January 15, 2013, NMFS designated the reintroduced MCR steelhead as a nonessential experimental population. This ruling alleviates ESA section 9 liabilities for lawful activities that may result in incidental take of reintroduced steelhead. This designation only applies to steelhead occurring upstream of Round Butte Dam, steelhead that occur below this dam retain their status as threatened. The nonessential experimental designation is set to expire on January 15, 2025 and take liabilities will apply for steelhead occurring upstream of Round Butte Dam. The DBHCP is proposed, in part, to mitigate to the maximum extent practicable the applicants' ESA liabilities for otherwise lawful activities that may result in incidental take.

National Environmental Policy Act Compliance

Issuing an ESA section 10(a)(1)(B) permit constitutes a Federal action requiring compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) as implemented by 40 CFR parts 1500–1508. For this action, the USFWS is the lead agency under NEPA. As the lead agency, the USFWS prepared a draft environmental impact statement (DEIS) and is accepting comments on the DEIS at *http://www.regulations.gov,* Docket No. FWS–R1–ES–2019–0091. More information regarding the DEIS is available at: *https://www.fws.gov/Oregonfwo/articles.cfm?id=149489716*. NMFS is a cooperating agency for this action and proposes to adopt the USFWS' NEPA document through its own NEPA process (40 CFR 1506.3).

Request for Comments

If you wish to comment on the proposed DBHCP, you may submit your comments to the address listed in the **ADDRESSES** section of this document. NMFS requests that comments be specific. In particular, we request information regarding: direct, indirect, and cumulative impacts that implementation of the proposed DBHCP or other alternatives could have on MCR steelhead, spring-run Chinook salmon and sockeye salmon and their habitat; potential adaptive management and monitoring provisions; existing environmental conditions in the plan area; other plans or projects that might be relevant to this proposed project; permit duration; and minimization and mitigation efforts.

Next Steps

NMFS provides this notice pursuant to section 10(c) of the ESA. We will evaluate this permit application, proposed DBHCDP, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a) of the ESA. If NMFS determines that the requirements are met, a permit will be issued for incidental take of covered species. The final permit determinations will not be made until after the end of the comment period. NMFS will publish a record of its final action in the **Federal Register**.

Dated: September 30, 2019.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–21608 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0649–XV088

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a meeting via webinar of its Standing, Reef Fish, Mackerel, and Socioeconomic Scientific and Statistical Committees (SSC).

DATES: The meeting will convene via webinar on Tuesday, October 29, 2019, from 1 p.m. to 4 p.m., EDT.

ADDRESSES: You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Ryan Rindone, Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: Tuesday, October 29, 2019; 1 p.m.–4 p.m., EDT

The meeting will begin with Introductions, Adoption of Agenda, and review of the Scope of Work. The Committees will review the NMFS Report to Congress: Section 201 of the Modernizing Recreational Fisheries Management Act of 2018, review *A Practitioner's Guide to Fisheries Social Impact Assessment,* and will discuss any other business items.

—Meeting Adjourns

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21650 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV090

Fisheries of the Gulf of Mexico; 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 62 Assessment Webinar V for Gulf of Mexico gray triggerfish.

SUMMARY: The SEDAR 62 stock assessment process for Gulf of Mexico gray triggerfish will consist of an In-person Workshop, and a series of data and assessment webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 62 Assessment Webinar V will be held November 13, 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 Assessment Webinar are as follows:

1. Using datasets and initial assessment analysis recommended from the in-person workshop, panelists will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions.

2. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

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: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21651 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV089

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting (webinar).

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Salmon Technical Team and Scientific and Statistical salmon subcommittee will hold a joint methodology review meeting. This meeting will be held via webinar and is open to the public.

DATES: The webinar will be held Tuesday, October 22, 2019 at 9 a.m. and will end at 4 p.m. or when business for the day has been completed.

ADDRESSES: A public listening station is available at the Pacific Council office (address below). To attend the webinar, use this link: *https://www.gotomeeting.com/webinar* (click ''Join'' in top right corner of page); (1) Enter the Webinar ID: 439–088–851; (2) Enter your name and email address (required); You must use your telephone for the audio portion of the meeting by dialing this TOLL number: 1 (415) 655–0052; (3) Enter the Attendee phone audio access code: 714–668–149. *Note:* We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and System Requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (see *https://www.gotomeeting.com/webinar/ipad-iphone-android-webinar-apps*). You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at 503–820–2280, extension 411 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE

Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Robin Ehlke, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The purpose of the methodology review meeting is to discuss and review proposed changes to analytical methods used in salmon management. Three topics were approved for consideration of review at the September 2019 Pacific Council meeting: (1) Conduct the technical analysis needed to inform a change of the salmon management boundary line from latitude 40°05′ (Horse Mountain, California) five miles north to latitude 40°10′, (2) Examine the data and models used to forecast impacts on Columbia River summer Chinook to determine whether a change in methodology is warranted, and (3) Provide documentation of the abundance forecast approach used for Willapa Bay natural coho.

Results and recommendations from this methodology review meeting will be presented at the November 2019 Pacific Council meeting where the Pacific Council is scheduled to take final action on the proposals. A draft of the updated Fishery Regulation Assessment Model user manual provided by the Pacific Council's Model Evaluation Workgroup may also be discussed. If time and interest allows, additional topics may be discussed, including, but not limited to, future Pacific Council agenda items.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The public listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*; (503) 820–2411) at least 10 days prior to the meeting date.

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21656 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XW008]

Endangered and Threatened Species; Initiation of 5-Year Reviews for 28 Listed Species of Pacific Salmon and Steelhead

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

ACTION: Notice of initiation of 5-year reviews; request for information.

SUMMARY: We, NMFS, are announcing 5-year reviews of 28 species listed under the Endangered Species Act of 1973, as amended (ESA). The listed species comprise 17 evolutionarily significant units (ESUs) of Pacific salmon (*Oncorhynchus spp.*) and 11 distinct population segments (DPSs) of steelhead (*Oncorhynchus mykiss*). The purpose of these reviews is to ensure the accuracy of their listing classifications. The 5-year reviews will be based on the best scientific and commercial data available at the time of the reviews; therefore, we are requesting that interested parties submit new relevant information on these ESUs and DPSs that has become available since the last species status reviews in 2016. Based on the results of these 5-year reviews, we will make the requisite determinations under the ESA.

DATES: To allow us adequate time to conduct these reviews, we must receive the new relevant information by close of business on March 27, 2020.

ADDRESSES: You may submit information on this document, identified by NOAA–NMFS–2019–0097, by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2019–0097 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon to the right of that line.
- *Mail or Hand-delivery:* Address comments to Robert Markle, NMFS, West Coast Region, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

Instructions: Comments must be submitted by one of the above methods to ensure that we can receive, document, and consider them. Comments sent by any other method, sent to any other address or individual, or received after the end of the comment period may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. We request that all information be accompanied by: (1) Supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Please note that submissions without supporting information—those merely stating support for or opposition to the action under consideration—will be noted but not used in making any listing determinations, as such comments do not represent actual scientific or commercial data.

FOR FURTHER INFORMATION CONTACT: Robert Markle at the above address, by phone at (503) 230–5419, or by email at *robert.markle@noaa.gov.*

SUPPLEMENTARY INFORMATION: Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every five years. On the basis of such reviews, we determine under section 4(c)(2)(B) whether a species should be delisted, or reclassified from endangered to threatened or from threatened to endangered.

We will undertake reviews for the following 17 Pacific salmon ESUs: (1) Sacramento River winter-run Chinook salmon; (2) Upper Columbia River spring-run Chinook salmon; (3) Snake River spring/summer-run Chinook salmon; (4) Central Valley spring-run Chinook salmon; (5) California Coastal Chinook salmon; (6) Puget Sound Chinook salmon; (7) Lower Columbia River Chinook salmon; (8) Upper Willamette River Chinook salmon; (9) Snake River fall-run Chinook salmon; (10) Hood Canal summer-run chum salmon; (11) Columbia River chum salmon; (12) Central California Coast

coho salmon; (13) Southern Oregon/Northern California Coast coho salmon; (14) Lower Columbia River coho salmon; (15) Oregon Coast coho salmon; (16) Snake River sockeye salmon; and (17) Ozette Lake sockeye salmon. We will also undertake reviews for the following 11 steelhead DPSs: (1) Southern California steelhead; (2) Upper Columbia River steelhead; (3) Middle Columbia River steelhead; (4) Snake River Basin steelhead; (5) Lower Columbia River steelhead; (6) Upper Willamette steelhead; (7) South-Central California Coast steelhead; (8) Central California Coast steelhead; (9) Northern California steelhead; (10) California Central Valley steelhead; and (11) Puget Sound steelhead. Information about these 17 ESUs and 11 DPSs can be found on our West Coast regional website: *http://www.westcoast.fisheries.noaa.gov.*

Our regulations for periodic reviews (50 CFR 424.21) require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice announces our active reviews of the ESUs and DPSs listed above. Any change in listing classification would require a separate rulemaking process.

Determining if a Species is Threatened or Endangered

Section 4(a)(1) of the ESA requires that we determine whether a species is endangered or threatened based on one or more of the five following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. Section 4(b) also requires that our determination be made on the basis of the best scientific and commercial data available after taking into account those efforts, if any, being made to protect such species.

Application of the ESU and DPS Policies

NMFS is responsible for determining whether species, subspecies, or DPSs of marine and anadromous species are threatened or endangered under the ESA. For Pacific salmon, we use our Policy on Applying the Definition of Species under the ESA to Pacific Salmon (ESU Policy) (November 20, 1991; 56 FR 58612) in determining the appropriate taxonomic unit for listing considerations. Under this policy, populations of salmon that are substantially reproductively isolated from other conspecific populations and that represent an important component in the evolutionary legacy of the biological species are considered to be an ESU. In our listing determinations for Pacific salmon under the ESA, we have determined that an ESU constitutes a DPS and may therefore be considered a ''species,'' under the ESA.

For non-salmon species, including steelhead, NMFS applies the joint U.S. Fish and Wildlife Service-NMFS DPS policy (February 7, 1996; 61 FR 4722) in identifying the appropriate taxonomic unit for listing consideration. Under this policy, a DPS must be discrete from other conspecific populations, and it must be significant to its taxon. A group of organisms is discrete if it is ''markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors.'' Under the DPS Policy, if a population group is determined to be discrete, the agency must then consider whether it is significant to the taxon to which it belongs.

Considerations in evaluating the significance of a discrete population include: (1) Persistence of the discrete population in an unusual or unique ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon's range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere outside its historical geographic range; or (4) evidence that the discrete population has marked genetic differences from other populations of the species.

On June 28, 2005, we announced a final policy addressing the role of artificially propagated (hatchery-produced) Pacific salmon and steelhead in listing determinations under the ESA (70 FR 37204). Specifically, this policy (1) establishes criteria for including hatchery stocks in ESUs and DPSs; (2) provides direction for considering hatchery fish in extinction risk assessments of ESUs and DPSs; (3) requires that hatchery fish determined to be part of an ESU or DPS will be included in any listing decision; (4) affirms NMFS' commitment to conserving natural salmon and steelhead populations and the ecosystems upon which they depend; and (5) affirms NMFS' commitment to fulfilling trust and treaty obligations with regard to the harvest of some Pacific salmon and steelhead populations, consistent with the conservation and recovery of listed salmon and steelhead ESUs and DPSs.

Public Solicitation of New Relevant Information

The 5-year reviews will consider the best scientific and commercial data available, particularly new information that has become available since the species' previous status reviews. Our Northwest and Southwest Fisheries Science Centers will assist the West Coast Region in gathering and analyzing this information. To ensure that the 5-year reviews are complete and based on the best available information, we are soliciting new information from the public, concerned governmental agencies, Native American tribes, the scientific community, industry, environmental entities, and any other parties interested in the status of the ESUs and DPSs listed above.

Specifically, we are seeking new information (generated since 2015) on: (1) Population abundance; (2) population productivity; (3) changes in species distribution or spatial structure; (4) genetics or other indicators of diversity; (5) changes in habitat conditions and associated limiting factors and threats; (6) conservation measures that have been implemented that benefit the species—including data that demonstrate the effectiveness of such measures in addressing identified limiting factors or threats; (7) data concerning the status and trends of identified limiting factors or threats; (8) information that may affect determinations regarding the composition of an ESU or DPS; (9) information on hatchery program changes that may affect determinations regarding a program's ESU or DPS membership; (10) information on targeted harvest (commercial, tribal, and recreational) and bycatch of the species; and (11) any other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes, identification of any erroneous information in the previous listing determinations, and improved analytical methods for evaluating extinction risk. Previous status reviews and supporting information are available on the internet at: *https://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016_status_review.html.*

If you wish to provide information for these 5-year reviews, see **ADDRESSES** for instructions.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: October 1, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–21666 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR036

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska

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

ACTION: Notice; issuance of modified Letter of Authorization.

SUMMARY: Pursuant to the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, NMFS issued a modified Letter of Authorization to Hilcorp Alaska LLC (Hilcorp) to take marine mammals incidental to oil and gas activities in Cook Inlet, Alaska.

DATES: Effective until July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Sara Young, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An incidental take authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

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).

Summary of Request

NMFS issued regulations governing the take of eleven species of marine mammal, by Level A and Level B harassment, incidental to Hilcorp's oil and gas activities on July 31, 2019 (84 FR 37442). These regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during the specified activities. As further detailed in the regulations (50 CFR 217.167), adaptive management measures allow NMFS to modify or renew Letters of Authorization as necessary if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in those regulations.

Here, NMFS proposes to modify a mitigation measure pertaining to 3D seismic surveying during Year 1 of Hilcorp's activity. NMFS' final regulations contain a mitigation measure that mistakenly states that the entire exclusion zone (EZ) must be visually cleared by protected species observers (PSOs) before ramp up of seismic airguns during the 3D seismic survey may occur. This measure is correct for operations beginning in daylight hours, however, requiring visual clearance of the entirety of the EZ to ramp up airgun activity at night was not NMFS' intent. The intent was that PSOs should monitor the EZ to the greatest extent possible for 30 minutes prior to ramp-up of nighttime operations, but with the understanding that it is not possible to observe the entirety of the EZ at night and that Hilcorp would still be allowed to initiate ramp-up as long as no marine mammals were seen during this time. If any marine mammal is observed in the EZ, during daylight hours or at night, ramp up would not commence until either the animal has voluntarily left and been visually confirmed outside the EZ or the required amount of time (15 minutes for porpoises and pinnipeds, 30 minutes for cetaceans) has passed without re-detection of the animal. The analysis and findings contained in the final rule were made under the premise that nighttime ramp up of airguns is allowable.

Ramping up airgun activity at night is essential to Hilcorp's survey design and minimizes the amount of days that active acoustic sources are emitting sound into the marine environment. As described in Hilcorp's application, acquisition of one line of 3D seismic takes approximately five hours. At the end of a line while the vessel turns to prepare for the next line acquisition, NMFS requires that airguns are turned off, to reduce the amount of unnecessary noise emitted into the marine environment. Turning the source vessel takes approximately one and a half hours, during which no noise is emitted from airguns. By allowing ramp up of airguns at night, the total number of 3D seismic survey days is notably reduced, which reduces both the total duration of impacts on the acoustic habitat of marine mammals, as well as the impacts on (and potentially take of) marine mammals themselves.

Specifically, while there is a somewhat higher probability that a marine mammal might go unseen within the clearance zone when the airguns are initiated at night, the likelihood of injury is still low because of the ramp-up requirement, which ensures that any initial injury zone is small and allows animals time to move away from the source. In addition, PSOs are on duty monitoring the exclusion zone to the degree possible at that time. Further, any potential slight increase in the probability of injury (in the form of a small degree of permanent threshold shift (PTS), and not considered at all likely, or authorized, for beluga whales or other mid-frequency specialists) is offset by the reduced behavioral harassment and reduced potential for more serious energetic effects expected to result from the significant reduction in the overall number of days across which the area will be ensonified by the airgun operation.

Ramp up of airguns at night is also the most practicable survey design, which allows the survey to be completed as quickly as possible before weather conditions deteriorate and daylight decreases in Cook Inlet, and at less cost.

Of important note, this change in mitigation does not change either the

predicted take numbers or the negligible impact analysis, as the predicted Level A harassment (injury) numbers conservatively do not include any sort of an adjustment to account for the effectiveness of any of the measures. We did not reduce the estimation of take based on an assumed level of effectiveness of the required mitigation and monitoring. In other words, we have determined that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

Public Comments and Responses

A notice of NMFS's proposal to modify a LOA was published in the **Federal Register** on August 16, 2019 (84 FR 41957). That notice described the necessity of the modification and affirmed that modifying the mitigation measure did not change any of our findings under the MMPA made in the rulemaking and issuance of the original LOA. During the 30-day public comment period, NMFS received comments from 11,821 individuals, as well as several groups and societies. Approximately 11,809 commenters followed one of two generic template formats, in which respondents provided comments that were identical or substantively the same. Of the two generic letter forms described above, one of the templates, used by approximately 11,638 commenters, generally referenced oil and gas drilling by Hilcorp and requested that NMFS refrain from permitting oil and gas exploration. As NMFS does not permit oil and gas exploration activities and these comments are outside the scope of our proposed modification (ramp-up of seismic airguns at night), NMFS did not address these comments further.

NMFS has reviewed all public comments received on the proposed modification of a LOA issued to Hilcorp. Comments indicating general support for or opposition to hydrocarbon exploration but not containing relevant recommendations or information are not addressed here. Similarly, any comments relating to hydrocarbon development (*e.g.,* leasing, drilling)—including numerous comments received that expressed concern regarding the risks of oil spills or of potential future industrialization of Cook Inlet—are not relevant to the proposed actions and therefore were not considered and are not addressed here. We also provide no response to specific comments that addressed species or statutes not relevant to our proposed actions under section 101(a)(5)(A) of the MMPA (*e.g.,* comments related to sea otters).

Comment: The Kachemak Bay Conservation Society, as well as many other commenters, commented that if seismic ramp-up will be allowed at night, there needs to be ''around the clock'' monitoring.

Response: NMFS agrees with this assertion. The regulations require constant visual monitoring by PSOs during seismic activities, as well as the designated pre- and post-activity periods. NMFS acknowledges that visibility of PSOs at night is reduced, but Hilcorp is still required to use PSOs to observe to the greatest extent possible during nighttime hours of seismic operation.

Comment: The Kachemak Bay Conservation Society also comments that NMFS must support their reasoning that nighttime ramp-up of seismic airguns will have a lower impact on marine mammals than refraining from ramping up at night. The Center for Biological Diversity (CBD) and Cook Inletkeeper commented similarly that NMFS' argument that nighttime operations minimize the amount of days that active acoustic sources are emitting sound into the marine environment and thus minimizes exposure is not supported by anything but conclusory statements.

Response: The requirement to cease operations at night is not only impracticable, it would also likely result in greater impacts to marine mammals, as such a measure would require operations to continue for roughly twice the time. The window of availability in which to conduct seismic in Cook Inlet is particularly limited due to the large tidal fluctuations. Even under good conditions, it is important to recognize the possibility that not all animals will be observed and cryptic species may not be observed at all. While visual observation is a common sense mitigation measure, its presence should not be determinative of when survey effort may occur. Given the lack of proven efficacy of visual observation in preventing auditory injury, its absence should not imply such potentially detrimental impacts on marine mammals. We also believe that the concentration of survey effort in the shortest duration of time possible will reduce the number of days on which marine mammals may be harassed and ensures that the surrounding marine environment can return to ambient noise levels as quickly as possible.

Comment: The Marine Mammal Commission (MMC) recommended that NMFS reconsider requiring the use of towed passive acoustic monitoring (PAM) and night-vision devices to better assess whether the exclusion zone is clear prior to implementing ramp-up procedures at night and consult with other seismic operators regarding the standard use of these devices in other regions. The CBD and Cook Inletkeeper submitted a similar comment suggested NMFS arbitrarily dismissed the use of PAM and thermal technologies for nighttime observations. The MMC also commented that NMFS should consult with acousticians at the Alaska Fisheries Science Center and the University of St. Andrews regarding acoustically monitoring for the various species in Cook Inlet.

Response: NMFS discussed the reasons that PAM was considered but not required for Hilcorp's activities in our final rule (84 FR 37442; July 31, 2019). These circumstances, including the physical environmental characteristics of Cook Inlet and the practicability of the measure, have not changed since issuance of the final rule and LOA. For previous authorizations, NMFS has worked with the Alaska Fisheries Science Center to develop a real-time practicable acoustic monitoring plan for implementation during seismic activity. Despite coordination with the Science Center, the use of PAM only resulted in two detections of beluga whales over the course of the entire survey. The detections occurred outside of active seismic activity and therefore did not result in any shutdowns. When expanded to all species, the use of PAM resulted in only 15 acoustic detections across all nighttime or low visibility hours, a detection rate of 0.049 detections per hour, as compared to a sighting rate of 0.135 detections per hour from visual observations (Kendall *et al.,* 2015). Therefore, when the limited effectiveness and value in decreasing impacts to marine mammals is considered in combination with the cost and impracticability of implementation, NMFS finds that the measure is not warranted, and PAM will not be required under this modified LOA.

However, since the final regulations were issued and in response to these comments, Hilcorp has equipped its source vessel with PV14 night vision devices and a requirement that they are used for observations at night or during other periods of low visibility for 3D seismic surveying has been added to this modified LOA. These devices are only outfitted on the source vessel and will only be used by PSOs aboard the source vessel, not the mitigation vessel.

Comment: The Commission recommended that NMFS require Hilcorp to limit ramp up at night and during low-visibility conditions to

situations in which operational planning cannot reasonably avoid such circumstances.

Response: NMFS agrees with this recommendation and will include it in the modified LOA.

Comment: The Commission recommended that NMFS specify the radial distances of the exclusion and safety zones, as well as the Level A and B harassment zones, for all sound sources and remove all references to mitigation and monitoring zones in Hilcorp's modified and subsequent LOAs.

Response: NMFS agrees that including the radial distances of exclusion and safety zones with the modified LOA would enhance clarity regarding the zones and has attached a chart with the relevant zones to the modified LOA. These zones may be modified pending results and review of sound source verifications as discussed in the final rule.

Comment: The CBD and Cook Inletkeeper commented that if NMFS plans to allow nighttime seismic surveys without clearing the exclusion zone, the incidental take regulations and environmental analyses must be amended and re-circulated for public comment. The commenters emphasized that a nighttime exception to clearing the full extent of the exclusion zone does not appear in the incidental take regulations.

Response: NMFS reminds the commenters that the incidental take regulations allowed for the continuation of operation of seismic airguns at night, as long as ramp up was conducted during a period of good visibility and the exclusion zone was fully cleared. The alteration to allow ramp up at night when operationally necessary does not change the take estimations, any of our findings under the MMPA in the rulemaking, or our finding of no significant impact under the National Environmental Policy Act (NEPA). PSO observations are still required from pre-activity ramp up through the 30 minute post-activity monitoring period and now night vision devices will also be required for observations conducted at night or in low visibility conditions. NMFS used the adaptive management provision described in the regulations and sought public comment on the proposed change to the LOA.

Comment: The CBD and Cook Inletkeeper commented that NMFS failed to explain why other measures are not practicable to minimize take and to maximize monitoring and enforcement of take limits.

Response: NMFS discussed in the notice of proposed modification of the LOA why the prohibition of nighttime ramp up for seismic surveying is not practicable. Cook Inlet tidal fluctuations present already limited windows within which seismic surveying can be done and some of those limited windows occur at night. By prohibiting nighttime ramp up, NMFS would extend the total duration of the survey, increasing the number of days that the seismic surveying equipment is on the water and increasing the total number of days during which noise is emitted to the marine environment. The monitoring data from previous seismic surveys in Cook Inlet indicate greatly reduced detections of marine mammals by PSOs in the presence of seismic activity and increase in detections when the airguns are not in use. This evidence suggests there is a potential aversion response by marine mammals to airgun noise and potential re-entry when the environment returns to ambient levels. Allowing ramp up of seismic at night when operationally necessary ensures the seismic work is concentrated in the fewest number of days possible, thereby reducing the number of days that marine mammals will exhibit aversion responses and temporarily abandon their preferred habitat. Prohibiting nighttime ramp up because potentially not all animals in the exclusion zone will be observed creates a notable increase in total duration and could greatly increase the number of separate occasions on which animals may leave their preferred habitat and interrupt typical behavioral patterns. An increased number of days of overall survey duration could then extend the seismic surveying into the cold and dark months of Cook Inlet creating increasingly hazardous conditions for the seismic operators and decreasing the amount of seismic that can be completed each day with increasingly limited daylight hours. Full visibility of the Level A and Level B harassment isopleths is not practicable, nor is it required based on the rationale included in our comment response below. The size of the Level B zones for 3D seismic are prohibitive to monitor at a level requiring full visibility, which would increase the number of vessels on the water and personnel required to be at sea. To ensure that takes are estimated as accurately as possible, the extrapolation detailed below is used by Hilcorp to address the assumption that some proportion of takes may occur in the unmonitored portions of the isopleths.

Comment: The CBD and Cook Inletkeeper commented that NMFS has not provided a sufficient explanation for why a greater monitoring area consistent with the harassment isopleth is not required nor why other mitigation measures are not employed to monitor the full Level A or Level B isopleths. The commenters also questioned how take is recorded if the full extent of the Level A and Level B zones are not observed and why NMFS does not believe allowing nighttime ramp-up would change our estimation of Level B take.

Response: Through the rulemaking and Letters of Authorization, NMFS is authorizing take, by Level A and Level B harassment, of marine mammals. Avoiding all take of marine mammals is not a requirement or the goal of mitigation and monitoring requirements laid out in the rulemaking. In order to issue an LOA under section 101(a)(5)(A) of the MMPA, NMFS was required to set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. NMFS considered 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, NMFS considered two primary factors: (1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and (2) the practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations. We have acknowledged that some limited occurrence of auditory injury is likely, for low- and high-frequency cetaceans

as well as some pinniped species. However, we disagree that a larger standard exclusion zone is warranted. As we explained in our rulemaking, our intent in prescribing standard exclusion zone distances is to: (1) Encompass zones for most species within which auditory injury could occur on the basis of instantaneous exposure; (2) provide additional protection from the potential for more severe behavioral reactions (*e.g.,* panic, antipredator response) for marine mammals at relatively close range to the acoustic source; (3) provide consistency and ease of implementation for PSOs, who need to monitor and implement the exclusion zones; and (4) to define a distance within which detection probabilities are reasonably high for most species under typical conditions. Our use of 100-m and 500-m zones is not based directly on any quantitative understanding of the range at which auditory injury would be entirely precluded or any range specifically related to disruption of behavioral patterns. Rather, we believe it is a reasonable combination of factors. In summary, a practicable criterion such as this has the advantage of familiarity and simplicity while still providing in most cases a zone larger than relevant auditory injury zones, given realistic movement of source and receiver. Increased shutdowns, without a firm idea of the outcome the measure seeks to avoid, simply displace survey activity in time and increase the total duration of acoustic influence as well as total sound energy in the water.

We agree that, when practicable, the exclusion zone should encompass distances within which auditory injury is expected to occur on the basis of instantaneous exposure. However, potential auditory injury is based on the accumulation of energy, and is therefore not a straightforward consideration. For example, observation of a whale at the distance calculated as being the ''Level A isopleth'' does not necessarily mean that the animal has in fact incurred auditory injury. Rather, the animal would have to be at the calculated distance (or closer) as the mobile source approaches, passes, and recedes from the exposed animal, being exposed to and accumulating energy from airgun pulses the entire time.

When evaluating the nighttime ramp up of seismic airguns, NMFS determined the data from previous seismic monitoring programs did not suggest that there would be a difference in the severity of impacts to marine mammals by not fully clearing the exclusion zone during nighttime ramp up that was not addressed through the number and type of taking authorized for Hilcorp's activities in the rulemaking. Ramp up would still be required for use of airguns at night and the use of ramp up still allows marine mammals to avoid the area before the full source level is realized. The mitigation measure that would be least effective due to low visibility conditions at night would be the implementation of the full extent of the exclusion zone and as discussed above, it is unlikely that animals would remain within the exclusion zone for the duration of the seismic activity such that injury is incurred. However, in the event that injury is incurred, Level A take was authorized for species more likely to occur in the survey area or for species that are difficult to detect. Similarly, Level B take is authorized incidental to Hilcorp's activities. These allowable takes were not calculated by assuming some underlying effectiveness of the mitigation and monitoring. No amount of Level B take was discounted from the total amount of take authorized because of assumptions of effectiveness of daytime monitoring. The amount of Level B take that may occur during seismic activity is unchanged, but the number of takes likely to be observed and recorded at night is slightly lessened by reduced visibility.

Regarding the counting and tracking of allowable takes, Hilcorp is using a methodology similar to that used by many other incidental take authorization applicants. Hilcorp will use the number of takes observed by PSOs within the monitored distance and will extrapolate those takes to estimate a number of unseen takes in the unmonitored area that is the rest of the relevant isopleth. Hilcorp will include these estimations in their reports to NMFS to ensure take is not exceeded during their activity.

Comment: The CBD and Cook Inletkeeper commented that NMFS' estimation of take of Cook Inlet belugas is flawed because ramp-up is not considered a take in our analyses.

Response: It is unclear if the commenters are referencing estimation of take pre-activity or accounting for take post-activity. NMFS disagrees with the commenters. Any animal sighted at any distance from the vessel during pre-clearance, ramp-up, seismic surveying, or post-activity monitoring is recorded as an observation and this information will be provided to NMFS in Hilcorp's monitoring reports. The sighting is not necessarily considered a take as the exclusion zone is derived from the energy output of the full seismic airgun array and any sound a marine mammal would be exposed to during ramp up is a lesser amount of energy than the full airgun array.

Authorization

NMFS has issued a modified LOA (available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-hilcorp-alaska-llc-oil-and-gas-activities-cook-inlet-alaska*) to Hilcorp Alaska LLC for the potential harassment of small numbers of four marine mammal species incidental to oil and gas activities in Cook Inlet, Alaska, provided the mitigation, monitoring and reporting requirements of the rulemaking are incorporated.

Dated: September 30, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–21692 Filed 10–3–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV087

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public webinar meeting.

SUMMARY: The Caribbean Fishery Management Council will hold a webinar meeting to consider establishing an advisory panel concerning Ecosystem-Based Fishery Management. The items to be discussed are contained in the agenda included in the **SUPPLEMENTARY INFORMATION**.

DATES: The webinar meeting will be held on October 23, 2019, from 10 a.m. to 5 p.m.

ADDRESSES: The webinar meeting will be held through GoToMeeting. You can join the meeting from your computer, tablet or smartphone at *https://global.gotomeeting.com/join/765313029.* You can also dial in using your phone. United States: +1 (786) 535–3211 Access Code: 765–313–029. If joining from a video-conferencing room or system, depending on your device, dial: 765313029@67.217.95.2 or 67.217.95.2##765313029

FOR FURTHER INFORMATION CONTACT: Miguel A. Rolón, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan,

Puerto Rico 00918–1903, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION:

October 23, 2019, 10 a.m.–12 noon

○ Considerations for Establishing an Ecosystem-Based Fishery Management Advisory Panel

○ Action to Establish Advisory Panel (AP)

1:30 p.m.–2:30 p.m.

○ Closed Session to Discuss AP Membership, if Established, and Internal Administrative Matters.

2:45 p.m.–5 p.m.

○ Time Schedule for Continuing the Development of the Ecosystem-Based Fishery Management Plan (EBFMP)

○ Other Business

The order of business may be adjusted as necessary to accommodate the completion of agenda items.

Special Accommodations

For more information on this webinar, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

Dated: October 1, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–21647 Filed 10–3–19; 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 a product and service from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* November 3, 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 product and service are proposed for deletion from the Procurement List:

Product

NSN—Product Name:
8140–01–063–7681—Grommet
Mandatory Source of Supply: LC Industries, Inc., Durham, NC
Contracting Activity: W40M RHCO–ATLANTIC USAHCA, FORT BELVOIR, VA

Service

Service Type: Janitorial/Custodial
Mandatory for: USDA, Forest Service: 4886 Cottage Grove Avenue, Humboldt Nursery, McKinleyville, CA
Contracting Activity: AGRICULTURE, DEPARTMENT OF, PROCUREMENT OPERATIONS DIVISION

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–21657 Filed 10–3–19; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

Certificate of Alternate Compliance for USS VERMONT (SSN 792)

AGENCY: Department of the Navy, DoD.

ACTION: Notice of Issuance of Certificate of Alternate Compliance.

SUMMARY: The U.S. Navy hereby announces that a Certificate of Alternate Compliance has been issued for USS VERMONT (SSN 792). Due to the special construction and purpose of this vessel, Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) has determined that it is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the navigation lights provisions of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) without interfering with its special functions as a naval ship. The intended effect of this notice is to warn mariners in waters where 72 COLREGS apply.

DATES: This action takes effect October 4, 2019 and is applicable beginning September 11, 2019.

FOR FURTHER INFORMATION CONTACT: Lieutenant Thomas J. Bright, JAGC, U.S. Navy, United States Navy, Admiralty Attorney, Office of the Judge Advocate General, Admiralty and Maritime Law Division (Code 11), 1322 Patterson Ave. SE, Suite 3000, Washington Navy Yard, DC 20374–5066, 202–685–5040, or *admiralty@navy.mil.*

SUPPLEMENTARY INFORMATION: Background and Purpose. Executive Order 11964 of January 19, 1977 and 33 U.S.C 1605 provide that the requirements of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), as to the number, position, range, or arc of visibility of lights or shapes, as well as to the disposition and characteristics of sound-signaling appliances, shall not apply to a vessel or class of vessels of the Navy where the Secretary of the Navy shall find and certify that, by reason of special construction or purpose, it is not possible for such vessel(s) to comply fully with the provisions without interfering with the special function of the vessel(s). Notice of issuance of a Certificate of Alternate Compliance must be made in the **Federal Register**.

In accordance with 33 U.S.C 1605, the DAJAG (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, hereby finds and certifies that USS VERMONT (SSN 792) is a vessel of special construction or purpose, and that, with respect to the position of the following navigational lights, it is not possible to comply fully with the requirements of the provisions enumerated in the 72 COLREGS without interfering with the special function of the vessel:

Rule 23(a) and Annex I, paragraph 2(a)(i), pertaining to the vertical placement of the masthead light, and Annex I, paragraph 2(f)(i), pertaining to the masthead light being above and clear of all other lights and obstructions;

Rule 30(a), Rule 21(e), and Annex I, paragraph 2(k), pertaining to the vertical separation of the anchor lights, vertical placement of the forward anchor light above the hull, and the arc of visibility of all-around lights;

Rule 23(a) and Annex I, paragraph 3(b), pertaining to the location of the sidelights; and Rule 21(c), pertaining to the location and arc of visibility of the sternlight.

The DAJAG (Admiralty and Maritime Law) further finds and certifies that these navigational lights are in closest possible compliance with the applicable provision of the 72 COLREGS.

Authority: 33 U.S.C 1605(c), E.O. 11964.

Approved: September 11, 2019.

D.J. Antenucci,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2019–21639 Filed 10–3–19; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho Cleanup Project; Meeting

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho Cleanup Project. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, October 24, 2019; 8:00 a.m.–3:00 p.m.

The opportunities for public comment are at 9:45 a.m. and 2:45 p.m.

This time is subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Teton Mountain Lodge, 3385 Cody Lane, Teton Village, WY 83025.

FOR FURTHER INFORMATION CONTACT: Brad Bugger, Federal Coordinator, U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, Idaho 83415. Phone (208) 526–0833; or email: *buggerbp@id.doe.gov* or visit the Board's internet home page at: *https://energy.gov/em/icpcab/*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Brad Bugger for the most current agenda):

- Recent Public Outreach
- Idaho Cleanup Project (ICP) Overview
- Update on Integrated Waste Treatment Unit (IWTU)
- Advanced Mixed Waste Treatment Project (AMWTP) Closure and Status of Transuranic Waste Program
- Subsurface Disposal Area (SDA) Cap Design Complete
- Board Discussion of Calcine Subcommittee Future Work
- Board Perspectives on National Cleanup Workshop

Public Participation: The meeting is open to the public. The EM SSAB, Idaho Cleanup Project, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Brad Bugger at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Brad Bugger at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Brad Bugger, Federal Coordinator, at the address and telephone number listed above. Minutes will also be available at the following website: *https://energy.gov/em/icpcab/listings/cab-meetings*.

Signed in Washington, DC, on October 1, 2019.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2019–21670 Filed 10–3–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Interim Report Implementing Updates to the Department of Energy's Information Quality Act Guidelines

AGENCY: Office of the Chief Information Officer, Department of Energy.

ACTION: Notice of availability and request for comment.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of an interim report to the Office of Management and Budget (OMB) on the DOE Information Quality Act (IQA) Guidelines setting forth updates to DOE's policy and procedures to ensure and maximize the quality, utility, objectivity, and integrity of the information that DOE disseminates to members of the public. DOE has prepared this interim report pursuant to OMB Memorandum M–19–15, *Improving Implementation of the Information Quality* Act, issued April 24, 2019, which requires federal departments and agencies to update their existing IQA Guidelines to address implementation updates and additional best practices. DOE invites public comment on the interim report and draft updates to the DOE IQA Guidelines.

DATES: DOE will accept comments regarding this interim report and draft guidelines no later than November 4, 2019. See section II, ''Public Participation,'' for details.

ADDRESSES: The interim DOE report and guidelines in this notice are available on the website of the DOE Chief Information Officer (CIO) at *https://www.energy.gov/cio/department-energy-information-quality-guidelines.*

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit written comments, by mail to: Brooke Dickson, Office of the Chief Information Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Room 8H–089, Washington, DC 20585, or by email at *DOEPRA@hq.doe.gov.* No telefacsimilies (faxes) will be accepted.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Brooke Dickson at *DOEPRA@hq.doe.gov* or by telephone at (202) 287–5786. A copy of the interim IQA Guidelines is included in this Notice and is also posted on the DOE website at *https://www.energy.gov/cio/department-energy-information-quality-guidelines.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

The Office of Management and Budget's (OMB) issued the *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (67 FR 8452, February 22, 2002) under section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554, 114 Stat. 2763) (OMB Guidelines). Pursuant to the OMB Guidelines, the DOE published its Final Report containing the Departmental version of the Guidelines in the **Federal Register** on October 7, 2002 (67 FR 62446) (DOE IQA Guidelines).

DOE's IQA Guidelines provide guidance to Departmental Elements (*i.e.,* major DOE offices) on maximizing the quality, objectivity, utility, and integrity of information (including statistical

information) disseminated to the public; establish mechanisms for the public to seek and request administrative correction of disseminated information; and explain how the Chief Information Officer will comply with OMB's annual reporting requirement concerning complaints from members of the public.

On April 24, 2019, OMB issued Memorandum M–19–15, *Improving Implementation of the Information Quality Act,* requiring federal departments and agencies to update their existing IQA Guidelines to address implementation updates and additional best practices. DOE is issuing an interim report that includes proposed updates to the DOE IQA Guidelines to align with the requirements of OMB M–19–15. This interim update has been approved by the Secretary of Energy and posted to the DOE IQA website located at *https://www.energy.gov/cio/department-energy-information-quality-guidelines.* The interim update outlines the Department's compliance with appropriate and acceptable OMB M–19–15 implementation updates.

DOE invites public comment on the interim report and draft updates to the DOE IQA Guidelines. DOE plans to issue its final and updated IQA Guidelines after consideration of public comments received on the draft guidelines.

II. Public Participation

Submission of Comments

DOE will accept comments and information regarding these proposed updates no later than the date provided in the **DATES** section at the beginning of this notice. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via *https://www.regulations.gov.* The *https://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE 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 *https://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereafter 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.

DOE processes submissions made through *https://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 or mail. Comments and documents submitted via email or mail also will be posted to *https://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

Signed in Washington, DC, on September 27, 2019.

Mark Kneidinger,

Principal Deputy Chief Information Officer, Office of the Chief Information Officer, U.S. Department of Energy.

Interim Update to the Department of Energy Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Energy

Introduction

The Office of Management and Budget (OMB) issued Memorandum M–19–15, *Improving Implementation of the Information Quality Act,* on April 24, 2019, requiring federal departments and agencies to update their existing Information Quality Act (IQA) Guidelines to address implementation updates and additional best practices. This is an interim update to the Department of Energy's (DOE or Department) final report pursuant to OMB's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (OMB IQA Guidelines), 67 FR 8452 (February 22, 2002) under section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554, 114 Stat. 2763). The Final Report, hereafter referred to as the DOE IQA Guidelines, was published in the **Federal Register** on October 7, 2002 (67 FR 62446).

The Department is issuing this interim update of its IQA Guidelines that includes proposed updates to the DOE IQA Guidelines to align with the requirements of OMB M–19–15, *Improving Implementation of the Information Quality Act,* April 24, 2019. The Department commits to updating its IQA Guidelines pursuant to the Implementation Updates requirements outlined in OMB M–19–15. The Department plans to issue its final and updated IQA Guidelines after consideration of public comments received on these draft guidelines after a public comment period.

Background

DOE is responsible for the administration of a wide variety of national defense, energy supply, energy conservation, and nuclear waste cleanup programs authorized by law. DOE administers a system of national

laboratories with active scientific research programs. DOE also disseminates a large volume of statistical reports through its Energy Information Administration (EIA). Although DOE is not a major regulatory agency, DOE has some rulemaking mandates and authorities, such as the appliance energy conservation program of test procedures and standards, that require the dissemination of financial, scientific, and statistical information. Like other agencies, DOE publishes draft and final environmental impact statements and environmental assessments under the National Environmental Policy Act, 42 U.S.C. 4321–4347.

Discussion of Guidelines and OMB M–19–15 Implementation Updates

DOE has always maintained high standards of quality in the production of information disseminated to members of the public. As a source of scientific and statistical information on which members of the public and other government officials rely, DOE has long had procedures to assure adequate information quality. EIA is a leader in this regard and has elaborate procedures to ensure the quality of its information products. DOE's Office of Energy Efficiency and Renewable Energy (EERE) has elaborate special procedures for some of its rulemakings. That office has codified a general statement of policy in Appendix A to Subpart C of 10 CFR part 430 with regard to its information quality review procedures for information used in its appliance energy conservation standards rulemakings. The draft updates to DOE IQA Guidelines set forth below are modeled on the Implementation Update requirements of OMB M–19–15 to augment the original standard of quality (including objectivity, utility, and integrity) in the development and dissemination of DOE or DOE-sponsored information to the public introduced in the DOE IQA Guidelines published in 2002. The updates also review the procedures that DOE has traditionally followed to review information products for adequate quality. The DOE IQA Guidelines continue to provide a uniform set of procedures for members of the public who wish to request correction. These procedures ensure that final DOE decisions with respect to requests for correction will be made by high level management officials with the concurrence of the DOE Office of General Counsel. Section 515 establishes procedures and performance goals for the internal management of the Executive Branch. While seeking to establish a process that assures that DOE is attentive to the issue of information quality, neither section 515 nor the OMB IQA Guidelines nor DOE's own IQA Guidelines provide for judicially manageable standards regarding the quality of information that the agency may disseminate. Therefore, neither section 515 nor the OMB IQA Guidelines nor DOE's IQA Guidelines create private rights or contemplate judicial oversight of its directives through judicial review. The Department complies with OMB annual reporting on IQA management.

This interim update to the DOE IQA Guidelines is prepared by the DOE Office of the Chief Information Officer (OCIO), who is responsible for coordinating DOE's response to OMB's IQA Guidelines, in cooperation with other affected DOE offices. This interim update has been through Departmental clearance and is posted to the DOE IQA website located at *https://www.energy.gov/cio/department-energy-information-quality-guidelines.* DOE invites public comment on the draft updates to the DOE IQA Guidelines. DOE plans to issue its final updated IQA Guidelines after consideration of public comments received on the draft updates.

Interim Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated to the Public by the Department of Energy

I. Background

Section 515, Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554), known as the Information Quality Act (IQA), directed the Office of Management and Budget (OMB) to issue government-wide guidelines that ''provide policy and procedural guidance to Federal Agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal Agencies.'' The Department issued its final report and guidelines on October 7, 2002 (67 FR 62446). Pursuant to OMB Memorandum M–19–15, *Improving Implementation of the Information Quality Act* April 24, 2019, the Department is updating its IQA Guidelines to align with M–19–15 Implementation Update requirements.

This interim update to DOE's IQA Guidelines is issued by the Department's Office of the Chief Information Officer (OCIO). DOE's IQA Guidelines are intended to provide guidance to Departmental Elements (*i.e.,* major DOE offices) on maximizing the quality, objectivity, utility, and integrity of information, including statistical information, disseminated to the public. The updates to DOE's IQA Guidelines are modeled on the OMB M–19–15 Implementation Update criteria with modifications specific to DOE.

DOE invites public comment on the interim report and draft interim update to the DOE IQA Guidelines. A final version of the Department's updated Information Quality Guidelines will be published after Departmental consideration and adjudication of received public comments.

The principal updates to DOE's IQA Guidelines based on OMB M–19–15 are as follows:

1. *Influential information.* OMB M–19–15 Implementation Update 1.1 directed agencies to identify specific types of information the agency produces that are ''influential'' and to provide a rigorous process for determining whether types of information not specifically listed by the guidelines qualify as ''influential.'' In the 2002 final report on the DOE IQA Guidelines, DOE included its own definition of ''influential'' when that term is applied to financial, scientific, or statistical information. Under the OMB IQA Guidelines, ''influential'' information should meet the highest standards of quality and transparency (consistent with countervailing considerations such as confidentiality) and data must be capable of reproduction by a qualified individual outside of the agency. DOE decided to define ''influential information'' as information that DOE routinely embargoes because of its potential effect on markets, information on which a regulatory action with a $100 million per year impact is based, and other information products on a case-by-case basis.

DOE revisited its parameters for identifying ''influential information,'' as instructed by OMB–M–19–15, and believes that, consistent with the OMB directive, DOE's definition of ''influential information'' provides sufficient guidance for program managers for determining the amount and type of pre-dissemination review necessary. In addition, DOE has extended the option to DOE Elements to tailor DOE's definition of ''influential information'' to meet their program requirements to ensure that high standards of quality are maintained for all information products aimed at the public. For example, EIA adopted DOE's definition of ''influential information'' and supplemented their application of the definition to include the associated requirements of ''reproducibility'' and

''transparency.'' [1] EIA's expansion of the DOE definition was necessary to ensure that important energy products that would not have been included under DOE's definition were subject to the same high standards for utility, transparency, and reproducibly. DOE OCIO will establish a review process for DOE Elements who elect to modify and adopt an Element-specific version of the DOE definition of ''influential'' information.

2. *Peer review.* DOE complies with OMB's *Final Information Quality Bulletin for Peer Review,* which states that ''peer review typically evaluates the clarity of hypotheses, the validity of the research design, the quality of data collection procedures, the robustness of the methods employed, the appropriateness of the methods for the hypotheses being tested, the extent to which the conclusions follow from the analysis, and the strengths and limitations of the overall product,'' 70 FR 2664–2665 (Jan. 14, 2005). DOE Elements, along with National Laboratories, may use peer review panels or comparable assessment processes, to objectively evaluate programmatic, technical, scientific, business methods, analytic results, and other findings. DOE Elements may rely on internal or external peer review panels and processes to make these evaluations. In cases where previously determined influential information has changed significantly, the DOE Element with authority over the data should consider whether a second peer review panel or comparable assessment process should be convened to evaluate the objectivity and reliability of the changed data, as appropriate given the program's intended use of the modified information.

3. *Privacy and confidentiality of data.* Existing Federal Government policy requires agencies to ensure that privacy and confidentiality are fully protected in data and information that is made publicly available, known as ''open data.'' DOE Elements must ensure that both raw information and analytic results that are covered by these Guidelines, including influential information, does not identify specific individuals or place confidentiality at risk. DOE Elements are directed to work with the Department's Privacy Program office, legal counsel, and other appropriate subject matter experts to ensure that information is appropriately and adequately managed and protected consistent with applicable laws, regulations, and policies regarding confidentiality, appropriate access and use, and security and privacy practices.

4. *Open data and re-use of data.* Open data is a core principle of OMB M–19–15 and has been a federal government-wide standard since 2009. The Department has an established open data program and maintains a website, located at *https://www.energy.gov/data/open-energy-data,* to enable public access to released DOE open data sets. DOE Elements both disseminate data that is re-used across a variety of sectors and utilize open data and other data sources to inform Departmental analyses. In addressing OMB M–19–15 Implementation Updates pertaining to open data, the Department elected to rely on established open data processes while strengthening the importance of documentation and transparency and source documentation to support informed selection of data and to enable accountability in the ''downstream'' or secondary use of data.

5. *Transparency, open code, data reproducibility, confidentiality, and applicability to non-government data.* Multiple OMB M–19–15 Implementation Updates focus on the principles of transparency and reproducibility. Several legal and policy updates have occurred since the publication of the 2002 IQA Guidelines. Data standards and architectures have been developed to manage data, which provide transparency for agencies into data creation, collection, usage, transfer, and dissemination. Open data requirements promulgated by OMB have required agencies to identify data sets and data collections with broad utility outside of their source agency. In 2016, OMB established policies for making Federal-source code publicly available. DOE complies with both legal and policy requirements for making source code available, consistent with applicable law and policy.

6. *Request for correction processing timelines and appeals requests.* Upon consideration of OMB M–19–15 implementation Updates 4.1–4.5, DOE reaffirms its previously established timelines for the Request for Correction and appeals process under its IQA Guidelines. DOE's 60-day response deadline is significantly shorter than the 120 days suggested by OMB M–19–15. Since DOE's IQA Guidelines were issued in 2002, DOE has received only one Request for Correction. DOE responded to the request consistent with its current guidelines, offering a response to the requestor's data quality arguments, and in doing so did not take a policy position. The requestor has not appealed DOE's response. To ensure the integrity of the appeals process, DOE has added to its Request for Correction appeals process that the DOE Element must ensure that those individuals reviewing and responding to an appeals request were not involved in the review and initial response to the Request for Correction. DOE OCIO will consider coordinating draft responses to received requests for correction with OMB appropriate to the received request.

The updated DOE IQA Guidelines maintain DOE's existing mechanisms for members of the public to seek and obtain administrative correction of disseminated information that does not comply with the quality requirements of these Guidelines. Finally, the Guidelines explain how the CIO will comply with OMB's annual reporting requirement concerning complaints from members of the public.

II. Introduction

The DOE OCIO has designed these Guidelines to apply to a wide variety of DOE information dissemination activities that may range in importance and scope. They are intended to be sufficiently generic to fit all media, printed, electronic, or other forms. The DOE OCIO has sought to avoid the problems that would be inherent in developing detailed, prescriptive, ''one-size-fits-all'' DOE-wide guidelines that would artificially require different types of dissemination activities to be treated in the same manner.

The Guidelines are designed so that DOE Elements can apply them in a common sense and workable manner. It is important that these guidelines not impose unnecessary administrative burdens that would inhibit DOE Elements from continuing to take advantage of the internet and other technologies to disseminate information to the public. In this regard, DOE Elements may incorporate the standards and procedures required by these guidelines into their existing information resources management and administrative practices rather than create new and potentially duplicative or contradictory processes. DOE Elements may rely on their implementation of the computer security provisions of the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 *et seq.,* to establish appropriate security safeguards for ensuring the integrity of the information that they disseminate.

[1] *https://www.eia.gov/about/information_quality_guidelines.php*

III. DOE Information Quality Guidelines

A. What definitions apply to these Guidelines?

1. DOE Element means a major DOE office headed by an official whose position is subject to Senate confirmation or an office which directly reports to the Secretary, Deputy Secretary, or either of the DOE Under Secretaries.

2. Dissemination means DOE Element initiated or sponsored distribution of information to the public.

3. Influential means, when used in the context of scientific, financial, or statistical information, information (1) that is subject to embargo until the date of its dissemination by the Department or DOE Element disseminating the information because of potential market effects; (2) that is the basis for a DOE action that may result in an annual effect on the economy of $100 million or more; or (3) that is designated by a DOE Element as ''influential.''

4. Information means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms, including information that a DOE Element disseminates from a web page, but excluding the provision of hyperlinks to information that others disseminate.

5. Information dissemination product means any book, paper, map, machine-readable material, audiovisual production, or other documentary material, regardless of physical form or characteristic, a DOE Element disseminates to the public, including any electronic document, CD–ROM, or web page.

6. Integrity means the information has been secured and protected from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.

7. Objectivity means the information is presented in an accurate, clear, complete, and unbiased manner and the substance of the information is accurate, reliable, and unbiased.

8. Open data means publicly available data that are made available consistent with relevant privacy, confidentiality, security, and other valid access, use, and dissemination restrictions, and are structured in a way that enables the data to be fully discoverable and usable by end users. Generally, open data are consistent with principles, explained in OMB guidance, of such data being public, accessible, machine-readable, described, reusable, complete, timely, and managed post-release.

9. Quality means utility, objectivity, and integrity.

10. Reproducibility means capability of being substantially reproduced, subject to an acceptable degree of imprecision, and with respect to analytical results, ''capable of being substantially reproduced'' means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

11. Subject to public comment means that DOE has made the information available for comment by members of the public, preliminary to making a final determination, through a notice in the **Federal Register** including, but not limited to, a notice of inquiry, an advance notice of proposed rulemaking, a notice of proposed rulemaking, a notice reopening or extending a comment period due to receipt of new information, a notice of availability of a draft environmental impact statement, a notice of a proposed information collection, or any other **Federal Register** notice that provides an opportunity for comment by members of the public regarding the quality of information on which a final determination may be based.

12. Utility means the usefulness of the information to its intended users, including the public.

B. Which public disseminations of information are and are not subject to these Guidelines?

These Guidelines apply to any public dissemination of information under the control of DOE. The definitions of ''information'' and ''dissemination'' establish the scope of the applicability of the guidelines. ''Information'' means any communication or representation of knowledge such as facts or data. Consequently, information does not include opinions.

''Dissemination'' is defined to mean agency initiated or sponsored distribution of information to the public, including, for example, a risk assessment prepared by a DOE Element to inform the agency's formulation of possible regulatory or other action. A DOE Element does not ''initiate'' the dissemination of information when a federally employed scientist or Federal grantee or contractor publishes his or her research findings, even if the DOE retains ownership or other intellectual property rights because DOE paid for the research. In such cases, to avoid confusion, the DOE Element should ensure that the researcher includes an appropriate disclaimer that the views are the researcher's and do not necessarily reflect the views of DOE. However, if a DOE Element directs a federally employed scientist or Federal grantee or contractor to disseminate information and retains authority to review and approve the information before release, then the DOE Element has sponsored the dissemination of the information.

Applicability to information from a non-Federal government source. These Guidelines apply to information under the control and management of the Department and its Element offices. Information is not under the control of the Department if the Department is not granted the authority to modify or change such data without the consent of the original source. In the interest of transparency or public awareness, DOE may make publicly available information provided by a non-Federal government source. For example, the Department may post on its website information regarding Native American Tribal infrastructure projects utilizing DOE-provided energy grants. Such information is produced and owned by the participating Tribal entities and made available to a broader audience through the DOE website, but DOE does not have authority to change or modify the data.

Dissemination also does not include the following distributions:

(1) Press releases, including but not limited to fact sheets, press conferences or similar communications in any medium that announce, support the announcement or give public notice of information a DOE Element has disseminated elsewhere;

(2) Any inadvertent or unauthorized disclosure of information intended only for interagency and intra-agency communications;

(3) Correspondence with individuals or persons;

(4) Testimony and other submissions to Congress containing information a DOE Element has disseminated elsewhere;

(5) Responses to requests for DOE records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or similar laws;

(6) Information in public filings (such as public comments received by DOE in rulemaking proceedings), except where the DOE Element distributes information submitted to it by a third party in a manner that suggests that the DOE Element endorses or adopts the information, or indicates in its distribution that it is using or proposing to use the information to formulate or

support a regulation, guidance, or other DOE Element decision or position.

(7) Information contained in subpoenas or documents filed in connection with adjudicative proceedings (characterized by trial-type procedures with opportunity to test information quality), including DOE adjudicatory orders, opinions, amicus and other briefs, documents filed in Bonneville Power Administration's ratemaking proceedings, and documents submitted for purposes of a Nuclear Regulatory Commission licensing proceeding for a DOE facility;

(8) Procedural, operational, policy and internal manuals and memoranda prepared for the management and operation of DOE Elements that are not primarily intended for public dissemination;

(9) Archival records (including information made available to the public on a DOE website to document historical DOE actions); and

(10) Communications intended to be limited to government employees or DOE contractors or grantees.

(11) Social medial or blog posts containing information a DOE Element has disseminated elsewhere.

C. What are the responsibilities of DOE Elements for ensuring quality of information disseminated to the public and responding to requests from members of the public for correction of information?

Ensuring Quality as a guiding principle. DOE Elements should have as a performance goal that information disseminated to the public meets a basic level of quality. The quality of information disseminated by DOE Elements is measured by its utility, objectivity, and integrity. ''Objectivity'' focuses on whether the disseminated information is being presented in an accurate, clear, complete and unbiased manner and as a matter of substance, is accurate, reliable and unbiased. This includes whether the information is presented in the proper context. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation.

When using non-government sources to create information, specifically influential information, DOE Elements must provide sufficient information about the characteristics of the data and any analysis, including scope, protocols, and any information relevant to ensure objectivity in the use of non-government data in products, evaluations, or policies disseminated by the Department or a DOE Element. In addition, ''objectivity'' involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data should be generated, and the analytical results developed, using sound statistical and research methods. If the data and analytical results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity. However, this presumption is rebuttable based on a persuasive showing by a member of the public seeking correction of information in a particular instance. If DOE Element-sponsored peer review is employed to help satisfy the objectivity standard, the review process employed should meet the general criteria for competent and credible peer review found in OMB's *Final Information Quality Bulletin for Peer Review,* issued in December 2004 and posted at (*https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2005/m05-03.pdf*))

DOE Elements should comply with OMB's *Final Information Quality Bulletin for Peer Review.* When conducting peer review, reviewers are expected to evaluate both the objectivity of the underlying data and the sensitivity of the conclusions to analytic assumptions. In cases where previously determined influential information has changed significantly, the DOE Element with authority over the data should consider whether a second peer review panel or comparable assessment process should be convened to evaluate the objectivity and reliability of the changed data, as appropriate given the program's intended use of the modified information.

Influential information. If a DOE Element is responsible for disseminating and disseminates influential scientific, statistical, or financial information, a high degree of transparency of data and methods should be ensured to facilitate the reproducibility of such information by qualified third parties.

Influential when used in the context of scientific, financial or statistical information, means information:

(1) That is subject to embargo until its dissemination by DOE or a DOE Element disseminating the information because of potential market effects;

(2) that is the basis for a DOE action that may result in an annual effect on the economy of $100 million or more; or

(3) that is designated by a DOE Element as ''influential.''

With regard to original and supporting data related thereto, these Guidelines do not direct that all disseminated original and supporting data be subjected to the reproducibility requirement applicable to influential information. DOE Elements may identify, in consultation with the relevant scientific and technical communities, those particular types of data that may practicably be subjected to the reproducibility requirement, given ethical, feasibility, confidentiality, privacy, trade secret, security, and intellectual property constraints. It is understood that reproducibility of data is an indication of transparency about research design and methods and thus a replication exercise (*i.e.* a new experiment, test, or sample) should not be required prior to each dissemination. At a minimum, DOE Elements should assure reproducibility for those kinds of original and supporting data according to ''commonly accepted scientific, financial, or statistical standards.'' DOE Elements may tailor DOE's definition of ''influential information'' to meet their program requirements and to ensure that high standards of quality are maintained for all information products aimed at the public.

Making the data and models publicly available will assist in determining whether analytical results are capable of being substantially reproduced. However, the objectivity standard does not override other compelling interests such as privacy, trade secret, security, intellectual property, and other confidentiality protections. In situations where public access to data and methods will not occur due to other compelling interests, DOE Elements should apply rigorous robustness checks to analytic results and document what checks were undertaken. DOE Elements should, however, disclose the specific data sources that have been used and the specific quantitative methods and assumptions that have been employed. However, each DOE Element should define the type of robustness checks and the level of detail for documentation thereof, in ways appropriate for it given the nature and multiplicity of issues for which the DOE Element is responsible. With regard to the dissemination of information containing analyses of risks to human health, safety and the environment, it is DOE policy for DOE Elements in complying with the OMB guidelines to apply the following criteria adapted from the Safe Drinking Water Act Amendments of 1996.

1. Use:

a. The best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and

b. Data collected by accepted methods (if the reliability of the method and the

nature of decision justify use of the data).

2. Present information that is comprehensive, informative, and understandable.

3. Specify, to the extent practicable:

a. Each population addressed by any estimate of risk;

b. The expected risk or central estimate of risk for the populations addressed;

c. Each appropriate upper-bound or lower-bound estimate of risk;

d. Each significant uncertainty identified in the process of an assessment of risk and the studies that would assist in resolving the uncertainty; and

e. Peer-reviewed studies known to the DOE Element that support, are directly relevant to, or fail to support any estimate of risk effects and the methodology used to reconcile inconsistencies in the scientific data. DOE Elements responsible for dissemination of vital health, environmental and medical information should interpret the reproducibility and peer-review standards in a manner appropriate to assuring the timely flow of vital information to medical providers, patients, health agencies, and the public.

''Utility'' refers to the usefulness of the information to intended users including the public. In assessing the usefulness of information, DOE Elements need to consider the uses of the information they plan to disseminate not only from their perspective but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, DOE Elements should take care to ensure that transparency has been addressed in its review of the information.

''Integrity'' refers to security—the protection of information from unauthorized access or revision to ensure that information by DOE or DOE Elements is not compromised through corruption or falsification.

Transparency of data and sources. With regard to analytic results, DOE Elements generally should demonstrate sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public. These transparency standards apply to analysis of data from a single study as well as to analyses that combine information from multiple studies.

Further, DOE Elements should, to the extent possible, consistent with security, privacy, intellectual property, trade secrets, and confidentiality protections, identify the sources of the disseminated information and, in a scientific, financial, or statistical context, the supporting data and models, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. While DOE Elements should consider the potential for using existing data sources, both internal and external to DOE, for statistical and research purposes, it is critical that data should have full, accurate, transparent documentation, and possible sources of error affecting data quality should be identified and disclosed to users.

If a DOE Element utilizes information originally collected or developed by another Federal agency and makes that information available to the public, the DOE Element will indicate the origin of the information and note that the originating Federal agency is responsible for the quality of the information.

When a DOE Element has performed analysis using a specialized set of computer code, the computer code used to process it should be made available to the public for further analysis, if consistent with applicable law and policy. Exceptions may arise when the code itself contains confidential information relating to the application of data protection methodologies, or DOE Elements are restricted from publicly releasing or disclosing any proprietary data. In such circumstances, DOE Elements should release a description of the data sources and/or methodology, and how the methodology is applied in the estimation process to maintain transparency of the published estimates.

Protection of privacy and confidentiality in data. Federal agencies, including DOE, collect, use, maintain, and disseminate information that may include personally identifiable information (PII). In addition to PII, DOE Elements may collect, use, and disseminate confidential information that includes proprietary business, technical, or financial information belonging to other Government agencies, other countries, or private sector or non-profit companies or organizations. DOE Elements should ensure that any data used or disseminated by or on behalf of the Department is protected consistent with statutory, regulatory, and policy requirements for privacy and confidentiality, proprietary data, and confidential business information. DOE Office of the CIO, in conjunction with DOE Elements, will explore methods that provide broader access to data sets while maintaining protections for PII and confidentiality in the use and disclosure of data. New methodologies for data access should be consistent with principles for ethnical governance, the employment of sound security and privacy practices to safeguard the identity of individuals, while ensuring appropriate access and use.

If a DOE Element is considering secondary analysis of data that includes personally identifiable information, the DOE Element should coordinate with the DOE Senior Agency Official for Privacy, the DOE Chief Privacy Officer, and the DOE Program Office to meet all privacy requirements and manage privacy risks.

Pre-dissemination review procedures. Before disseminating information to members of the public, the originating office of the DOE Element is responsible for ensuring that the information is consistent with the OMB and DOE guidelines and that the information is of adequate quality for dissemination. If the information is influential financial, scientific, or statistical information, then, to the extent practicable, the DOE Element should provide for higher level review of the originating office's conclusions. Each DOE Element should identify for the CIO a high ranking official who is responsible for ensuring the accountability of the DOE Element's program offices in reviewing information to be disseminated to members of the public under the OMB and DOE guidelines.

As a matter of good and effective information resources management, DOE Elements may develop and post on their websites supplemental guidelines for the process they will follow for reviewing the quality (including objectivity, utility and integrity) of information before it is disseminated. The DOE IQA Guidelines website will provide a central repository for DOE Element supplemental guidance related to quality review processes. DOE Elements should treat information quality as integral to every step of development of information, including creation, collection, maintenance, and dissemination. This process will enable every DOE Element to substantiate the quality of the information it has disseminated through documentation or other means appropriate to the information.

Paperwork Reduction Act. It is important that DOE Elements make use of OMB's Paperwork Reduction Act (PRA) clearance process to help improve the quality information that the DOE Elements collect and disseminate to the public. DOE Elements already are required to demonstrate in their PRA

submissions to OMB the ''practical utility'' of a proposed collection of information the DOE Element plans to disseminate. Additionally, for all proposed collections of information that will be disseminated to the public, DOE Elements should evaluate the proposed collection in light of the OMB and DOE guidelines, and based on that evaluation, state in their PRA clearance submissions to OMB that the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with the OMB and DOE information quality guidelines. DOE Elements should consider and plan for any potential re-use or re-purposing of information in data collection systems, known as ''downstream uses.'' In developing a PRA information collection, DOE Elements should add language to published public comment notices that identify potential downstream uses and potential impacts and uses and seek public comment on the anticipated downstream uses.

2. Responding to requests from members of the public. To facilitate public review of information disseminated to the public, these Guidelines provide procedures allowing members of the public to seek and obtain correction of information disseminated to the public that does not comply with the quality provisions of the OMB and DOE guidelines. The procedures, set out in Part IV below, provide separate mechanisms for information set forth or referenced in a DOE or DOE-sponsored document subject to public comment and all other DOE or DOE-sponsored information.

IV. Requests From Members of the Public for Correction of Publicly Disseminated Data

A. How does a member of the public request correction of publicly disseminated information?

1. Requests from members of the public seeking correction of DOE or DOE-sponsored documents subject to public comment, rulemaking notices, and environmental impact statements.

(A) With respect to information set forth or referenced with endorsement in a DOE or DOE-sponsored document subject to public comment on or after [DATE OF ISSUANCE OF FINAL DOE IQA GUIDELINES], a member of the public must request correction within the comment period in a comment that:

(1) Specifically identifies the information in question and the document(s) containing the information;

(2) Explains with specificity the reasons why the information is inconsistent with the applicable quality standards in the OMB or DOE guidelines;

(3) Presents substitute information, if any, with an explanation showing that such information is consistent with the applicable quality standards in the OMB and DOE guidelines; and

(4) Justifies the necessity for, and the form of, the requested correction.

(B) A member of the public must file a request for correction of a document subject to public comment at the address for comments set forth in DOE's notice providing for public comment.

(C) If a member of the public requests correction of information set forth or referenced with endorsement in a document subject to public comment prior to publication of the final document and provides a justification of the necessity for an early response, DOE may consider providing a preliminary response including but not limited to a **Federal Register** notice describing the request for correction and reopening the comment period.

(D) If a member of the public files a request for correction under paragraph IV.A.1 of these guidelines after the close of a comment period, DOE may consider the request to the same extent that DOE considers late-filed comments and time permits such consideration.

(E) With respect to information that is set forth or referenced with endorsement in a notice of final rulemaking or a final regulation disseminated on or after October 1, 2002, (regardless of when first disseminated and regardless of whether there was prior notice and opportunity for public comment), a member of the public:

(1) Must file a request for correction with Office of the Chief Information Officer at the address provided in paragraph IV.A.2 of these guidelines;

(2) Must include in such a request the content required by paragraph IV.A.1 of these guidelines; and

(3) Must file such a request regarding the regulatory text or supporting information that would necessitate changes to the regulatory text as a petition for reconsideration or for regulatory amendments under 5 U.S.C. 553(e).

(F) With respect to information set forth or referenced with endorsement in a final environmental impact statement (and any related portion of a Record of Decision) disseminated on or after October 1, 2002, regardless of when first disseminated, a member of the public:

(1) Must file a request for correction with the Office of the Chief Information Officer at the address provided in paragraph IV.A.2 of these guidelines;

(2) Must include in such a request the content required by paragraph IV.A.1 of these guidelines; and

(3) Must file such a request in the form of a petition for a supplemental environmental impact statement if the petitioner asserts that are significant new circumstances or information as provided for in 40 CFR 1502.9(c)(1)(ii).

(G) With respect to information that is made subject to public comment on or after October 1, 2002, and that is set forth or referenced with endorsement in a DOE notice of final rulemaking or a final environmental impact statement (and any related portions of a Record of Decision), DOE may summarily deny a request for correction as untimely.

(H) A member of the public who files a request for correction under paragraph IV.A.1 has the burden of justification with respect to the necessity for correction as well as with respect to the timing and type of correction requested.

2. Requests from members of the public seeking correction of DOE or other DOE-sponsored documents.

(A) With respect to information set forth or referenced with endorsement in a DOE or DOE-sponsored document that is disseminated on or after October 1, 2002, regardless of when the information was first disseminated, and that is not subject to paragraph IV.A.1 of these guidelines, a member of the public must request correction by letter to the Office of the Chief Information Officer, Attention: DOE Quality Guidelines, U.S. Department of Energy, Forrestal Building—Room 8H–089, 1000 Independence Avenue SW, Washington, DC 20585, or via Fax to (202) 586–0262, or by providing the information called for at the DOE Information Quality website: *https://www.energy.gov/cio/department-energy-information-quality-guidelines.* This website outlines the Department's process for submitting a request for correction under these Guidelines as set forth in paragraph (B) below.

(B) If a member of the public requests correction of DOE or DOE-sponsored information by letter, addressed to the CIO, then the letter must:

(1) Specifically identify the information in question and the document(s) containing the information;

(2) Explain with specificity the reasons why the information is inconsistent with the applicable quality standards in the OMB Guidelines or DOE guidelines;

(3) Present substitute information, if any, with an explanation showing that such information is consistent with the OMB guidelines and the DOE implementing guidelines; and

(4) Justify the necessity for, and the form of, the requested correction.

(C) A member of the public who files a request for correction under paragraph IV.A.2 has the burden of justification with respect to the necessity for correction as well as with respect to the type of correction requested.

(D) Requests from members of the public seeking correction of non-DOE information.

(1) DOE Elements may collect, use, and make available information from various sources and data owners. Elements must identify and highlight original sources of information when such information is used to create or modify influential information.

(2) If the Department receives a request for correction involving non-DOE controlled information, the following applies:

(a) The Department cannot correct or modify information that is owned or made available on behalf of the original data owner, such as a tribal nation.

(b) The Department will identify the specific information exempt from the correction process through a written response to the requester.

B. How does DOE process requests for correction?

1. *Incomplete requests.* If a request for correction is incomplete, DOE may seek clarification from the person submitting the request or return it without prejudice to resubmission.

2. *Public notice of a request for correction.* In selected cases, DOE may publish notice of the receipt of a request for correction and may invite public comment.

3. *Participation by other interested persons.* By letter, DOE may invite or allow other interested persons to comment on a request for correction.

4. *Initial decisions.* If the request for correction concerns information that does not involve a document subject to public comment, then the originating office of the DOE Element responsible for dissemination of the information should provide at least an initial decision within 60 days from the date of receipt. The response should contain a statement of reasons for the disposition. If an initial decision on a request for correction under this paragraph requires more than 60 days, then the DOE Element should inform the requestor that more time is required and indicate the reason why and an estimated decision date. The DOE Element's response should contain a point-by-point response to any data quality arguments contained in the RFC and should refer to any relevant peer review that directly considered the issue being raised, if available. In responding to an RFC, the DOE Element should not opine on the requestor's or DOE's policy position.

5. *Administrative appeals.* In the event DOE initially denies a request for correction of information not subject to public comment and the person who submitted the request would like additional review, then that person must submit a request for review, including a statement of reasons for modifying or reversing the initial decision, no later than 30 days from the date of that decision. A request for review under this paragraph must be submitted by email to *DOEPRA@hq.doe.gov* or by regular mail to Office of the Chief Information Officer, Attention: DOE Quality Guidelines, U.S. Department of Energy, Forrestal Building—Room 8H–089, 1000 Independence Avenue SW, Washington, DC 20585, or via Fax to (202) 586–0262. The CIO will direct the request for review to the DOE Element which supervises the originating DOE program office, and the DOE Element, with the concurrence of the Office of the General Counsel, should issue a final decision for DOE (with a copy to the CIO) within 60 days from the date that the request for review is received. To ensure the integrity of the appeals process, the DOE Element should ensure that those individuals reviewing and responding to the appeals request were not involved in the review and initial response to the RFC. If a final decision on a request for correction under this paragraph requires more than 60 days, then the DOE Element should inform the requestor that more time is required and indicate the reason why and an estimated decision date.

6. *Any corrective action will be determined by the nature and timeliness of the information, the magnitude of the error, and the cost of undertaking a correction.* DOE Elements are not required to change, or in any way alter, the content or status of information simply based on the receipt of a request for correction. DOE Elements need not respond substantively to frivolous or repetitive requests for correction. Nor do DOE Elements have to respond substantively to requests that concern information not covered by the OMB or DOE Guidelines or from a person who has not justified the necessity for correction.

7. *Determination of merit.* If DOE determines that a request for correction of information not subject to public comment has merit, DOE may respond by correcting the information in question and without issuing a decision explaining the reasons for accepting the request.

8. *Multiple requests for correction.* If DOE receives multiple requests for correction of information not subject to public comment, DOE may consolidate the requests and respond on a DOE website, or by notice in the **Federal Register,** or by issuing a correction in similar form and manner as the original information was issued.

9. *Applicability of the request for correction to the Guidelines.* If a member of the public complains about information set forth or referenced with endorsement in a DOE or DOE-sponsored document and does not request correction under the OMB and DOE guidelines, then the complaint is not subject to processing as a request for correction under those guidelines.

10. *Timeliness of the request for correction.* If a member of the public requests correction of information first disseminated more than one year prior to the request and the information does not have a continuing significant impact on DOE projects or policy decisions or on important private sector decisions, DOE may regard the information as stale for purposes of responding to the request.

11. *Additional procedures.* DOE may devise additional procedures on a case-by-case basis as may be appropriate to process requests for correction.

V. IQA Reporting Requirements.

On an annual basis, the Department will report to the Director of OMB on the requests for corrections received under these Guidelines through a process managed by OMB. The OCIO will serve as the Departmental lead for this report. DOE Elements must designate a reporting official, except as agreed otherwise between the DOE Element and the OCIO. The report will include the location of the Department's IQA web page, the number of complaints received for the previous fiscal year, and a detailed description of the nature of submitted complaints (*e.g.,* request for deletion or correction) and the resolution of complaints (*e.g.,* number corrected, denied, or pending review).

[FR Doc. 2019–21662 Filed 10–3–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/NSF Nuclear Science Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of renewal.

Pursuant to the Federal Advisory Committee Act and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the DOE/NSF Nuclear Science Advisory Committee (NSAC) has been renewed for a two-year period.

The NSAC will provide advice and recommendations to the Director, Office of Science (DOE), and the Assistant Director, Directorate for Mathematical and Physical Sciences (NSF), on scientific priorities within the field of basic nuclear science research.

Additionally, the renewal of the NSAC has been determined to be essential to conduct business of the Department of Energy and the National Science Foundation, and to be in the public interest in connection with the performance of duties imposed upon DOE and NSF, by law and agreement. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, and the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Dr. Timothy Hallman at (301) 903–3613 or email at: *timothy.hallman@science.doe.gov.*

Signed in Washington, DC, on September 27, 2019.

Rachael J. Beitler,

Committee Management Officer.

[FR Doc. 2019–21661 Filed 10–3–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Amended Record of Decision for the Continued Interim Operation of the Y–12 National Security Complex

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Amended record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA), a separately organized agency within the U.S. Department of Energy (DOE), is amending its July 2011 Record of Decision for the Continued Operation of the Y–12 National Security Complex (2011 ROD) to reflect its decision to continue to implement on an interim basis a revised approach for meeting enriched uranium requirements (while addressing issues related to seismic analysis), by upgrading existing enriched uranium (EU) processing buildings and constructing a new Uranium Processing Facility (UPF). Additionally, NNSA has decided to separate the single-structure UPF design concept into a new design consisting of multiple buildings, with each constructed to safety and security requirements appropriate to the building's function. This revised approach is combining elements of the two alternatives previously analyzed in the Final Site-Wide Environmental Impact Statement for the Y–12 National Security Complex, DOE/EIS–0387 (Y–12 SWEIS).

FOR FURTHER INFORMATION CONTACT: For further information on this Amended Record of Decision (ROD), contact: Ms. Terri Slack, Field Counsel, U.S. Department of Energy, National Nuclear Security Administration, NNSA Production Office, P.O. Box 2050, Oak Ridge, TN 37831, (865) 576–1722. For information on the DOE National Environmental Policy Act (NEPA) process, contact: Mr. Brian Costner, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4600, or leave a message at (800) 472–2756. This Amended ROD and related NEPA documents are available on the DOE NEPA website at *www.nepa.energy.gov*.

SUPPLEMENTARY INFORMATION:

Background

Y–12 is NNSA's primary site for uranium operations, including EU processing and storage, and is one of the primary manufacturing facilities for maintaining the U.S. nuclear weapons stockpile. Y–12 is unique in that it is the only source of secondaries, cases, and other nuclear weapons components for the NNSA nuclear security mission.

In the Y–12 SWEIS, NNSA analyzed the potential environmental impacts of ongoing and future operations and activities at Y–12. Five alternatives were analyzed in the Y–12 SWEIS: (1) No Action Alternative (maintain the status quo), (2) UPF Alternative, (3) Upgrade in-Place Alternative (4) Capability-sized UPF Alternative, and (5) No Net Production/Capability-sized UPF Alternative. In the 2011 ROD (July 20, 2011, 76 FR 43319), NNSA decided to implement the Capability-sized UPF Alternative and to construct and operate a single-structure Capability-sized UPF at Y–12 as a replacement for certain existing buildings. Subsequent to the publication of the 2011 ROD, concerns about UPF cost and schedule growth prompted NNSA to reevaluate its strategy for meeting EU requirements, including the UPF design approach.

Under the updated strategy, previously approved in a July 12, 2016, Amended Record of Decision (2016 AROD), NNSA would meet enriched uranium requirements using a revised approach of upgrading existing enriched uranium processing buildings and constructing a smaller-scale UPF facility implementing a new multiple building design approach. The updated strategy is consistent with recommendations from a project peer review of the UPF [''Final Report of the Committee to Recommend Alternatives to the Uranium Processing Facility Plan in Meeting the Nation's Enriched Uranium Strategy''] conducted in 2014. In the new UPF design approach, the single-structure UPF concept would be separated into multiple buildings, each being constructed to safety and security requirements appropriate to the building's function.

NEPA Process for Amending the ROD and Subsequent Litigation

The Y–12 SWEIS evaluated the potential impacts of the reasonable range of alternatives for continuing enriched uranium processing operations at Y–12 and provided a basis for the 2011 ROD. As discussed above, NNSA's new strategy of upgrading existing enriched uranium buildings and constructing UPF with multiple buildings, previously approved in the 2016 AROD, is different from the Capability-sized UPF that NNSA selected in the 2011 ROD. Instead it is a hybrid approach that combines elements of the Capability-sized UPF Alternative and certain elements of the Upgrade in Place Alternative. Consequently, NNSA prepared a Supplement Analysis (DOE/EIS–0387–SA–01) in accordance with CEQ and DOE regulations implementing NEPA (40 CFR 1502.9(c) and 10 CFR 1021.314(c)) to determine (1) if there are potential environmental impacts that differ from those analyzed in the Y–12 SWEIS that would be expected to result from NNSA's new strategy and (2), if so, if the impacts would be considered significant in the context of NEPA (40 CFR 1508.27), which would require preparation of a new or Supplemental Environmental Impact Statement (EIS). On July 12, 2016, NNSA issued the 2016 AROD, determining that because the action was a hybrid of two alternatives reviewed in the 2011 SWEIS and its environmental impacts would not be significantly different or significantly greater than those reviewed in the prior analysis, it need not prepare a new or supplemental environmental impact statement (EIS). NNSA again updated this environmental analysis under

NEPA in its Supplement Analysis issued in August 2018. This Supplement Analysis reviewed new information post-dating the 2011 SWEIS, and again determined that NNSA need not prepare a new or supplemental EIS because this new information did not result in environmental impacts significantly different or significantly greater than those reviewed in the prior analysis.

As the result of a lawsuit filed against DOE and NNSA, the federal district court issued several rulings related to NNSA's NEPA documents for Y–12. While the judge vacated the AROD, the 2016 Supplement Analysis, and the 2018 Supplement Analysis based on its determination that additional NEPA analysis of new information pertaining to seismic risks at Y–12 was needed, the court held that the NNSA's new strategy of upgrading existing enriched uranium buildings pursuant to the Extended Life Program and constructing UPF with multiple buildings was adequately considered as part of the 2011 SWEIS. The court further held that NNSA is not required to prepare a Supplemental EIS for the UPF Project or the Extended Life Program. See Memorandum Opinion and Order in Case 3:18–cv–00150–PLR–DCP.

Summary of Impacts Associated With Continued Interim Operation of the Y–12 National Security Complex

With respect to the environmental impacts associated with the revised UPF strategy and the Extended Life Program, the court determined that ''[b]ecause the environmental effects in the 2011 SWEIS were evaluated along a spectrum—from 'no action' at one end, to a brand-new UPF at the other, and with an 'Upgrade-in-Place' program occupying the middle,'' NNSA's new strategy is adequately supported by theY–12 SWEIS, and the court did not vacate the 2011 ROD or Y–12 SWEIS or enjoin any activities at Y–12. The court also found the NEPA analysis in the 2016 Supplement Analysis and the 2018 Supplement Analysis deficient only as to their analysis of new information pertaining to seismic risks. Thus, consistent with 10 CFR 1021.315(e), the existing 2011 ROD for the Y–12 SWEIS can be amended. However, in accordance with the court's determination that additional NEPA analysis of new information pertaining to seismic risks at Y–12 is needed, further NEPA documentation will be developed on an expedited basis that includes an unbounded accident analysis of earthquake consequences at Y–12, using updated seismic hazard analyses that incorporate the 2014 United States Geological Survey maps.

Amended Decision

NNSA has decided to continue to operate Y–12 to meet the stockpile stewardship mission critical activities assigned to the site on an interim basis, pending further review of seismic risks at Y–12. NNSA will also meet EU requirements using a hybrid approach of upgrading existing EU buildings under its Extended Life Program and separating the single-structure UPF into multiple buildings, with each constructed to safety and security requirements appropriate to the building's function;

This amended decision will enable NNSA to maintain the required expertise and capabilities to deliver uranium products while modernizing production facilities. This amended decision to continue operations on an interim basis will avoid many of the safety risks of operating aged buildings and equipment by relocating processes that cannot be sustained in existing, enduring buildings or through process improvements. Through an Extended Life Program, mission-critical existing and enduring buildings and infrastructure will be maintained and/or upgraded, which will enhance safety and security at the Y–12 site, pending further review of seismic risks at Y–12. Such continued operations are consistent with the court's ruling and will continue to implement safety improvements under previously approved contracts, pending the completion of additional NEPA documentation on an expedited basis. Once further seismic analysis has been performed, NNSA will issue a new ROD describing, what, if any, changes it has decided to make in light of that analysis.

Signed in Washington, DC, this 27th day of September 2019, for the United States Department of Energy.

Lisa E. Gordon-Hagerty,

Under Secretary for Nuclear Security, National Nuclear Security Administration.

[FR Doc. 2019–21660 Filed 10–3–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15002–000]

Premium Energy Holdings, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 10, 2019, Premium Energy Holdings, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Walker Lake Pumped Storage Project (Walker Lake or project) to be located on Walker Lake and Walker River, near the community of Walker Lake, Mineral County, Nevada. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would be a closed-loop pumped storage hydropower facility. The applicant proposes three alternative upper reservoirs: Bald Mountain Reservoir, Copper Canyon Reservoir, or Dry Creek Reservoir. The existing Walker Lake would be the lower reservoir for each alternative.

Upper Reservoir Alternative 1: Bald Mountain Reservoir

The Bald Mountain Reservoir alternative consists of: (1) A 101-acre upper reservoir having a total storage capacity of 23,419 acre-feet at a normal maximum operating elevation of 6,500 feet mean sea level (msl); (2) a 615-foot-high, 2,195-foot-long roller compacted concrete upper reservoir dam; (3) a 0.88-mile-long, 30-foot-diameter concrete-lined headrace tunnel; (4) a 0.3-mile-long, 27-foot-diameter concrete-lined vertical shaft; (5) a 1.85-mile-long, 27-foot-diameter concrete-lined horizontal tunnel; (6) five 0.15-mile-long, 17-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 megawatts (MW) each; and (8) a 0.45-mile-long, 32-foot-diameter concrete-lined tailrace tunnel discharging into the existing Walker Lake.

Upper Reservoir Alternative 2: Copper Canyon Reservoir

The Copper Canyon Reservoir alternative consists of: (1) A 235-acre upper reservoir having a total storage capacity of 36,266 acre-feet at a normal maximum operating elevation of 5,740 feet msl; (2) a 505-foot-high, 6,105-foot-long roller compacted concrete upper reservoir dam; (3) a 0.56-mile-long, 35-foot-diameter concrete-lined headrace tunnel; (4) a 0.2-mile-long, 31-foot-diameter concrete-lined vertical shaft; (5) a 1.05-mile-long, 31-foot-diameter concrete-lined horizontal tunnel; (6) five 0.1-mile-long, 20-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 MW each; and (8) a 0.6-mile-long, 38-foot-diameter concrete-lined tailrace tunnel discharging into the existing Walker Lake.

Upper Reservoir Alternative 3: Dry Creek Reservoir

The Dry Creek Canyon Reservoir alternative consists of: (1) A 105-acre upper reservoir having a total storage capacity of 21,953 acre-feet at a normal maximum operating elevation of 6,560 feet msl; (2) a 775-foot-high, 6,870-foot-long roller compacted concrete upper reservoir dam; (3) a 0.98-mile-long, 29-foot-diameter concrete-lined headrace tunnel; (4) a 0.33-mile-long, 26-foot-diameter concrete-lined vertical shaft; (5) a 2.56-mile-long, 26-foot-diameter concrete-lined horizontal tunnel; (6) five 0.1-mile-long, 17-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 MW each; and (8) a 0.23-mile-long, 31-foot-diameter concrete-lined tailrace tunnel discharging into the existing Walker Lake.

Lower Reservoir: Walker Lake

The existing Walker Lake has a surface are of 32,120 acres at 3,920 feet msl, and a total storage capacity of 1.4 million acre-feet.

Interconnection

For each upper reservoir alternative, project power would be transmitted to the grid via: (1) A new, approximately 10-mile-long, 500 kilovolt (kV) transmission line extending from the powerhouse to the proposed Walker Converter Station (the point of interconnection); and (2) appurtenant facilities. The estimated annual generation of the Pyramid Lake Project under each of the alternatives would be 6,900 gigawatt-hours.

Applicant Contact: Victor M. Rojas, Managing Director, Premium Energy Holdings, LLC, 355 South Lemon Avenue, Suite A, Walnut, California 91789; phone: (909) 595–5314.

FERC Contact: Kyle Olcott; phone: (202) 502–8963.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–15002–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 30, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–21638 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2814–025]

Great Falls Hydroelectric Company, City of Paterson, New Jersey; Notice of Scoping Meetings and Environmental Site Review and Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2814–025.

c. *Date Filed:* February 28, 2019.

d. *Applicants:* Great Falls Hydroelectric Company and the City of Paterson, New Jersey, as co-licensees.

e. *Name of Project:* Great Falls Hydroelectric Project.

f. *Location:* On the Passaic River, near the City of Paterson, Passaic County, New Jersey. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825 (r).

h. *Applicant Contact:* Mr. Robert Gates, Senior Vice President of Operations, Eagle Creek Renewable Energy, 65 Madison Avenue, Suite 500, Morristown, NJ 07960; (973) 998–8400; email—*bob.gates@eaglecreekre.com* and/or Ben-David Seligman, 2nd Assistant Corp. Counsel, City of Paterson, 155 Market Street, Paterson, NJ; (973) 321–1366; email—*bseligman@patersonnj.gov.*

i. *FERC Contact:* Christopher Millard at (202) 502–8256; or email at *christopher.millard@ferc.gov.*

j. *Deadline for filing scoping comments:* November 23, 2019.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2814–025.

k. This application is not ready for environmental analysis at this time.

l. *The existing project works consist of:* (1) The Society for the Establishment of Useful Manufactures dam, an overflow granite stone gravity structure about 315 feet long, with a maximum height of 15 feet and having a crest elevation of 114.6 feet mean sea level (msl); (2) a reservoir with a surface area of 202 acres and a storage capacity of 1,415 acre-feet at elevation 114.6 feet msl; (3) a forebay inlet structure; (4) a headgate control structure containing three trashracks and three steel gates; (5)

three penstocks, each 8.5 feet in diameter and approximately 55 feet long; (6) a powerhouse containing three turbine-generator units with a total rated capacity of 10.95 megawatts; (7) a 37-foot-long, 4.16-kilovolt (kV) underground transmission line connecting the powerhouse to a 4.16/26.4-kV step-up transformer which in turn is connected to a 26.4-kV transmission grid via an approximately 30-foot-long, 26.4-kV underground transmission line; (8) and appurtenant facilities.

The Great Falls Project is operated in a run-of-river mode. For the period 2010 through 2018, the average annual generation at the Great Falls Project was 17,484 megawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Scoping Process

The Commission intends to prepare an environmental assessment (EA) on the projects in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Scoping Meetings

FERC staff will conduct one agency scoping meeting and one public meeting. The agency scoping meeting will focus on resource agency and non-governmental organization (NGO) concerns, while the public scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of these meetings are as follows:

Public Scoping Meeting

Date: Wednesday, October 23, 2019.
Time: 7:00 p.m. (EDT).
Place: Rogers Meeting Center, Second Floor.
Address: 32 Spruce Street, Paterson, New Jersey.

Agency Scoping Meeting

Date: Thursday, October 24, 2019.
Time: 2:00 p.m. (EDT).
Place: Rogers Meeting Center, Second Floor.
Address: 32 Spruce Street, Paterson, New Jersey.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the SD1 will be available at the scoping meeting or may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above).

Environmental Site Review

The applicants and FERC staff will conduct a project Environmental Site Review beginning at 9:00 a.m. on October 24, 2019. All interested individuals, organizations, and agencies are invited to attend. All participants should meet at the Great Falls Project facility, located at 72 McBride Avenue, Paterson, New Jersey. All participants are responsible for their own transportation to the site and during the site visit. Anyone with questions about the Environmental Site Review should contact Mr. Matt Nini, Relicensing Project Manager for Eagle Creek, at 973–998–8171 or *matthew.nini@eaglecreekre.com*.

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings are recorded by a stenographer and become part of the formal record of the Commission proceeding on the projects. Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

Dated: September 23, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–21676 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL19–8–003]

PJM Interconnection, LLC; Notice of Filing

Take notice that on September 13, 2019, PJM Interconnection, L.L.C. (PJM), submitted a compliance filing containing modifications to the Amended and Restated Operating Agreement of PJM, pursuant to the Federal Energy Regulatory Commission's (Commission) August 29, 2019 Order, 168 FERC 61,134.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call

(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 8, 2019.

Dated: September 30, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–21635 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2894–013]

Flambeau Hydro, LLC; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2894–013.

c. *Date filed:* December 31, 2018.

d. *Applicant:* Flambeau Hydro, LLC.

e. *Name of Project:* Black Brook Hydroelectric Project.

f. *Location:* On the Apple River, in the township of Black Brook, Polk County, Wisconsin. There are no federal lands within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Jason Kreuscher, Renewable World Energies, LLC, 100 South State St., P.O. Box 264, Neshkoro, WI 54960, (855) 994–9376 ext. 102.

i. *FERC Contact:* Michael Davis (202) 502–8339, *Michael.Davis@ferc.gov.*

j. *Deadline for filing for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2894–013.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, and is ready for environmental analysis at this time.

l. The Black Brook Project consists of the following existing facilities: (1) A 131-foot-long by 32-foot-high concrete gravity dam with three 12-foot-high by 12-foot-wide radial gates, a 32.5-foot-wide by 23.6-foot-high overflow section with a 6-inch flashboard, a 315-foot-long by 12-foot-wide by 8.3-foot-high left embankment, and a 75-foot-long by 38.5-foot-wide by 31.2-foot-high right embankment; (2) a 10-foot-long by 3.17-foot-wide by 15-foot-high reinforced concrete intake structure containing two 7-foot-wide by 12-foot-high steel dewatering gates and two 65-degree inclined 16-foot-wide by 15-foot-high trash racks with a 1.5-inch clear-bar spacing; (3) a 34.7-foot by 25.3-foot cement block powerhouse with two generating units providing a total of 0.645 megawatt of installed capacity; (4) a 30-foot by 10-foot tailrace; (5) a 6-foot by 5.5-foot 13.2-kilovolt (kV) substation facility; (6) a 20-foot-long, 2,400-volt transmission line and a 1.25-mile-long 13.2 kV transmission line; and (7) appurtenant facilities. The project has a normal pool elevation of 1045.47 feet National Geodetic Vertical Datum with a surface area of about 98 acres and no usable storage capacity. The project generates about 7,336 megawatt-hours annually.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

p. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to

the schedule will be made as appropriate.

Commission issues Environmental Assessment May 2020

Comments on Environmental Assessment June 2020

Dated: September 30, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–21675 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–191–000]

Notice of Availability of the Environmental Assessment for the Texas Eastern Transmission Company, L.P. Proposed Bernville Compressor Units Replacement Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Bernville Compressor Units Replacement Project, proposed by Texas Eastern Transmission, L.P. (Texas Eastern) in the above-referenced docket. Texas Eastern requests authorization to replace two existing natural gas-fired turbine compressor engines and appurtenant facilities at its existing Bernville Compressor Station in Berks, Pennsylvania.

The EA assesses the potential environmental effects of the construction and operation of the Bernville Compressor Units Replacement Project in accordance with the requirements of the National Environmental Policy Act. The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The project would consist of the following new facilities:

- Installation of one 26,000 horsepower (hp) and one 18,100 hp Solar Turbine Inc. natural gas-fired centrifugal turbine compressor units and associated auxiliary piping and equipment;
- installation of related software controls that would limit the total hp of the 26,000 hp compressor unit to 23,700 hp;
- conversion of an existing 3,070-square-foot compressor unit building to an office building; and
- other related appurtenances.

The project would involve removing one 22,000 hp and one 19,800 hp natural gas-fired centrifugal turbine compressor unit and the associated auxiliary piping and equipment. Texas Eastern would also remove the 4,352-square-foot building, which houses the existing 22,000 hp compressor unit, to allow for the installation of an 11,780-square-foot building to house the two new replacement compressor units. The replacement activities would require the use of additional temporary workspace beyond the existing facility boundary.

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; Native American tribes; potentially affected landowners and other interested individuals and groups, including commenters; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from FERC's website (*www.ferc.gov*), on the Environmental Documents page (*https://www.ferc.gov/industries/gas/enviro/eis.asp*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://www.ferc.gov/docs-filing/elibrary.asp*), click on General Search, and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.,* CP19–191). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on October 31, 2019.

For your convenience, there are three methods you can use to file your comments with the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature located on the Commission's website (*www.ferc.gov*) under the link to *Documents and Filings.* This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the *eFiling* feature on the Commission's website (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP19–191–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 Code of Federal Regulations 385.214). Motions to intervene are more fully described at *http://www.ferc.gov/resources/guides/how-to/intervene.asp.* Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. The Commission may grant affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. *Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription, which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document

summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: September 30, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–21673 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2622–013]

Turners Falls Hydro, LLC; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Terms and Conditions, Recommendations, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2622–013.

c. *Date filed:* February 4, 2019.

d. *Applicant:* Turners Falls Hydro, LLC (Turners Falls Hydro).

e. *Name of Project:* Turners Falls Project.

f. *Location:* On the Connecticut River, in the power canal of the Turners Falls Hydroelectric Project No. 1889, in Franklin County, Massachusetts. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Michael Scarzello, Director, Eagle Creek Renewable Energy, LLC, 65 Madison Avenue, Suite 500, Morristown, NJ 07960; Phone at (973) 998–8400, or email at *michael.scarzello@eaglecreekre.com.*

i. *FERC Contact:* Amanda Gill, (202) 502–6773 or *amanda.gill@ferc.govj.*

Deadline for filing comments, recommendations, terms and conditions, and prescriptions: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All filings must (1) bear in all capital letters the title ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2622–013.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is ready for environmental analysis at this time.

l. *Project Description:* The proposed Turners Falls Project would consist of: (1) An existing 10-foot-long, 20-foot-wide, 12- to 22-foot-high forebay; (2) a 20-foot-wide, 22-foot-high trashrack with 1.5-inch clear-bar spacing; (3) two 9.75-foot-wide, 10.3-foot-high headgates; (4) an 8.5-foot-diameter, 50-foot-long steel penstock; (5) a 77-foot-long, 42-foot-wide powerhouse containing one 937-kilowatt vertical Francis-type turbine-generator unit; (6) a 50-foot-long, 10-foot-diameter draft tube; (7) an 80-foot-long, 10-foot-wide tailrace; (8) a 110-foot-long, 2.3-kilovolt generator lead line that connects the generator to a step-up transformer; (9) and appurtenant facilities.

When generating, the project withdraws up to 289 cubic feet per second from FirstLight Hydro Generating Company's power canal for the Turners Falls Hydroelectric Project No. 1889, and discharges directly into the Connecticut River. Turners Falls Hydro operates the project in a run-of-river mode with an average annual generation of approximately 1,512 megawatt-hours. Turners Falls Hydro proposes to continue operating the project in a run-of-river mode and does not propose any new construction or modifications to the project.

m. A copy of the license application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document (P–2622). For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the Montague Public Library, Carnegie Library Branch located at 201 Avenue A, Turners Falls, MA 01376.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Procedural Schedule: The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Filing of comments, recommendations, terms and conditions, and preliminary fishway prescriptions.	November 2019.
Commission issues Environmental Assessment.	April 2020.
Comments on Environmental Assessment.	May 2020.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

n. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: September 30, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–21674 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP19–495–000]

Double E Pipeline, LLC; Notice of Schedule for Environmental Review of the Double E Project

On July 31, 2019, Double E Pipeline, LLC (Double E) filed an application in Docket No. CP19–495–000 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, known as the Double E Pipeline Project (Project), involves the construction and operation of approximately 132.9 combined miles of varying diameter natural gas pipeline connecting the Delaware Basin production areas in New Mexico and Texas to the Waha Hub. The Project would provide up to 1,350,000 dekatherms per day of firm capacity to delivery points near the Waha Hub in Reeves and Pecos Counties, Texas.

On August 14, 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—March 24, 2020
90-day Federal Authorization Decision Deadline—June 22, 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

As part of the Project, Double E would construct and operate:

- 33.3 miles of new 30-inch-diameter trunkline T100 from Summit Midstream's existing Lane Processing Plant located in Eddy County, New Mexico, to a new Double E Poker Lake Meter Station in Eddy County, New Mexico.
- 81.9 miles of new 42-inch-diameter trunkline T200 from the proposed Poker Lake Meter Station through Loving, Ward, and Reeves Counties, Texas to a terminus point at Double E's proposed Waha Receiver and Separation Site at the Waha Hub in Reeves County.
- Approximately 1.4 miles of new 42-inch-diameter pipeline T300 from the proposed Waha Receiver site to the final delivery location in Pecos County, Texas.
- Approximately 16.3 miles of new 30-inch-diameter pipeline L100 from three existing Gas Processing Plants in Loving, New Mexico to the proposed T100 trunkline in Eddy County, New Mexico.

Background

On December 11, 2018, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Double E Pipeline Project and Request for Comments on Environmental Issues* (NOI). The NOI was issued during the pre-filing review of the Project in Docket No. PF18–6–000 and sent to affected landowners; federal, state, and local government agencies; elected officials; Native American tribes; other interested parties; and local libraries and newspapers. Comments were received from the New Mexico Department of Game and Fish, the Hopi Tribe, Choctaw Nation of Oklahoma, Alabama-Coushatta Tribe of Texas, and the New Mexico Department of Transportation. All substantive comments received will be addressed in the EA.

The Bureau of Land Management will be a cooperating agency in the preparation of 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.,* CP19–495), 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: September 30, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–21634 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14998–000]

Premium Energy Holdings, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On June 18, 2019, Premium Energy Holdings, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Pyramid Lake Pumped Storage Project (Pyramid Lake Project or project) to be located on Pyramid Lake and Truckee River, near the community of Nixon, Washoe County, Nevada. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would be a closed-loop pumped storage hydropower facility. The applicant proposes three alternative upper reservoirs: San Emidio Reservoir, Tohakum Peak Reservoir, or Lake Range Reservoir. The existing Pyramid Lake would be the lower reservoir for each alternative.

Upper Reservoir Alternative 1: San Emidio Reservoir

The San Emidio alternative consists of: (1) A 180-acre upper reservoir having a total storage capacity of 21,550 acre-feet at a normal maximum operating elevation of 6,700 feet mean sea level (msl); (2) a 315-foot-high, 2,385-foot-long roller compacted concrete upper

reservoir dam; (3) a 0.63-mile-long, 28-foot-diameter concrete-lined headrace tunnel; (4) a 0.5-mile-long, 25-foot-diameter concrete-lined vertical shaft; (5) a 2-mile-long, 25-foot-diameter concrete-lined horizontal tunnel; (6) five 0.1-mile-long, 16-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 megawatts (MW) each; and (8) a 0.23-mile-long, 30-foot-diameter concrete-lined tailrace tunnel discharging into the existing Pyramid Lake.

Upper Reservoir Alternative 2: Tohakum Peak Reservoir

The Tohakum Peak Reservoir alternative consists of: (1) A 160-acre upper reservoir having a total storage capacity of 27,050 acre-feet at a normal maximum operating elevation of 5,960 feet msl; (2) a 575-foot-high, 1,740-foot-long roller compacted concrete upper reservoir dam; (3) a 0.74-mile-long, 33-foot-diameter concrete-lined headrace tunnel; (4) a 0.28-mile-long, 29-foot-diameter concrete-lined vertical shaft; (5) a 1.6-mile-long, 29-foot-diameter concrete-lined horizontal tunnel; (6) five 0.18-mile-long, 19-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 MW each; and (8) a 0.22-mile-long, 35-foot-diameter concrete-lined tailrace tunnel discharging into the existing Pyramid Lake.

Upper Reservoir Alternative 3: Lake Range Reservoir

The Lake Range Reservoir alternative consists of: (1) A 160-acre upper reservoir having a total storage capacity of 26,020 acre-feet at a normal maximum operating elevation of 6,180 feet msl; (2) a 495-foot-high, 2,474-foot-long roller compacted concrete upper reservoir dam; (3) a 0.75-mile-long, 32-foot-diameter concrete-lined headrace tunnel; (4) a 0.31-mile-long, 29-foot-diameter concrete-lined vertical shaft; (5) a 1.8-mile-long, 29-foot-diameter concrete-lined horizontal tunnel; (6) five 0.18-mile-long, 18-foot-diameter steel penstocks; (7) a 500-foot-long, 85-foot-wide, 160-foot-high concrete-lined powerhouse located in an underground cavern, housing five pump-turbine generator-motor units rated for 400 MW each; and (8) a 0.22 mile-long, 34-foot-diameter concrete-lined tailrace tunnel discharging into the existing Pyramid Lake.

Lower Reservoir: Pyramid Lake

The existing Pyramid Lake is the discharge point of the Truckee River, which is the sole outlet of Lake Tahoe. It has a surface are of 121,080 acres at 3,796 feet msl, and a total storage capacity of 23.6 million acre-feet.

Interconnection

For each upper reservoir alternative, project power would be transmitted to the grid via: (1) A new, approximately 15-mile-long, 500 kilovolt (kV) transmission line extending from the powerhouse to the proposed Pyramid Converter Station (the point of interconnection); and (2) appurtenant facilities. The estimated annual generation of the Pyramid Lake Project under each of the alternatives would be 6,900 gigawatt-hours.

Applicant Contact: Victor M. Rojas, Managing Director, Premium Energy Holdings, LLC, 355 South Lemon Avenue, Suite A, Walnut, California 91789; phone: (909) 595–5314.

FERC Contact: Kyle Olcott; phone: (202) 502–8963.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–14998–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14998) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 30, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–21637 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–2050–002.
Applicants: Midcontinent Independent System Operator, Inc., GridLiance Heartland LLC.
Description: Tariff Amendment: 2019–09–26_Deficiency Response to GridLiance Attachment O to be effective 12/31/9998.
Filed Date: 9/26/19.
Accession Number: 20190926–5112.
Comments Due: 5 p.m. ET 10/17/19.

Docket Numbers: ER19–2902–000.
Applicants: New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: Oct 2019 Membership Filing to be effective 9/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5066.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ER19–2903–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Amendments to GIA and DSA re: RB Inyokern, SA Nos. 958 & 959 to be effective 10/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5092.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ER19–2905–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Vallecito Energy Storage Project, GIA and DSA, 1091 & 1092, Ntc of Canx, SA 1045 to be effective 10/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5124.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ER19–2906–000.
Applicants: Tucson Electric Power Company.
Description: § 205(d) Rate Filing: Concurrence to CAISO RS No. 5223 to be effective 12/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5149.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ER19–2907–000.
Applicants: ISO New England Inc., Emera Maine.

Description: § 205(d) Rate Filing: ISO–NE and Emera Maine; First Revised TSA–EMERA–18–01 to be effective 10/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5154.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ER19–2908–000.
Applicants: Tenaska Clear Creek Wind, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization Under Section 205 of the FPA to be effective 10/1/2019.
Filed Date: 9/30/19.
Accession Number: 20190930–5156.
Comments Due: 5 p.m. ET 10/21/19.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES19–55–000.
Applicants: ITC Great Plains, LLC.
Description: Supplement to September 18, 2019 Application under Section 204 of the Federal Power Act [revised Exhibit D] of ITC Great Plains, LLC.
Filed Date: 9/30/19.
Accession Number: 20190930–5085.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ES19–56–000.
Applicants: ITC Midwest LLC.
Description: Supplement to September 18, 2019 Application under Section 204 of the Federal Power Act [revised Exhibit D] of ITC Midwest LLC.
Filed Date: 9/30/19.
Accession Number: 20190930–5086.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ES19–57–000.
Applicants: International Transmission Company.
Description: Supplement to September 18, 2019 Application under Section 204 of the Federal Power Act [revised Exhibit D] of International Transmission Company.
Filed Date: 9/30/19.
Accession Number: 20190930–5087.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ES19–58–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Supplement to September 18, 2019 Application under Section 204 of the Federal Power Act [revised Exhibit D] of Michigan Electric Transmission Company, LLC.
Filed Date: 9/30/19.
Accession Number: 20190930–5088.
Comments Due: 5 p.m. ET 10/21/19.

Docket Numbers: ES19–64–000.
Applicants: Metropolitan Edison Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Metropolitan Edison Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5158.
Comments Due: 5 p.m. ET 10/18/19.

Docket Numbers: ES19–65–000.
Applicants: Monongahela Power Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Monongahela Power Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5162.
Comments Due: 5 p.m. ET 10/18/19.

Docket Numbers: ES19–66–000.
Applicants: Pennsylvania Electric Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Pennsylvania Electric Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5178.
Comments Due: 5 p.m. ET 10/18/19.

Docket Numbers: ES19–67–000.
Applicants: Pennsylvania Power Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Pennsylvania Power Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5190.
Comments Due: 5 p.m. ET 10/18/19.

Docket Numbers: ES19–68–000.
Applicants: The Potomac Edison Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of The Potomac Edison Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5192.
Comments Due: 5 p.m. ET 10/18/19.

Docket Numbers: ES19–69–000.
Applicants: Trans-Allegheny Interstate Line Company.
Description: Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Trans-Allegheny Interstate Line Company.
Filed Date: 9/27/19.
Accession Number: 20190927–5193.
Comments Due: 5 p.m. ET 10/18/19.

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: September 30, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–21633 Filed 10–3–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA R9–2019–06; FRL–10000–82–Region 9]

Notice of Proposed CERCLA Administrative Settlement Agreement and Order on Consent for Southern Avenue Industrial Area Superfund Site, South Gate, California

AGENCY: Environmental Protection Agency (''EPA'').

ACTION: Notice of settlement; request for public comment.

SUMMARY: Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Environmental Protection Agency (''EPA'') is hereby providing notice of a proposed administrative settlement agreement and order on consent (''Settlement Agreement'') with Joyce Mendell Brody, as an individual and in her capacity as the sole member and manager of 5211 Southern Avenue LLC (''Settling Party''). The Settlement Agreement is intended to resolve claims for the recovery of past and future response costs associated with EPA's ongoing efforts to remediate the hazardous substances in the soil and groundwater beneath the Southern Avenue Industrial Area Superfund Site, in South Gate, California. The Settlement Agreement includes a covenant by EPA not to sue and requires the Settling Party to reimburse EPA $134,821.

DATES: EPA will receive written comments relating to the Settlement Agreement until November 4, 2019.

ADDRESSES: The Settlement Agreement is available for public inspection at United States Environmental Protection Agency, Superfund Records Center, 75 Hawthorne Street, Room 3110, San Francisco, California 94105. Telephone 415–947–8717. Comments should be addressed to Diane Prend, Assistant Regional Counsel, Office of Regional Counsel (ORC–3–1), EPA Region IX, 75

Hawthorne Street, San Francisco, California 94105 or by email at *Prend.Diane@epa.gov;* and should reference the Southern Avenue Industrial Area Superfund Site, EPA R9–2019–06. EPA's response to any comments received will be available for public inspection at the same address.

FOR FURTHER INFORMATION CONTACT: Diane Prend, Assistant Regional Counsel, Office of Regional Counsel, EPA Region IX, 75 Hawthorne Street, ORC 3–1, San Francisco, California 94105; phone: (415) 972–3825; email: *Prend.Diane@epa.gov.*

SUPPLEMENTARY INFORMATION: The Settlement Agreement is entered into pursuant to Section 122(h)(1) of CERCLA and notice is made in accordance with Section 122(i). The Settlement Agreement is intended to resolve Settling Party's ownership liability for the Southern Avenue Industrial Area Superfund Site under Sections 106 and 107 of CERCLA. The Settlement Agreement requires the Settling Party to reimburse EPA $134,821 and includes a covenant by EPA not to sue or take administrative action against Settling Party.

Dated: September 24, 2019.

Enrique Manzanilla,

Director, Superfund and Emergency Management Division, Region 9.

[FR Doc. 2019–21689 Filed 10–3–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9047–3]

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 09/23/2019 10 a.m. ET Through 09/30/2019 10 a.m. ET

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. 20190237, Final Supplement, BLM, MT, Miles City Field Office Final Supplemental EIS and Proposed RMP Amendment, Review Period Ends: 11/04/2019, Contact: Irma Nansel 406–233–3653

EIS No. 20190238, Final Supplement, BLM, WY, Buffalo Field Office Final Supplemental EIS and Proposed RMP Amendment, Review Period Ends: 11/04/2019, Contact: Thomas Bills 307–684–1133

EIS No. 20190239, Draft, USFWS, OR, Deschutes Basin Habitat Conservation Plan, Comment Period Ends: 11/18/2019, Contact: Bridget Moran 541–383–7146

EIS No. 20190240, Draft Supplement, FERC, LA, Magnolia Liquefied Natural Gas Production Capacity Amendment, Comment Period Ends: 11/18/2019, Contact: Office of External Affairs 866–208–3372

EIS No. 20190241, Final, USFWS, IA, Proposed Habitat Conservation Plan and Incidental Take Permit, Review Period Ends: 11/04/2019, Contact: Kraig McPeek 309–757–5800

EIS No. 20190242, Draft, USFS, BLM, CO, Draft Resource Management Plan and Associated Environmental Impact Statement for the Browns Canyon National Monument, Colorado, Comment Period Ends: 01/02/2020, Contact: Joseph Vieira 719–246–9966

EIS No. 20190243, Final Supplement, FHWA, GSA, ME, New Madawaska U.S. Land Port of Entry and International Bridge Project, Review Period Ends: 11/04/2019, Contact: Alexas Kelly 617–549–8190

EIS No. 20190244, Second Draft Supplemental, DOS, MT, Keystone XL Project, Comment Period Ends: 11/18/2019, Contact: M. Ross Alliston 202–647–4828

Dated: October 1, 2019.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2019–21655 Filed 10–3–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA R9–2019–05; FRL–10000–77–Region 9]

Notice of Proposed Administrative Settlement Agreement and Order on Consent for Removal Site Evaluation and Removal Action for the Offsite Operable Unit of the Triple Site, Sunnyvale, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (''CERCLA''), notice is hereby given that the Environmental Protection Agency (''EPA''), has entered into a proposed settlement, embodied in an Administrative Settlement Agreement and Order on Consent for Removal Site Evaluation and Removal Action (''Settlement Agreement''), with Advanced Micro Devices, Inc. (''AMD''), Northrop Grumman Systems Corporation (''NGC''), and Philips Semiconductors, Inc. (''PSI''). Under the Settlement Agreement, AMD, NGC, and PSI agree to carry out a removal action to investigate and address vapor intrusion in the Offsite Operable Unit (''OOU'') of the Triple Site located in Sunnyvale, California. In addition, AMD, NGC, and PSI agree to pay EPA compromised past costs incurred by EPA at the OOU and future response costs incurred by EPA at the OOU during the cleanup.

DATES: Comments must be received on or before November 4, 2019.

ADDRESSES: The Settlement Agreement is available for public inspection at the United States Environmental Protection Agency, Superfund Records Center, 75 Hawthorne Street, Room 3110, San Francisco, California 94105. Telephone: 415–947–8717. Comments should be addressed to Rebekah Reynolds, Assistant Regional Counsel, Office of Regional Counsel (ORC–3), U.S. Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105; or Email: *reynolds.rebekah@epa.gov;* and should reference the Offsite Operable Unit, Triple Site, EPA R9–2019–05. EPA's response to any comments received will be available for public inspection at the same address.

FOR FURTHER INFORMATION CONTACT: Rebekah Reynolds, Assistant Regional Counsel (ORC–3), Office of Regional Counsel, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; Email: *reynolds.rebekah@epa.gov;* Phone (415) 972–3816.

SUPPLEMENTARY INFORMATION: Notice of this proposed administrative settlement is made in accordance with the Section 122(i) of CERCLA. The Settlement Agreement concerns work to be done by AMD, NGC, and PSI in connection with the OOU of the Triple Site, located in Sunnyvale, California. Parties to the Settlement Agreement include the EPA, AMD, NGC, and PSI. The Site that is the subject of this Settlement Agreement includes all portions of the OOU where CERCLA hazardous substances are located. Under this Settlement Agreement, AMD, NGC and PSI agrees to carry out a removal action to

investigate and address vapor intrusion. The performance of this work by AMD, NGC, and PSI shall be approved and monitored by EPA. The settlement includes a covenant not to sue pursuant to Sections 106 or 107(a) of CERCLA.

Under the Settlement Agreement, AMD, NGC, and PSI also agree to pay EPA $3,143,623.42 in past response costs. This represents a compromise payment for past costs incurred by EPA. EPA is also entitled to reimbursement of additional future response costs. EPA will consider all comments received on the Settlement Agreement in accordance with the **DATES** and **ADDRESSES** sections of this Notice and may modify or withdraw its consent to the Settlement Agreement if comments received disclose facts or considerations that indicate that the settlement is inappropriate, improper, or inadequate.

Dated: September 23, 2019.

John Lyons,

Acting Director, Superfund Division, EPA Region 9.

[FR Doc. 2019–21688 Filed 10–3–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0698]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before December 3, 2019. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0698.

Title: Section 25.203(i) and 73.1030(a)(2), Radio Astronomy Coordination Zone in Puerto Rico.

Form No: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, Not-for-profit institutions, and State, Local, or Tribal Government.

Number of Respondents and Responses: 1,200 respondents, 10,500 responses.

Estimated Time per Response: 20 minutes (.0333 hours).

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained 47 U.S.C. 154(i), 303(f), 303(r), and 309(j)(13).

Total Annual Burden: 3,500 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60-day comment period to obtain the three-year clearance from them.

On October 15, 1997, the FCC released a Report and Order, ET Docket No. 96–2, RM–8165, FCC 97–347, that established a Coordination Zone for new and modified radio facilities in various communications services that cover the islands of Puerto Rico, Desecheo, Mona, Vieques, and Culebra within the Commonwealth of Puerto Rico. The coordination zone and notification procedures enable the Arecibo Radio Astronomy Observatory to receive information needed to assess whether an applicant's proposed operations will cause harmful interference to the Arecibo Observatory's operations, which also promotes efficient resolution of coordination problems between the applicants and the Arecibo Observatory.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–21572 Filed 10–3–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee, Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States

AGENCY: Federal Communications Commission.

ACTION: Notice of intent to establish.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Federal Communications Commission (Commission) announces its intent to establish a Federal Advisory Committee, known as the ''Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States'' (the Task Force).

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jesse Jachman, Designated Federal Officer, Federal Communications Commission, Wireline Competition Bureau, (202) 418–2668, or email: *Jesse.Jachman@fcc.gov;* Erin Boone, Deputy Designated Federal Officer, Federal Communications Commission, Wireless Telecommunications Bureau, (202) 418–0736, or email: *Erin.Boone@fcc.gov;* or Celia Lewis, Deputy Designated Federal Officer, Federal Communications Commission, Wireline Competition Bureau, (202) 418–7456, or email *Celia.Lewis@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Chairman of the Commission, as required by Section 12511 of the Agriculture Improvement Act of 2018, Public Law 115–334, 132 Stat 4490, is taking appropriate steps to establish the Task Force, which Congress has deemed necessary and in the public interest.

After consultation and concurrence with the General Services Administration, the Commission intends to establish the charter on or before December 19, 2019, providing the Task Force with authorization to operate for two years.

In consultation with the Secretary of Agriculture (Secretary), or a designee of the Secretary, and in collaboration with public and private stakeholders in the agriculture and technology fields, the purpose of the Task Force is to: Identify and measure current gaps in the availability of broadband internet access service on agricultural land; develop policy recommendations to promote the rapid, expanded deployment of broadband internet access service on unserved agricultural land, with a goal of achieving reliable capabilities on 95 percent of agricultural land in the United States by 2025; promote effective policy and regulatory solutions that encourage the adoption of broadband internet access service on farms and ranches and promote precision agriculture; recommend specific new rules or amendments to existing rules of the Commission that the Commission should issue to achieve the goals and purposes of the policy recommendations described in the second bullet in this list; recommend specific steps that the Commission should take to obtain reliable and standardized data measurements of the availability of broadband internet access service as may be necessary to target funding support, from future programs of the Commission dedicated to the deployment of broadband internet access service, to unserved agricultural land in need of broadband internet access service; and recommend specific steps that the Commission should consider to ensure that the expertise of the Secretary and available farm data are reflected in future programs of the Commission dedicated to the infrastructure deployment of broadband internet access service and to direct available funding to unserved agricultural land where needed.

In addition, not later than one (1) year after the date on which the Commission officially establishes the Task Force, and annually thereafter, the Task Force will submit to the Chairman of the Commission a report, which shall be made public, that details: The status of fixed and mobile broadband internet access service coverage of agricultural land; the projected future connectivity needs of agricultural operations, farmers, and ranchers; and the steps being taken to accurately measure the availability of broadband internet access service on agricultural land and the limitations of current, as of the date of the report, measurement processes.

Advisory Committee

The Task Force will be organized under, and will operate in accordance with, the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2). The Task Force will be solely advisory in nature. Consistent with FACA and its requirements, each meeting of the Task Force will be open to the public unless otherwise noticed. A notice of each meeting will be published in the **Federal Register** at least fifteen (15) days in advance of the meeting. Records will be maintained of each meeting and made available for public inspection. All activities of the Task Force will be conducted in an open, transparent, and accessible manner. The Task Force shall terminate two (2) years from filing date of its charter. However, the Commission will seek to renew the Task Force's charter for successive terms until the Task Force terminates on January 1, 2025. The first meeting date and agenda topics will be described in a Public Notice issued and published in the **Federal Register** at least fifteen (15) days prior to the first meeting date. In addition, as needed, working groups or subcommittees (ad hoc or steering) will be established to facilitate the Task Force's work between meetings of the full Task Force. Meetings of the Task Force will be fully accessible to individuals with disabilities.

Accessible Formats: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), 1–888–835–5322 (TTY).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–21577 Filed 10–3–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1211, 3060–1058, 3060–0798 and 3060–0800]

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before December 3, 2019. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1211.

Title: Sections 96.17; 96.21; 96.23; 96.25; 96.33; 96.35; 96.39; 96.41; 96.43; 96.45; 96.51; 96.57; 96.59; 96.61; 96.63; 96.67, Commercial Operations in the 3550–3700 MHz Band.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not for profit institutions, and state, local, or tribal government.

Number of Respondents: 110,782 respondents; 226,099 responses.

Estimated Time per Response: 0.25 to 1.5 hours.

Frequency of Response: Ten-year reporting requirement, One-time and on occasion reporting requirements; other reporting requirements—as-needed basis for equipment safety certification that is no longer in use, and consistently (likely daily) responses automated via the device.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 151, 152, 154(i), 154(j), 155(c), 302a, 303, 304, 307(e), and 316 of the Communications Act of 1934.

Total Annual Burden: 64,561 hours.

Total Annual Cost: $13,213,975.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: On October 24, 2018, the Commission released a Report and Order, FCC 18–149, in GN Docket No. 17–158, adopting limited changes to the rules governing Priority Access Licenses (PALs) in the 3550–3700 MHz (3.5 GHz) band, including larger license areas, longer license terms, renewability, and performance requirements. The Commission anticipated that the targeted changes made in its *2018 Report and Order* will spur additional investment and broader deployment in the band, promote robust and efficient spectrum use, and help ensure the rapid deployment of advanced wireless technologies—including 5G—in the United States.

The rule changes and information requirements contained in the Commission's previous 3.5 GHz band orders—the *2015 Report and Order,* FCC 15–47, and *2016 Order on Reconsideration and Second Report and Order,* FCC 16–55, both in GN Docket No. 12–354—are also approved under this Office of Management and Budget (OMB) control number (3060–1211) and have not changed since OMB last approved them.

The Commission seeks approval from OMB for the information collection requirements contained in the *2018 Report and Order,* FCC 18–149, stemming from the changes made to section 96.25(b) of it rules. The Commission revised section 96.25(b) to adopt performance requirements for Priority Access Licensees. Specifically, under the revised rule, Priority Access Licensees must provide substantial service in their license area by the end of the initial license term, *i.e.,* at the end of 10 years. ''Substantial service'' is defined as service which is sound, favorable, and substantially above the level of mediocre service which might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license without further Commission action, and the licensee will be ineligible to regain it. Licensees shall demonstrate compliance with the performance requirement by filing a construction notification with the Commission in accordance with section 1.946(d) of the Commission's rules. The licensee must certify whether it has met the performance requirement, and file supporting documentation, including description and demonstration of the bona fide service provided, electronic maps accurately depicting the boundaries of the license area and where in the license area the licensee provides service that meets the performance requirement, supporting technical documentation, any population-related assumptions or data used in determining the population covered by a service to the extent any were relied upon, and any other information the Wireless Telecommunications Bureau may prescribe by public notice. A licensee's showing of substantial service may not rely on service coverage outside of the PAL Protection Areas of registered Citizens Broadband Radio Service Devices (CBSDs) or on deployments that are not reflected in Spectrum Access System (SAS) records of CBSD registrations.

The Commission adopted two safe harbors for meeting the ''substantial service'' requirement:

(1) A Priority Access Licensee providing a *mobile service or point-to-multipoint service* may demonstrate substantial service by showing that it provides signal coverage and offers service, either to customers or for internal use, over at least 50 percent of the population in the license area; and (2) A Priority Access Licensee providing a *fixed point-to-point service* may demonstrate substantial service by showing that it has constructed and operates at least four links, either to customers or for internal use, in license areas with 134,000 population or less and in license areas with greater population, a minimum number of links equal to the population of the license area divided by 33,500 and rounded up to the nearest whole number. To satisfy this provision, such links must operate using registered Category B CBSDs.

OMB Control Number: 3060–1058.

Title: FCC Application or Notification for Spectrum Leasing Arrangement or Private Commons Arrangement: Wireless Telecommunications Bureau Public Safety and Homeland Security Bureau.

Form Number: FCC Form 608.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not for profit institutions, individuals or households, and state, local, or tribal government.

Number of Respondents: 1,091 respondents; 1,091 responses.

Estimated Time per Response: 0.5 to 1 hour.

Frequency of Response: Recordkeeping requirement, third party disclosure requirement, on occasion reporting requirement and periodic reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 154, 155, 158, 161, 301, 303(r), 308, 309, 310 and 332 of the Communications Act of 1934.

Total Annual Burden: 1,096 hours.

Total Annual Cost: $1,411,450.

Privacy Impact Assessment: Yes.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: FCC Form 608 is a multipurpose form. It is used to provide notification or request approval for any spectrum leasing arrangement (''Leases'') entered into between an existing licensee (''Licensee'') in certain wireless services and a spectrum lessee (''Lessee''). This form also is required to notify or request approval for any spectrum subleasing arrangement (''Sublease''). The data collected on the form is used by the FCC to determine whether the public interest would be served by the Lease or Sublease. The form is also used to provide notification for any Private Commons Arrangement entered into between a Licensee, Lessee, or Sublessee and a class of third-party users (as defined in Section 1.9080 of the Commission's Rules). Respondents are required to submit FCC Form 608 electronically, except in certain services specifically designated by the Commission.

Records may include information about individuals or households, *e.g.,* personally identifiable information or PII, and the use(s) and disclosure of this information will be governed by the requirements of a system of records notice or 'SORN', FCC/WTB–1, ''Wireless Services Licensing Records.'' Updating the SORN to include FCC Form 608 is currently underway. There are no additional impacts under the Privacy Act.

On April 28, 2016, the Commission adopted its *Second Report and Order,* FCC 16–55, in GN Docket No. 12–354, adopting additional rules for the

Citizens Broadband Radio Service in the 3.5 GHz band. As part of the *Second Report and Order,* the Commission adopted a light-touch leasing regime for Priority Access Licensees by amending its existing Part 1 rules to include a streamlined spectrum manager leasing process, based on the current spectrum manager leasing rules, tailored for the PAL leasing context. The Commission expects there will be a demand for Priority Access rights for a wide variety of use cases, and that a robust, flexible, and lightly regulated secondary market through these band-specific spectrum manager leasing rules will incentivize efficient spectrum use, promote innovation, and encourage the rapid deployment of broadband networks in the 3.5 GHz Band. Specifically, in the *Second Report and Order,* the Commission adopted section 1.9046, which provides special provisions for spectrum manager leases in the Citizens Broadband Radio Service. This rule allows a Priority Access Licensee to engage in spectrum manager leasing for any portion of its spectrum or geographic area, outside of the PAL Protection Area, for any bandwidth or duration period of time with any entity that has provided a certification to the Commission in accordance with section 1.9046 or pursuant to the general notification procedures of section 1.9020(e) of the Commission's rules. The lessee seeking to engage in spectrum manager leasing pursuant to section 1.9046 must certify with the Commission that it meets the same eligibility and qualification requirements applicable to the licensee before entering into a spectrum manger leasing arrangement with a Priority Access Licensee. The certification will be made via FCC Form 608.

Prior to lessee operation, the licensee seeking to engage in spectrum manager leasing pursuant to section 1.9046 must submit notification of the leasing arrangement to the Spectrum Access System (SAS) Administrator with the following information: (1) Lessee contact information including name, address, telephone number, fax number, email address; (2) Lessee FCC Registration Number (FRN); (3) name of Real Party in Interest and related FCC Registration Number (FRN); (4) the specific spectrum leased (in terms of amount of bandwidth and geographic area involved) including the call sign(s) affected by the lease; and (5) duration of the lease.

A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing notification for an additional period not to exceed the term of the Priority Access License, provided that the licensee notifies the SAS Administrator of the extension in advance of operation under the extended term and does so pursuant to the notification procedures in section 1.9046.

If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the SAS Administrator no later than ten (10) days after the early termination, indicating the date of the termination.

If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Spectrum Access System Administrator as promptly as practicable.

Under the Part 96 rules, three types of respondents may be completing FCC Form 608. First, entities seeking to engage in light touch leasing will pre-certify with the FCC that they meet the non-lease-specific eligibility and qualification criteria by completing non-lease-specific data fields pulled from FCC Form 608. Second, the Priority Access Licensees would use the form in three ways. For light touch leasing, Priority Access Licensees would notify the SAS Administrator of leasing arrangements with pre-certified lessees by completing lease-specific data fields pulled from FCC Form 608. Part 96 also permits Priority Access Licensees to enter into lease agreements using the general spectrum manager leasing agreement rules under part 1 of the rules, which would require a FCC Form 608. Priority Access Licensees may also enter into *de facto* transfer leasing arrangements for a portion of their licensed spectrum pursuant to part 1 of the Commission's rules and would use FCC Form 608 to do so. Third, on a daily basis, the SAS Administrator will provide the Commission with an electronic report of the leasing notifications completed by the Priority Access Licensees. The SAS Administrators will be providing the report through an Application Programming Interface (API). The Commission has reused the code from the general spectrum manager leasing FCC Form 608 in the Commission's Universal Licensing System (ULS) to program the SAS light touch leasing API.

OMB Control Number: 3060–0798.

Title: FCC Application for Radio Service Authorization; Wireless Telecommunications Bureau; Public Safety and Homeland Security Bureau.

Form Number: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not for profit institutions, individuals and households, and state, local, or tribal government.

Number of Respondents: 255,452 respondents; 255,452 responses.

Estimated Time per Response: 0.5 to 1.25 hours.

Frequency of Response: Recordkeeping requirement, third party disclosure requirement, on occasion reporting requirement and periodic reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 151, 152, 154, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302a, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 331, 332, 333, 336, 534, 535 and 554.

Total Annual Burden: 223,921 hours.

Total Annual Cost: $71,906,000.

Privacy Impact Assessment: Yes.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: FCC Form 601 is a consolidated, multi-part application form that is used for market-based and site-based licensing for wireless telecommunications services, including public safety licenses, which are filed through the Commission's Universal Licensing System (ULS). FCC Form 601 is composed of a main form that contains administrative information and a series of schedules used for filing technical and other information. This form is used to apply for a new license, to amend or withdraw a pending application, to modify or renew an existing license, cancel a license, request a duplicate license, submit required notifications, request an extension of time to satisfy construction requirements, or request an administrative update to an existing license (such as mailing address change), request a Special Temporary Authority or Developmental License. Respondents are required to submit FCC Form 601 electronically, except in certain services specifically designated by the Commission.

The data collected on FCC Form 601 includes the FCC Registration Number (FRN), which serves as a ''common link'' for all filings an entity has with the FCC. The Debt Collection Improvement Act of 1996 requires entities filing with the Commission to use an FRN. Records may include information about individuals or households, *e.g.,* personally identifiable information or PII, and the use(s) and

disclosure of this information are governed by the requirements of a system of records notice or 'SORN', FCC/WTB–1, ''Wireless Services Licensing Records.'' There are no additional impacts under the Privacy Act.

On October 24, 2018, the Commission released a Report and Order, FCC 18–149, in GN Docket No. 17–158, adopting limited changes to the rules governing Priority Access Licenses (PALs) in the 3550–3700 MHz (3.5 GHz) band, including larger license areas, longer license terms, renewability, and performance requirements. The Commission anticipated that the targeted changes made in its *2018 Report and Order* will spur additional investment and broader deployment in the band, promote robust and efficient spectrum use, and help ensure the rapid deployment of advanced wireless technologies—including 5G—in the United States. Among these changes, the Commission revised section 96.32(a) of its rules to require that an applicant must file an application for an initial PAL, and that the application must: (1) Demonstrate the applicant's qualifications to hold an authorization; (2) state how a grant would serve the public interest, convenience, and necessity; (3) contain all information required by FCC rules and application forms; (4) propose operation of a facility or facilities in compliance with all rules governing the Citizens Broadband Radio Service; and (5) be amended as necessary to remain substantially accurate and complete in all significant respects, in accordance with the provisions of section 1.65 of the Commission's rules.

The Commission therefore seeks approval for a revision to its currently approved information collection on FCC Form 601.

OMB Control Number: 3060–0800.

Title: FCC Application For Assignment of Authorization and Transfers of Control: Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau.

Form Number: FCC Form 603.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not for profit institutions, individuals and households, and state, local, or tribal government.

Number of Respondents: 2,547 respondents; 2,547 responses.

Estimated Time per Response: 0.5 to 1.75 hours.

Frequency of Response: Recordkeeping requirement, on occasion reporting requirement, and periodic reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 154, 155, 158, 161, 301, 303(r), 308, 309, 310, and 332.

Total Annual Burden: 2,872 hours.

Total Annual Cost: $381,975.

Privacy Impact Assessment: Yes.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: FCC Form 603 is a multi-purpose form that is used by radio services in Wireless Services within the Universal Licensing System (ULS). FCC 603 is composed of a main form that contains the administrative information and a series of schedules. These schedules are required when applying for Auctioned Services, Partitioning and Disaggregation, Undefined Geographical Area Partitioning, and Notification of Consummation or Request for Extension of Time for Consummation. Applicants/licensees in the Public Mobile Services, Personal Communications Services, Private Land Mobile Radio Services, Broadband Radio Service, Educational Broadband Service, Maritime Services (excluding Ship), and Aviation Services (excluding Aircraft) use FCC Form 603 to apply for an assignment or transfer, to establish their parties' basic eligibility and qualifications, to classify the filing, and/or to determine the nature of the proposed service. This form is also used to notify the FCC of consummated assignments and transfers of wireless licenses to which the Commission has previously consented or for which notification but not prior consent is required. Respondents are required to submit FCC Form 603 electronically, except in certain services specifically designated by the Commission.

The data collected on FCC Form 603 include the FCC Registration Number (FRN), which serves as a ''common link'' for all filings an entity has with the FCC. The Debt Collection Improvement Act of 1996 required that those filing with the Commission to use an FRN, effective December 3, 2001.

Records may include information about individuals or households, *e.g.,* personally identifiable information or PII, and the use(s) and disclosure of this information are governed by the requirements of a system of records notice or 'SORN', FCC/WTB–1, ''Wireless Services Licensing Records.'' There are no additional impacts under the Privacy Act.

On October 24, 2018, the Commission released a Report and Order, FCC 18–149, in GN Docket No. 17–158, adopting limited changes to the rules governing Priority Access Licenses (PALs) in the 3550–3700 MHz (3.5 GHz) band, including larger license areas, longer license terms, renewability, and performance requirements. The Commission anticipated that the targeted changes made in its *2018 Report and Order* will spur additional investment and broader deployment in the band, promote robust and efficient spectrum use, and help ensure the rapid deployment of advanced wireless technologies—including 5G—in the United States. The Commission seeks approval for revisions to its currently approved collection of information under OMB Control Number 3060–0800 to permit the collection of the additional information in connection with partial assignments of authorizations for geographic partitioning, spectrum disaggregation, or a combination of both, pursuant to the rules and information collection requirements adopted by the Commission *2018 Report and Order.* Specifically, in the *2018 Report and Order,* the Commission revised section 96.32(b) of its rules to allow Priority Access Licensees to partition their licenses or disaggregate their spectrum, and partially assign or transfer their licenses, pursuant to § 1.950 of the Commission's rules. Because of the additional Priority Access Licensees, additional respondents may be filing FCC Form 603 for assignments or transfers of control of licenses.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–21569 Filed 10–3–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Economic Inclusion (ComE–IN); Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of open meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the FDIC Advisory Committee on Economic Inclusion (ComE–IN), which will be held in Washington, DC. The Advisory Committee will provide advice and recommendations on initiatives to expand access to banking services by underserved populations.

DATES: Tuesday, October 22, 2019, from 9:00 a.m. to 4:00 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898–7043.

SUPPLEMENTARY INFORMATION:

Agenda: The agenda will focus on updates from the committee members about key challenges facing their communities or organizations, developments in credit scoring and underwriting, mortgage market updates, and sustainable transaction accounts progress. The agenda is subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY) at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting. This ComE–IN meeting will be Webcast live via the internet *http://fdic.windrosemedia.com*. Questions or troubleshooting help can be found at the same link. For optimal viewing, a high speed internet connection is recommended. The ComE–IN meeting videos are made available on-demand approximately two weeks after the event.

Federal Deposit Insurance Corporation.

Dated: October 1, 2019.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–21641 Filed 10–3–19; 8:45 am]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Termination of Receiverships

The Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for each of the following insured depository institutions, was charged with the duty of winding up the affairs of the former institutions and liquidating all related assets. The Receiver has fulfilled its obligations and made all dividend distributions required by law.

NOTICE OF TERMINATION OF RECEIVERSHIPS

Fund	Receivership name	City	State	Termination date
10044	Freedom Bank Of Georgia	Commerce	GA	10/1/2019
10501	Valley Bank	Fort Lauderdale	FL	10/1/2019

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary, including but not limited to releases, discharges, satisfactions, endorsements, assignments, and deeds. Effective on the termination dates listed above, the Receiverships have been terminated, the Receiver has been discharged, and the Receiverships have ceased to exist as legal entities.

Authority: 12 U.S.C. 1819.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on October 1, 2019.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–21642 Filed 10–3–19; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice.

SUMMARY: The FTC plans to ask the Office of Management and Budget (OMB) to extend for an additional three years the current Paperwork Reduction Act (PRA) clearance for information collection requirements contained in the FTC's Consumer Product Warranty Rule (Warranty Rule or Rule). The current clearance expires on January 31, 2020.

DATES: Comments must be received on or before December 3, 2019.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Warranty Rule; PRA Comment: FTC File No. P072108'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Christine M. Todaro, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, (202) 326–3711.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520, federal agencies must get OMB approval for each collection of information they conduct, sponsor, or require. ''Collection of information'' means agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by Section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing PRA clearance for the information collection requirements associated with the Commission's Rule Concerning Disclosure of Written Consumer Product Warranty Terms and Conditions (Warranty Rule or Rule), 16 CFR 701 (OMB Control Number 3084–0111).

The Warranty Rule is one of three rules [1] that the FTC implemented pursuant to requirements of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.* (Warranty Act or Act).[2] The Warranty Rule specifies the information that must appear in a written warranty on a consumer product [3] costing more than $15. The Rule tracks Section 102(a) of the Warranty Act,[4] specifying information that must appear in the written warranty and, for certain disclosures, mandates the exact language that must be used.[5] Neither the Warranty Rule nor the Act requires that a manufacturer or retailer warrant a consumer product in writing, but if they choose to do so, the warranty must comply with the Rule.

Warranty Rule Burden Statement

Total annual hours burden: 142,384 hours.

In its 2016 submission to OMB, the FTC estimated that the information collection burden of including the disclosures required by the Warranty Rule was 140,280 hours per year. Although the Rule's information collection requirements have not changed, the current estimate slightly increases the number of manufacturers subject to the Rule based on recent Census data. Further, because most warrantors likely would continue to disclose the information required by the Rule, even if there were no statute or rule requiring them to do so, staff's estimates likely overstate the PRA-related burden attributable to the Rule. Moreover, the Warranty Rule has been in effect since 1976, and warrantors have long since modified their warranties to include the information the Rule requires.

Based on conversations with various warrantors' representatives over the years, staff has concluded that eight hours per year is a reasonable estimate of warrantors' PRA-related burden attributable to the Warranty Rule.[6] This estimate includes the number of hours warrantors may need to ensure new warranties and any changes to existing warranties comply with the Rule. Based on recent Census data, staff now estimates that there are 17,798 manufacturers covered by the Rule.[7] This results in an annual burden estimate of approximately 142,384 hours (17,798 manufacturers × 8 hours of burden per year).

Total annual labor costs: $19,381,310.

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. The work required to comply with the Warranty Rule—ensuring that new warranties and changes to existing warranties comply with the Rule—requires a mix of legal analysis (50%), legal support (paralegals) (25%) and clerical help (25%). Staff estimates that half of the total burden hours (71,192 hours) requires legal analysis at an average hourly wage of $250 for legal professionals,[8] resulting in a labor cost of $17,798,000. Assuming that 25% of the total burden hours requires legal support at the average hourly wage of $26.20, and that the remaining 25% requires clerical work at an average hourly wage of $18.28; the resulting labor cost is approximately $1,583,310 ($932,615 + $650,695). Thus, the total annual labor cost is approximately $19,381,310 ($17,798,000 for legal professionals + $932,615 for legal support + $650,695 for clerical workers).

Total annual capital or other non-labor costs: $0.

The Rule imposes no appreciable current capital or start-up costs. As stated above, warrantors likely have already modified their warranties to include the information the Rule requires. Rule compliance does not require the use of any capital goods, other than ordinary office equipment, which providers would already have available for general business use.

Request for Comments

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond. All comments must be received on or before December 3, 2019.

You can file a comment online or on paper. For the FTC to consider your comment, we must receive it on or before December 3, 2019. Write ''Warranty Rule; PRA Comment: FTC File No. P072108'' on your comment. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it through the *https://www.regulations.gov* website by following the instructions on the web-based form. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the *https://www.regulations.gov* website. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on *www.regulations.gov.*

If you file your comment on paper, write ''Warranty Rule; PRA Comment: FTC File No. P072108'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC website at *www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number;

[1] The other two rules relate to the pre-sale availability of warranty terms and minimum standards for informal dispute settlement mechanisms that are incorporated into a written warranty.

[2] 40 FR 60168 (Dec. 31, 1975).

[3] The definition of *consumer product* excludes products purchased solely for commercial or industrial use. 16 CFR 701.1(b).

[4] 15 U.S.C. 2302(a).

[5] 40 FR 60168, 60169–60170.

[6] FTC staff has previously contacted two manufacturing associations—the Association of Home Appliance Manufacturers and the National Association of Manufacturers—and we have not located additional data that further clarifies this figure.

[7] Because some manufacturers likely make products that are not priced above $15 or not intended for household use—and thus would not be subject to the Rule—this figure is likely an overstatement.

[8] Staff has derived an hourly wage rate for legal professionals based upon industry knowledge. The hourly wage rates for legal support workers and for clerical support are based on mean hourly wages found at *https://www.bls.gov/news.release/ocwage.htm* (''Occupational Employment and Wages–May 2018,'' U.S. Department of Labor, released March 2019, Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2018'').

financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.[9] Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *www.regulations.gov,* we cannot redact or remove your comment unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 3, 2019. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *https://www.ftc.gov/site-information/privacy-policy.*

Heather Hippsley,

Deputy General Counsel.

[FR Doc. 2019–21667 Filed 10–3–19; 8:45 am]

BILLING CODE 6750–01–P

[9] *See* FTC Rule 4.9(c).

GENERAL SERVICES ADMINISTRATION

[Notice–PBS–2019–07; Docket No. 2019–0002; Sequence No. 17]

Notice of Availability of a Final Supplemental Environmental Impact Statement/Final Programmatic Section 4(f) Evaluation for the Construction of a New U.S. Land Port of Entry in Madawaska, Maine, and a New Madawaska-Edmundston International Bridge (the FSEIS)

AGENCY: Public Buildings Service (PBS), General Services Administration (GSA); Federal Highway Administration (FHWA); Maine Department of Transportation (MaineDOT).

ACTION: Notice.

SUMMARY: Pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality Regulations, GSA Order ADM 1095.1F Environmental Considerations in Decision Making, the GSA PBS NEPA Desk Guide, the FHWA Policy Guide, and FHWA's Environmental Impact and Related Procedures, GSA, PBS, FHWA, and MaineDOT, in cooperation with the U.S. Coast Guard and in coordination with the U.S. Customs and Border Protection (CBP), announce the availability of a Final Supplemental Environmental Impact Statement (FSEIS)/Final Programmatic Section 4(f) Evaluation for the proposed new U.S. land port of entry (LPOE) in Madawaska, Maine, and a new International Bridge between Madawaska, Maine, and Edmundston, New Brunswick, Canada.

DATES: The comment period for the FSEIS will end November 4, 2019. Comments should be sent to the individuals listed below.

ADDRESSES: GSA, FHWA, and MaineDOT will have copies of the FSEIS for review at the Town of Madawaska Town Office on 328 St. Thomas Street, Suite 101, Madawaska, Maine 04756. Further information, including an electronic copy of the FSEIS, may be found online on the following websites:

- *gsa.gov/madawaskalpoe.*
- *https://www.maine.gov/mdot/planning/studies/meib/.*

FOR FURTHER INFORMATION CONTACT: Alexas Kelly, Project Manager, GSA, New England Region, 10 Causeway Street, 11th Floor, Boston, MA 02222, by phone at 617–549–8190, or by email at *alexandria.kelly@gsa.gov;* or Cheryl Martin, Assistant Division Administrator, FHWA, Edmund S. Muskie Federal Building, 40 Western Avenue, Room 614, Augusta, ME 04330, by phone at 207–512–4912, or by email at *cheryl.martin@dot.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the Proposed Action is to provide for the long-term safe and efficient flow of current and projected traffic volumes, including the movement of goods and people between Edmundston, New Brunswick, and Madawaska, Maine. The Proposed Action is needed because (1) the existing International Bridge is nearing the end of its useful life, and (2) the existing Madawaska LPOE is substandard, inhibiting the agencies assigned to the Port from adequately fulfilling their respective missions.

The existing Madawaska-Edmundston International Bridge opened to traffic in 1921 and its design life has been exceeded. Notable bridge deficiencies are (1) substandard roadway width and clearance, (2) foundation susceptible to undermining, (3) piers cracked and deteriorated, (4) significant steel corrosion, (5) bridge capacity is insufficient, and (6) deficiencies prompting the bridge posting on October 27, 2017, from 50 tons to 5 tons.

A Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) were published in January 2007, which addressed the construction of a new Madawaska LPOE. Built in 1959, the current LPOE suffers from facility, operational and site deficiencies, and does not meet current CBP mission and operational requirements for an LPOE. A few noted deficiencies: (1) Lack of office and inspection areas, (2) deficient inbound and outbound passenger and commercial processing areas, (3) inadequate queuing space for vehicles, and (4) inability to meet the Architectural Barriers Act. In furtherance of the LPOE Project, GSA previously acquired approximately nine acres of land but did not commence construction.

A Supplemental Environmental Impact Statement (SEIS) was needed due to a change in circumstance: The decision by MaineDOT and New Brunswick Department of Transportation and Infrastructure (NBDTI) to include alternatives for addressing deficiencies to the existing Madawaska-Edmundston International Bridge. The SEIS addresses changes to the Proposed Action, including an updated design in accordance with current GSA and CBP requirements, a new International Bridge, and additional land acquisition.

The FSEIS identifies the Preferred Alternative for the new U.S. LPOE and

new International Bridge location and design; describes the environmental impacts of the proposed project and proposed mitigation; and addresses comments received on the Draft Supplemental Environmental Impact Statement/Draft Programmatic Section 4(f) Evaluation issued on November 26, 2018.

The Preferred Alternative is identified as LPOE Alternative C and Bridge Alternative 2 (bridge replacement with a steel plate girder bridge with six spans and five piers, west of the existing bridge) from the Draft Supplemental Environmental Impact Statement.

The new LPOE would consist of a main administration building and support building with parking, circulation and processing areas. The new LPOE would be designed in accordance with the requirements and criteria of the GSA and CBP to provide facilities adequate for fulfilling the agencies' respective missions. Portions of Mill Street and Main Street adjacent to the LPOE may be reconstructed or re-profiled to provide smooth ingress and egress to the LPOE. The Proposed Action includes the demolition of the existing LPOE.

The new International Bridge would be designed in accordance with MaineDOT standards with a design life of at least 75 years. The Proposed Action includes the demolition of the existing International Bridge.

In accordance with GSA Order #ADM 1095.1F Environmental Considerations in Decision Making and 23 CFR 771 Environmental Impact and Related Procedures, GSA and FHWA expect to complete and sign a Record of Decision (ROD) no sooner than 30 days after publication of the FSEIS Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency.

Dated: September 23, 2019.

Drew Dilks,

Acting Division Director, Design and Construction, Public Buildings Service.

[FR Doc. 2019–21691 Filed 10–3–19; 8:45 am]

BILLING CODE 6820–FP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 84 FR 45152–45153, August 28, 2019) is amended to reorganize the Office of the Chief Information Officer, Office of the Chief Operating Officer, Office of the Director, Centers for Disease Control and Prevention.

Key functional changes include the abolishment of the Information Technology Services Office, Management Information Systems Office and the Office of the Chief Information Security Officer and the creation of an organizational structure that is customer centric and fosters modernization.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title and the mission and function statements for the *Office of the Chief Information Officer (CAJR)* and insert the following:

Office of the Chief Information Officer (CAJR). The mission of the Office of the Chief Information Officer (OCIO) is to administer the Centers for Disease Control and Prevention's (CDC) information resources and information technology programs including collection, management, use, and disposition of data and information assets; development, acquisition, operation, maintenance, and retirement of information systems and information technologies; IT capital planning; enterprise architecture; information security; education, training, and workforce development in information and IT disciplines; development and oversight of information and IT policies, standards, and guidance; and administration of certain other general management functions and services for CDC.

Office of the Director (CAJR1). (1) Provides leadership, direction, coordination, support and assistance to CDC's programs and activities to enhance CDC's strategic position in public health informatics, information technology, and other information areas to optimize operational effectiveness (2) represents CDC with various external stakeholders, collaborators, service providers, and oversight organizations; (3) maintains liaison with HHS officials; (4) directs the strategic objectives and operations of offices within the OCIO to ensure effective and efficient service delivery; (5) provides strategic and tactical management of CDC's IT investments and initiatives; (6) delivers change management support to promote the adoption of technology solutions and process improvements; (7) manages and ensures proper execution of enterprise projects and programs; (8) directs IT research and development priorities; (9) leads, plans, and manages CDC's information technology (IT) budget development and review processes; (10) plans and directs the Capital Planning Investment Control processes; (11) develops and monitors earned value management (EVM) analyses of project cost, schedule and deliverable commitments; (12) provides guidance to program and project managers on the use of tools for preparing investment documentation that meet CDC, HHS, and OMB requirements; (13) provides guidance to program and project managers on Technology Business Management; and (14) supports CDC information resource governance structures.

Office of Business Operations (CAJR16). (1) Provides leadership, oversight, and guidance for OCIO's centralized accounting, acquisition and budget services; (2) provides guidance, oversight, and coordination of OCIOs organizational design and human capital management; (3) provide OCIO IT policy coordination; (4) provides expertise in interpreting applicable laws, regulations, policies, and offers guidance, direction, and coordination in resolving issues; (5) advises and assists the CDC Chief Information Officer, OCIO office directors, and senior staff on all matters regarding internal business service operations; (6) maintains internal controls; (7) provides leadership and strategic support in the determination of long-term operational needs; (8) provides collaboration and centralized consolidation of office reporting requirements; (9) provides strategic planning and coordination of OCIO transformation projects and initiatives; (10) provides leadership, oversight, and guidance for OCIO enterprise risk management, continual process improvement; performance measures and evaluation; (11) provides and oversees the delivery of OCIO-wide administrative management and support services in the areas of fiscal management, personnel, travel, records management, vendor management, internal controls, and other administrative services; (12) plans, develops, manages and conducts oversight of OCIOs information technology and services contracts; and (13) provides coordination and oversight for internal and external OCIO communications.

Enterprise Data Office (CAJR17). (1) Develops, promotes, implements, and evaluates data science approaches for improved research of large and complex

data sets; (2) maintains and leverages data acquired from multiple sources; (3) develops and implements solutions to strengthen information systems and reporting; (4) develops and implements computer-based decision support tools and mobile applications; (5) collaborates with other CDC programs to develop and promote informatics solutions for improving data management, practice, and preparedness; (6) identifies needs and develops strategies and approaches to acquire and manage enterprise statistical software licenses; (7) develops internal cost allocation methods and coordinates allocation of costs for annual license renewal payments; and (8) coordinates and manages an enterprise data governance program and procedures to maintain ''fit for purpose'' standards and decision rights for enterprise data.

Customer Engagement Office, (CAJRH). The Customer Engagement Office oversees agency-wide OCIO customer relationships, account management, innovation and research and development agenda for business and administrative systems.

Office of the Director (CAJRH1). (1) Provides account management representing the entire range of OCIO products and services to OCIO customers; (2) maintains and expands OCIO customer relationships; (3) manages OCIO help desk response, coordination, tracking and reporting; (4) provides and maintains end user support services for OCIO products and devices; (5) collaborates with OCIO offices and customers in support of IT innovation and to achieve program outcomes; and (6) ensures the execution of OCIO's research and development agenda.

Program Services Branch (CAJRHB). (1) Focuses on improving the end-to-end experience of OCIO customers and fostering a customer-first mentality by serving as the day-to-day point of contact; (2) works with other OCIO units to better understand technology users' experiences and to align OCIO products and services to customer needs; (3) creates customer interview and survey guides, journey maps, and personas; (4) develops and strengthens OCIO's customer experience abilities and processes by helping teams adapt to shifting customer preferences; (5) applies research strategies and outputs to shed light on customer perspectives and collect customer feedback; and (6) coordinates solution development efforts to address customer needs.

Customer Assistance Branch (CAJRHC). (1) Serves as the first line of help when customers encounter problems or defects with products and programs; (2) provides end user services support including installs, moves, adds and changes, and desk-side support; (3) manages and coordinates product, service, systems and infrastructure help desk; (4) answers and addresses customer problems directly; (5) escalates customer problems and questions to appropriate OCIO office or branch staff and tracks open help desk tickets to resolution; (6) provides meeting support services including electronic meeting systems; and (7) manages, conducts, and monitors OCIO supported device deployment and refresh activities.

Emerging Technology & Design Acceleration Branch (CAJRHD). (1) Collaborates with CDC programs and external partners to develop innovative technologies and techniques to positively impact public health practice; (2) executes OCIO's research and development agenda in support of advancing public health programs and enterprise IT; (3) prototypes products and processes and gathers user feedback to evaluate and refine big ideas to prioritize investments; (4) develops, implements and maintains OCIO's intake process for new mission-based technology requests; (5) transitions new technology-based solutions, standards, and techniques to programs for deployment and implementation; (6) provides consultation, evaluation, guidance, and support in the use of new informatics solutions and architecture; (7) works directly with customers to facilitate design sessions that integrate human-centered design principles; (8) rapidly defines problems, facilitates design sessions, creates prototypes, conducts pilot projects, and examines and tests hypotheses to support information technology solutions; and (9) participates and represents the agency on technology innovation committees, workgroups, organizations, and councils, within CDC and with other federal agencies.

Digital Services Office (CAJRJ). The Digital Services Office (DSO) oversees agency-wide business and administrative customer facing information technology solutions and OCIO's modernization roadmap.

Office of the Director (CAJRJ1). (1) Manages and approves new product development and deployments for all customer facing solutions; (2) executes the OCIO modernization strategy and roadmap, and ensures adequate resources are available to achieve the organization's strategic goals and objectives; (3) provides approval for and ensures the execution of OCIO product lifecycle roadmaps; (4) facilitates cross-functional collaboration across OCIO to achieve targeted performance goals and business outcomes; (5) provides identity and access management services to meet current and future organizational needs; (6) ensures efficient operations and proper maintenance of all network, security, storage and computer systems; (7) works with the Cybersecurity Program Offices to address identified application, system, network and infrastructure performance issues; (8) ensures the availability of a modern, customer-driven IT workforce within DSO; and (9) coordinates, tracks, and manages project assignments for all DSO human and technology resources.

Technology Solutions Branch (CAJRJB). (1) Identifies, tests and integrates new technologies and digital services; (2) ensures products and services align to customer needs and meet OCIO's modernization and transformation strategic objectives; (3) standardizes and enhances technology and service development practices; (4) obtains and manages cloud computing services from cloud service providers; (5) designs, deploys and maintains Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS) such as virtual machines, networks and databases; (6) identifies optimization opportunities and coordinates technology modernization efforts; and (7) operates and maintains business and mission systems, including change requests, release cycle management, and decommissioning of redundant or outdated technology.

Product Management Branch (CAJRJC). (1) Manages the vision and strategy for OCIO products and ensures alignment to customer needs and modernization goals; (2) works across OCIO service teams as well as with other OCIO offices and customers to define current and future product capabilities and requirements; (3) establishes and maintains product lifecycle roadmaps; (4) coordinates cross-service and cross-product collaboration; (5) maintains all network, security, storage and computer systems to support global mission activities; (6) detects and responds to global incidents that affect network performance and availability; (7) develops and maintains backup and recovery processes to enable global IT services, and global help desk support capabilities; and (8) collaborates with partners to implement country-specific IT regulations and requirements.

Identity and Access Management Branch (CAJRJD). (1) Develops and maintains CDC's identity and access management (IAM) strategy; (2) designs and deploys identification standards for federal employees, contractors and

external partners; (3) designs, implements and deploys IAM services; (4) performs identity attribute management; and (5) manages identity governance for the enterprise.

Infrastructure Services Branch (CAJRJE). (1) Maintains and monitors all IT infrastructure for network, security, data centers, storage, telecommunications, and computer systems; (2) works with the Cybersecurity Program Office to detect and respond to incidents that affect network performance and availability, and security of information assets; (3) coordinates approved changes and upgrades to the CDC infrastructure environment; (4) develops and maintains backup and recovery processes to maintain continuity of operations; and (5) collaborates with Customer Engagement Office to facilitate appropriate help desk support capabilities.

Cybersecurity Program Office (CAJRK). The Cybersecurity Program Office oversees agency-wide cyber functions, privacy, risk management, threat protection, and compliance to ensure the safety of CDC's public health mission.

Office of the Director (CAJRK1). (1) Manages CDC privacy policies, procedures, and processes; (2) ensures compliance with Federal Information Security Management Agency (FISMA), OMB, HHS, CDC and other government mandates, and regulations; (3) establishes and oversees CDC information security risk management and compliance activities; (4) provides and manages a centralized network and security operations command and control center; (5) provides oversight and implementation of Information Security Continuous Monitoring (ISCM) activities, including maintenance of the agency's Continuous Diagnostics and Mitigation (CDM) program; (6) manages CDC cybersecurity related insider threat detection, response, and security awareness training programs; (7) manages and executes privacy incident response, including compliance and remediation efforts; (8) performs Personally Identifiable Information (PII) inventory and data classification mapping; and (9) works with OCIO offices and customers to effectively implement privacy standards in support of program outcomes.

Policy Branch (CAJRKB). (1) Works with OCIO development and operations teams to identify and adapt applicable standards and service level agreements (SLAs) for OCIO products and services; (2) ensures CDC-wide compliance and adherence to applicable FISMA and other federal mandates, standards, practices and policies; (3) oversees an annual security policy review and approval process; (4) develops and manages CDC Cybersecurity policies; (5) determines security requirements for IT systems to receive an authority to operate (ATO) and connect to agency systems and networks; and (6) performs ongoing authorization of information technology systems.

Risk and Compliance Branch (CAJRKC). (1) Establishes and implements information security risk management protocols and processes; (2) performs penetration testing of all external and important systems; (3) conducts security architecture reviews of key technologies; (4) provides FISMA management, including audits of agency IT assets (architecture, hardware, software, networks, hosted applications, etc.) for possible security risks and compliance to cybersecurity standards and policies identified by the Cybersecurity Policy Branch; (5) manages corrective efforts for security weaknesses, including Plan of Action and Milestones (POA&Ms); (6) collects, synthesizes and reports on compliance to standards and cybersecurity incidents, including risks, issues, incidents, violations, and the status of remediation efforts; and (7) develops and implements cyber and information security awareness activities and training.

Advanced Threat Protection Branch (CAJRKD). (1) Administers the integrated Network Operations Center (NOC) and Security Operations Center (SOC) central command and control Systems Management Team (SMT) for monitoring, triaging, troubleshooting and escalating all detected, reported, or potential security incidents, performance issues, enterprise services and infrastructure operations; (2) oversees Computer Security Incident Response (CSIR); (3) monitors network, systems, infrastructure, and application security; (4) establishes network defenses through proactive and reactive measures; (5) identifies and mitigates network intrusion attempts; (6) investigates security policy violations and other cybersecurity-related anomalies; (7) conducts technical and operational cybersecurity vulnerability assessments and manages remediation efforts; (8) conducts code vulnerability and penetration testing, including detailed packet analysis on triggered events and malicious code, and troubleshoots identified threats and vulnerabilities; (9) applies and coordinates directed cybersecurity compliance requirements; (10) coordinates reporting and incident response actions with DHS US–CERT, HHS CSIRC and/or other external entities; (11) provides tool management and configuration to implement, configure and maintain the capabilities and tools used to deter and detect threats, risks, and vulnerabilities on the CDC enterprise network; (12) develops, deploys and maintains security products and tools to the CDC environment; (13) deploys, configures and operates CDC enterprise firewalls; (14) designs, implements and maintains security controls, develops and deploys continuous monitoring systems within the infrastructure environment; (15) deploys, configures and operates CDC enterprise Continuous Diagnostics & Mitigation (CDM) tools; and (16) consolidates critical IT data from disparate sources into meaningful data sets used to effectively conduct cyber Hunt activities across the enterprise.

Engineering and Technologies Branch (CAJRKE). (1) Develops and maintains security architecture and engineering procedures, policies and frameworks including firewall policy; (2) provides technical security architecture and engineering advice and expertise to OCIO development, operations and maintenance teams and particularly the Digital Services Office; (3) manages and maintains system and user access control lists (ACLs); (4) establishes policies for and maintains perimeter networks or demilitarized zones that prevent interaction between internal and external networks; and (5) conducts assessment and testing of emerging cybersecurity technologies to identify, evaluate, and make recommendations to integrate potential advances in cyber threat protection.

Cyber Intelligence and Insider Threat Branch (CAJRKG) (1) Establishes policies and procedures for detecting and responding to insider threats; (2) establishes policies and procedures for detecting and responding to intelligence threats resulting from foreign travel of CDC personnel; (3) conducts personnel forensics and analysis of anomalous cybersecurity activities, including data transiting, storage, and use of electronic media; (4) conducts self-phishing exercises and follow-up activities; (5) delivers analytic and technical support to Law Enforcement, Counterintelligence and National Security inquiries and investigations; (6) deploys and maintains systems that allow the examinations in a forensically-sound manner using repeatable and defensible processes; (7) assists in the implementation of intelligence-driven threat mitigation, including applying tools that identify and mitigate current and projected risks; and (8) ensures that insider threat

related activities occur in accordance with applicable privacy laws and policies.

Sherri A. Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–21629 Filed 10–3–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Delegation of Authority

Notice is hereby given that I have delegated to the Chief Operating Officer, Centers for Disease Control and Prevention (CDC), without the authority to redelegate, the authority vested in the Secretary of HHS by section 212(1) of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (FY 19 HHS Appropriations Act) Public Law No. 115–245, division B, title II, or substantially similar authorities vested in the Secretary in the future by Congress, in order to carry out international health activities to respond to the current Ebola outbreak.

The authority under section 212(1) is immediately revoked in the event that any subsequent fiscal year HHS appropriations act does not contain the provision currently in section 212(1) or substantially similar authority.

The Chief Operating Officer, CDC, shall consult with the Secretary of State and relevant Chief of Mission to ensure that this authority is exercised in a manner consistent with section 207 of the Foreign Service Act of 1980 and other applicable statutes administered by the Department of State.

This delegation became effective on September 26, 2019 and is valid until September 18, 2020.

Robert R. Redfield,

Director, Centers for Disease Control and Prevention.

[FR Doc. 2019–21580 Filed 10–3–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Mine Safety and Health Research Advisory Committee (MSHRAC)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Mine Safety and Health Research Advisory Committee (MSHRAC). This meeting is open to the public, limited only by the space available. The meeting room accommodates approximately 75 people. If you wish to attend in person or by phone, please contact Marie Chovanec by email at *MChovanec@cdc.gov* or by phone at 412–386–5302 at least 5 business days in advance of the meeting.

DATES: The meeting will be held on November 13, 2019, 8:45 a.m.–4:30 p.m., EDT and on November 14, 2019, 8:15 a.m.–12:00 p.m. EDT.

ADDRESSES: Atlanta Marriott Northeast/Emory Area, 2000 Century Boulevard NE, Atlanta, GA 30345 United States.

FOR FURTHER INFORMATION CONTACT: Jeffrey H. Welsh, Designated Federal Officer, MSHRAC, NIOSH, CDC, 626 Cochrans Mill Road, Pittsburgh, PA 15236, telephone 412–386–4040; email *juw5@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: This committee is charged with providing advice to the Secretary, Department of Health and Human Services; the Director, CDC; and the Director, NIOSH, on priorities in mine safety and health research, including grants and contracts for such research, 30 U.S.C. 812(b)(2), Section 102(b)(2).

Matters To Be Considered: The agenda will include discussions on mining safety and health research projects and outcomes, including updates from two MSHRAC Workgroups, the Health Advisory in the Mining Program (HAMP) workgroup and the Metal Mining Automation and Advanced Technologies (MMAAT) workgroup, external review of the NIOSH Mining program recommendations, NIOSH Mining Program strategic plan update, update on acquiring a replacement for the Lake Lynn Experimental Mine, proximity detection research, corrosion research, update on miner health data sources and analyses, update on fatigue research, update on EOS–RCS monitoring method, and canopy air curtain research. The meeting will also include updates from the NIOSH Associate Director for Mining, the Spokane Mining Research Division, and the Pittsburgh Mining Research Division. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–21581 Filed 10–3–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Solicitation of Nominations for Appointment to the Interagency Committee on Smoking and Health (ICSH)

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC) is seeking nominations for membership on the ICSH. The ICSH consists of 5 experts in fields that represent private entities involved in informing the public about the health effects of smoking. Nominations are being sought for individuals who have expertise and qualifications necessary to contribute to the accomplishments of the committee's objectives. Nominees will be selected based on expertise in the fields of the health effects of smoking. Additionally, desirable qualifications include: (1) Knowledge of emerging tobacco control policies and experience in analyzing, evaluating, and interpreting Federal, State and/or local health or regulatory policy; and/or (2) familiarity and expertise in developing or contributing to the development of policies and/or programs for reducing health disparities in tobacco use in the United States; and/or (3) knowledge of the intersection of behavioral health conditions (mental and/or substance use disorders) and tobacco use/tobacco control. Federal employees will not be considered for membership. Members may be invited

to serve for four-year terms. Selection of members is based on candidates' qualifications to contribute to the accomplishment of ICSH objectives *https://www.cdc.gov/tobacco/about/icsh/index.htm.*

DATES: Nominations for membership on the ICSH must be received no later than October 31, 2019. Packages received after this time will not be considered for the current membership cycle.

ADDRESSES: All nominations should be mailed to Monica Swann, Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), CDC, 395 E Street SW, Room 9167, Washington, DC 20024, emailed (recommended) to *mswann@cdc.gov,* or faxed to (202) 245–0554.

FOR FURTHER INFORMATION CONTACT: Simon McNabb, Designated Federal Official (DFO), ICSH, Office on Smoking and Health, NCCDPHP, CDC, 395 E Street SW, Room 9167, Washington, DC 20024, telephone (202) 245–0550; *GMcNabb@cdc.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Department of Health and Human Services policy stipulates that committee membership be balanced in terms of points of view represented, and the committee's function. Appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, gender identity, HIV status, disability, and cultural, religious, or socioeconomic status. Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Current participation on federal workgroups or prior experience serving on a federal advisory committee does not disqualify a candidate; however, HHS policy is to avoid excessive individual service on advisory committees and multiple committee memberships. Committee members are Special Government Employees, requiring the filing of financial disclosure reports at the beginning and annually during their terms. CDC reviews potential candidates for ICSH membership each year, and provides a slate of nominees for consideration to the Secretary of HHS for final selection. HHS notifies selected candidates of their appointment near the start of the term in July 2020, or as soon as the HHS selection process is completed. Note that the need for different expertise varies from year to year and a candidate who is not selected in one year may be reconsidered in a subsequent year.

Nominees must be U.S. citizens, and cannot be full-time employees of the U.S. Government. Candidates should submit the following items:

- Current curriculum vitae, including complete contact information (telephone numbers, mailing address, email address)
- At least one letter of recommendation from person(s) not employed by the U.S. Department of Health and Human Services. (Candidates may submit letter(s) from current HHS employees if they wish, but at least one letter must be submitted by a person not employed by an HHS agency (*e.g.,* CDC, NIH, FDA, etc.).

Nominations may be submitted by the candidate him- or herself, or by the person/organization recommending the candidate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2019–21582 Filed 10–3–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–262 and CMS–10662]

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 December 3, 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–R–262 Contract Year 2021 Plan Benefit Package (PBP) Software and Formulary Submission

CMS–10662 Administrative Simplification HIPAA Compliance Review

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 with change of a currently approved collection; *Title of Information Collection:* Contract Year 2021 Plan Benefit Package (PBP) Software and Formulary Submission; *Use:* Under the Medicare Modernization Act (MMA), Medicare Advantage (MA) and Prescription Drug Plan (PDP) organizations are required to submit plan benefit packages for all Medicare beneficiaries residing in their service area. The plan benefit package submission consists of the Plan Benefit Package (PBP) software, formulary file, and supporting documentation, as necessary. MA and PDP organizations use the PBP software to describe their organization's plan benefit packages, including information on premiums, cost sharing, authorization rules, and supplemental benefits. They also generate a formulary to describe their list of drugs, including information on prior authorization, step therapy, tiering, and quantity limits.

CMS requires that MA and PDP organizations submit a completed PBP and formulary as part of the annual bidding process. During this process, organizations prepare their proposed plan benefit packages for the upcoming contract year and submit them to CMS for review and approval. CMS uses this data to review and approve the benefit packages that the plans will offer to Medicare beneficiaries. This allows CMS to review the benefit packages in a consistent way across all submitted bids during with incredibly tight timeframes. This data is also used to populate data on Medicare Plan Finder, which allows beneficiaries to access and compare Medicare Advantage and Prescription Drug plans. *Form Number:* CMS–R–262 (OMB control number: 0938–0763); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 672; *Total Annual Responses:* 7,264; *Total Annual Hours:* 67,368. (For policy questions regarding this collection contact Kristy L. Holtje at 410–786–2209.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Administrative Simplification HIPAA Compliance Review; *Use:* The authority for administering and enforcing compliance with the Administrative Simplification non-privacy Health Insurance Portability and Accountability Act (HIPAA) rules has been delegated to the Centers for Medicare & Medicaid Services (CMS). (68 FR 60694 Part F, October 23, 2003) 45 CFR 160.308 states, ''that the Secretary may conduct compliance reviews to determine whether covered entities are complying with the applicable administrative simplification provisions.'' These reviews are conducted at the discretion of the Secretary. Title 45 CFR 160.310 requires that a covered entity provide records and compliance reports to the Secretary in cooperation with a compliance review. Title 45 CFR 160.310 provides that a covered entity must permit HHS, or its delegated entity, access during normal business hours to its facilities, books, records, and other information, and other information necessary to determine compliance, but also provides that if the Secretary determines that ''exigent circumstances exist, such as when documents may be hidden or destroyed,'' the covered entity must permit access at any time without notice.

The purpose of this collection is to retrieve information necessary to conduct a compliance review as described in CMS–0014–N (68 FR 60694). These forms will be submitted to the Centers for Medicare & Medicaid Services (CMS), Program Management National Standards Group, from entities covered by HIPAA Administrative Simplification regulations. This collection is not applicable to HIPAA Privacy and Security Rules. *Form Number:* CMS–10662 (OMB control number: 0938-New); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 10; *Total Annual Responses:* 10; *Total Annual Hours:* 425. (For policy questions regarding this collection contact Cecily Austin at 410–786–0895.)

Dated: October 1, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–21687 Filed 10–3–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Building Capacity To Evaluate Child Welfare Community Collaborations To Strengthen and Preserve Families (CWCC) Cross-Site Process Evaluation (New Collection)

AGENCY: Office of Planning, Research, and Evaluation; Administration for Children and Families; HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services (HHS) intends to collect data for an evaluation of the initiative, Community Collaborations to Strengthen and Preserve Families (also referred to as Child Welfare Community Collaborations [CWCC]). The cross-site process evaluation will provide insight to ACF about the various factors that promote or impede the implementation of child welfare community collaborations.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *OPREinfocollection@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 evaluation will involve seven data collection requests:

• *Four Site Visit Discussion Guides.* To systematically document the approaches and strategies used by the first two cohorts of CWCC grantees (FY18 and FY19 awardees), the evaluation team will conduct initial and follow-up interviews with: (1) Project Directors from Lead Grantee organizations and Leaders from partner organizations, and (2) staff from the lead and partner organizations. These interviews will take place during site visits. Each grantee will participate in four site visits.

• *Survey Invitee Template:* The evaluation team will ask the Project Director of each CWCC grant to fill out a Survey Invitee Template to gather contact information for leaders and staff from lead and partner organizations who the evaluation team will invite to complete the Collaboration Survey (see below).

• *Collaboration Survey:* This electronic survey will document perceptions that leaders and staff from the CWCC lead and partner organizations have regarding their organizational/group processes, implementation activities, and progress towards goals. This survey will be administered to staff at all grantee and partner organizations on an annual basis during each cohort's grant period.

• *Site Visit Planning Template:* Each Project Director (or their designee) will complete a Site Visit Planning Template to schedule site visit activities prior to each annual site visit.

Respondents: Leadership and staff from CWCC lead (grantee) organizations and from partner organizations.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
Cohort 1 Data Collection for FY18 Grantees					
Site Visit Discussion Guide for Project Directors and Leaders from Partner Organizations—Interview #1	12	1	2	24	8
Site Visit Discussion Guide for Staff from Lead and Partner Organizations—Interview #1	36	1	1	36	12
Site Visit Discussion Guide for Project Directors and Leaders from Partner Organizations—Follow-Up Interviews	12	2	1.5	36	12
Site Visit Discussion Guide for Staff from Lead and Partner Organizations—Follow-Up Interviews	36	2	1	72	24
Survey Invitee Template	4	3	1	12	4
Annual Collaboration Survey	260	3	0.5	390	130
Site Visit Planning Template	4	3	2	24	8
Cohort 2 Data Collection for FY19 grantees					
Site Visit Discussion Guide for Project Directors and Leaders from Partner Organizations—Interview #1	27	1	2	54	18
Site Visit Discussion Guide for Staff from Lead and Partner Organizations—Interview #1	81	1	1	81	27
Site Visit Discussion Guide for Project Directors and Leaders from Partner Organizations—Follow-Up Interviews	27	2	1.5	81	27
Site Visit Discussion Guide for Staff from Lead and Partner Organizations—Follow-Up Interviews	81	2	1	162	54
Survey Invitee Template	9	3	1	27	9
Annual Collaboration Survey	585	3	0.5	877.5	292.5
Site Visit Planning Template	9	3	2	54	18

Estimated Total Annual Burden Hours: 643.5.

Comments: The Department specifically requests comments 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 of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Section 105(b)(5) of the Child Abuse Prevention and Treatment Act (CAPTA) of 1978 (42 U.S.C. 5106(b)(5)), as amended by the CAPTA Reauthorization Act of 2010 (Pub. L. 111–320).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–21574 Filed 10–3–19; 8:45 am]

BILLING CODE 4184–25–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: Nurse Corps Scholarship Program (NCSP), OMB No. 0915–0301—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

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 should be received no later than December 3, 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 information request collection title for reference.

Information Collection Request Title: Nurse Corps Scholarship Program (NCSP) OMB No. 0915–0301—Revision

Abstract: The NCSP, administered by the Bureau of Health Workforce in HRSA, provides scholarships to nursing students in exchange for a minimum two-year full-time service commitment (or part-time equivalent) at an eligible health care facility with a critical shortage of nurses (*i.e.,* Critical Shortage Facility (CSF)). The scholarship consists of payment of tuition, fees, other reasonable educational costs, and a monthly support stipend. Program recipients are required to fulfill NCSP service commitments at CSFs located in the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, American Samoa, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

Need and Proposed Use of the Information: The NCSP collects data to determine an applicant's eligibility for the program, monitor a participant's continued enrollment in a school of nursing, monitor the participant's compliance with the NCSP service obligation, and prepare annual reports to Congress. Generally, the following information will be collected (1) from the schools of nursing, on a quarterly basis—general applicant and nursing school data such as full name, location, tuition/fees, and enrollment status; (2) from the schools of nursing, on an annual basis—data concerning tuition/fees and overall student enrollment status; and (3) from the participants and their employing CSF, on a biannual basis—data concerning the participant's employment status, work schedule and leave usage.

The Employment Verification Form has been updated to include two questions about participants who work at multiple sites. The In-Service Verification form has been updated to include questions on telehealth and mental health services provided by NCSP participants. Additionally, the application will include a question about participation in other federal pipeline programs.

Likely Respondents: NCSP participants, educational institutions, and critical shortage facilities.

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	Total responses	Average burden per response (in hours)	Total burden hours
Eligible Applications/Application Program Guidance	2,600	1	2,600	2.00	5,200
School Enrollment Verification Form	500	4	2,000	.33	660
Confirmation of Interest Form	250	1	250	.20	50
Data Collection Worksheet Form	500	1	500	1.00	500
Graduation Close Out Form	200	1	200	.17	34
Initial Employment Verification Form	500	1	500	.42	210
Employer—Participant Service Verification Form	1,000	2	2,000	.12	240
CSF Verification Form	200	1	200	.20	40
Total	5,750		8,250		6,934

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Division of the Executive Secretariat.

[FR Doc. 2019–21684 Filed 10–3–19; 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: Children's Hospitals Graduate Medical Education Payment Program, OMB No. 0915–0247, Revision

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 November 4, 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: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Children's Hospitals Graduate Medical Education Payment Program

OMB No. 0915–0247 Revision

Abstract: In 1999, the Children's Hospitals Graduate Medical Education (CHGME) Payment Program was established by section 4 of the Healthcare Research and Quality Act of 1999 (Pub. L. 106–129) and most recently amended by the Dr. Benjy Frances Brooks Children's Hospital GME Support Reauthorization Act of 2018 (Pub. L. 115–241). The purpose of this program is to fund freestanding children's hospitals to support the training of pediatric and other residents in GME programs. The legislation indicates that eligible children's hospitals will receive payments for both direct and indirect medical education. Direct payments are designed to offset the expenses associated with operating approved graduate medical residency training programs and indirect payments are designed to compensate hospitals for expenses associated with the treatment of more severely ill patients and the additional costs relating to teaching residents in such programs.

A 60-day notice was published in the **Federal Register** on July 11, 2019, vol. 84, No. 133; pp. 33079–80. There were no public comments.

Need and Proposed Use of the Information: Data are collected on the number of full-time equivalent (FTE) residents in applicant children's hospitals' training programs to determine the amount of direct and indirect medical education payments to be distributed to participating children's hospitals. Indirect medical education payments will be derived from a formula that requires the reporting of discharges, beds, and case mix index information from participating children's hospitals.

Hospitals will also be requested to submit data on the number of resident FTEs trained during the federal fiscal year to participate in the reconciliation payment process. Auditors will be requested to submit data on the number of resident FTEs trained by the hospitals in a resident FTE assessment summary. An assessment of the hospital data ensures that appropriate Medicare regulations and CHGME Payment Program guidelines are followed in determining which residents are eligible to be claimed for funding. The audit results impact final payments made by the CHGME Payment Program to all eligible children's hospitals.

The previously approved information collection included 25 separate forms. Based on feedback from current CHGME Payment Program grantees and a current CHGME resident FTE assessment contractor, this request now includes 30 separate forms. Previously these five additional forms were combined. Specifically:

- HRSA 99–2 is now HRSA 99–2 (Initial) and HRSA 99–2 (Reconciliation);
- Application Cover Letter (Initial and Reconciliation) is now Application Cover Letter (Initial) and Application Cover Letter (Reconciliation)
- Exhibit 2 (Initial, Resident FTE Assessment, Reconciliation) is now Exhibit 2 (Initial and Reconciliation) and Exhibit 2 (FTE Resident Assessment);
- Exhibit 3 (Initial, Resident FTE Assessment, Reconciliation) is now Exhibit 3 (Initial and Reconciliation) and Exhibit 3 (FTE Resident Assessment); and
- Exhibit 4 (Initial, Resident FTE Assessment, Reconciliation) is now Exhibit 4 (Initial and Reconciliation) and Exhibit 4 (FTE Resident Assessment).

Based on this same feedback, the burden hours for a number of forms was revised which resulted in an increase in burden hours from 8,018.40 hours as published in the 60-day **Federal Register** notice to 8,197.80 hours.

Likely Respondents: Hospitals applying for and receiving CHGME funds and fiscal intermediaries auditing data submitted by the hospitals receiving CHGME funds.

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

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
Application Cover Letter (Initial)	60	1	60	0.33	19.8
Application Cover Letter (Reconciliation)	60	1	60	2.50	150.0
HRSA 99 (Initial and Reconciliation)	60	2	120	0.33	39.6
HRSA 99–1 (Initial)	60	1	60	26.50	1,590.0
HRSA 99–1 (Reconciliation)	60	1	60	6.50	390.0
HRSA 99–1 (Supplemental) (FTE Resident Assessment)	30	2	60	3.67	220.2
HRSA 99–2 (Initial)	60	1	60	9.67	580.2
HRSA 99–2 (Reconciliation)	60	1	60	2.84	170.4
HRSA 99–4 (Reconciliation)	60	1	60	12.50	750.0
HRSA 99–5 (Initial and Reconciliation)	60	2	120	0.33	39.6
CFO Form Letter (Initial and Reconciliation)	60	2	120	0.33	39.6
Exhibit 2 (Initial and Reconciliation)	60	2	120	0.33	39.6
Exhibit 3 (Initial and Reconciliation)	60	2	120	1.83	219.6
Exhibit 4 (Initial and Reconciliation)	60	2	120	0.33	39.6
FTE Resident Assessment Cover Letter (FTE Resident Assessment)	30	2	60	0.25	15.0
Conversation Record (FTE Resident Assessment)	30	2	60	1.00	60.0
Exhibit C (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit F (FTE Resident Assessment)	30	2	60	1.50	90.0
Exhibit N (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit O(1) (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit O(2) (FTE Resident Assessment)	30	2	60	30.00	1,800.0
Exhibit P (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit P(2) (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit S (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit T (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit T(1) (FTE Resident Assessment)	30	2	60	0.25	15.0
Exhibit 1 (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit 2 (FTE Resident Assessment)	30	2	60	0.33	19.8
Exhibit 3 (FTE Resident Assessment)	30	2	60	3.50	210.0
Exhibit 4 (FTE Resident Assessment)	30	2	60	0.33	19.8
Total	*90		*90		8,197.80

*The total is 90 because the same hospitals and auditors are completing the forms.

Maria G. Button,

Director, Division of the Executive Secretariat.

[FR Doc. 2019–21680 Filed 10–3–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Member Conflict Panel—Treatment and Health Services Related Applications.

Date: October 29, 2019.

Time: 2:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2114, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: September 30, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–21601 Filed 10–3–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Biomedical Computing and Health Informatics Study Section, October 10, 2019 8:00 a.m. to October 11, 2019 6:00 p.m. at the Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda MD 20814, which was published in the **Federal Register** on September 10, 2019, 84 FR 47528.

The contact person for this meeting has been changed to Karen Nieves Lugo,

Ph.D. The meeting date, time and location remain the same. The meeting is closed to the public.

Dated: September 30, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–21602 Filed 10–3–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Child Health and Human Development Special Emphasis Panel, November 14, 2019, 08:00 a.m. to November 15, 2019, 05:00 p.m., Residence Inn Bethesda, which was published in the **Federal Register** on February 28, 2019, 84 FR 6807.

The date of this meeting has changed from November 14, 2019, 08:00 a.m. to November 15, 2019, 05:00 p.m. to November 19, 2019, 08:00 a.m. to November 19, 2019, 05:00 p.m. The location of the meeting has changed from the Residence Inn Bethesda to 6710B Rockledge Drive, Room 2121B, Bethesda, MD 20892. The meeting is closed to the public.

Dated: September 30, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–21603 Filed 10–3–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Generic Clearance To Collect Research or Educational Tools and Resources (Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Institutes of Health Office of the Director (OD) will publish periodic summaries of propose projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Mikia Currie, Chief, Project Clearance Branch (PCB), Office of Policy and Extramural Research Administration (OPERA), Office of the Director (OD), Office of Extramural Research (OER), 6705 Rockledge Drive, Bethesda, Maryland 20892 MSC 7980, or call non-toll-free number (301) 435–0941 or Email your request, including your address to: *ProjectClearanceBranch@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Generic Clearance to Collect Research or Educational Tools and Resources, 0925–NEW, exp., date XX/XX/XXXX, Project Clearance Branch (PCB), Office of Policy and Extramural Research Administration (OPERA), Office of the Director (OD), Office of Extramural Research (OER) National Institutes of Health (NIH).

Need and Use of Information Collection: The purpose of this generic is to allow for the collection of information that exist outside the currently approved NIH generics, OMB control numbers #0925–0740 titled, ''Conference, Meeting, Workshop, and Poster Session Registration and #0925–0648 titled, ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.'' The purpose of this information collection is to collect and disseminate NIH-identified resources more broadly to the public, on Institutes and Centers' (ICs) websites, and/or collect information for agency internal use to improve scientific and related practices and/or assist in scientific reviews (*e.g.,* to understand the use of research or educational resources and resource limitations, to promote scientific and pubic collaboration, public dissemination, and program guidance.) NIH plans to collect researcher and educational information, related administrative or operational information, and related project information in order to share widely with a range of audiences such as researchers, patients and advocates, and the general public. The primary purpose of information collections under this generic is to identify and ultimately promote interdisciplinary research, best practices, and collaboration among academia, industry, non-profit, and other public actors. The various types of information collected through this clearance may include soliciting names from the public, relevant communities of practice, or within NIH to recruit appropriate scientific expertise. Requests to the public may include requests to identify and/or describe extramural research, research tools, or existing resources. Requests for population characteristics within crowdsourcing mechanisms may include institutional affiliation and career level/stage. This will allow ICs to determine which functionalities are typically used, assess engagement and population characteristics of communities of practice, and prioritize investments and design future improvements for related tools and resources.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 18,601.

ESTIMATED ANNUALIZED BURDEN HOURS

Category of respondent	Number of respondents	Number of responses per respondent	Time per response (in hours)	Total hours
Call for Nominations/Resources	1,000	1	10/60	167
Recommendations of scientific reviewers	1,000	1	5/60	83
Crowdsourcing requests	1,000	1	10/60	17
Request for Population Characteristics	20,000	1	5/60	1,667
Repository of Tools and Best Practices	100,000	1	10/60	16,667
Total		123,000		18,601

Dated: September 28, 2019.

Lawrence Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2019–21694 Filed 10–3–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0063]

Agency Information Collection Activities: Petroleum Refineries in Foreign Trade Sub-Zones

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted (no later than December 3, 2019) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0063 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

(2) Mail. Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Petroleum Refineries in Foreign Trade Sub-zones.

OMB Number: 1651–0063.

Abstract: The Foreign Trade Zones Act, 19 U.S.C. 81c(d) contains specific provisions for petroleum refinery sub-zones. It permits refiners and CBP to assess the relative value of such products at the end of the manufacturing period during which these products were produced when the actual quantities of these products resulting from the refining process can be measured with certainty.

19 CFR 146.4(d) provides that the operator of the refinery sub-zone is required to retain all records relating to the above mentioned activities for five years after the merchandise is removed from the sub-zone. Further, the records shall be readily available for CBP review at the sub-zone.

Instructions on compliance with these record keeping provisions are available in the Foreign Trade Zone Manual which is accessible at: *http://www.cbp.gov/document/guides/foreign-trade-zones-manual.*

Action: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 81.

Estimated Number of Total Annual Responses: 81.

Estimated Time per Response: 1000 hours.

Estimated Total Annual Burden Hours: 81,000.

Dated: October 1, 2019.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2019–21668 Filed 10–3–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0074]

Agency Information Collection Activities: Prior Disclosure

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted no later than December 3, 2019 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0074 in the subject line and the agency name. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Email.* Submit comments to: *CBP_PRA@cbp.dhs.gov.*

(2) *Mail.* Submit written comments to CBP Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Economic Impact Analysis Branch, 90 K Street NE, 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Prior Disclosure.

OMB Number: 1651–0074.

Form number: N/A.

Abstract: The Prior Disclosure program establishes a method for a potential violator to disclose to CBP that they have committed an error or a violation with respect to the legal requirements of entering merchandise into the United States, such as underpaid tariffs or duties, or misclassified merchandise. The procedure for making a prior disclosure is set forth in 19 CFR 162.74 which requires that respondents submit information about the merchandise involved, a specification of the false statements or omissions, and what the true and accurate information should be. A valid prior disclosure will entitle the disclosing party to the reduced penalties pursuant to 19 U.S.C. 1592(c)(4).

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 3,500.

Estimated Number of Annual Responses: 3,500.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 3,500.

Dated: October 1, 2019.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2019–21664 Filed 10–3–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R1–ES–2019–0091; FXES11140100000–190–FF01E00000]

Draft Environmental Impact Statement and Draft Habitat Conservation Plan; Receipt of Applications for Incidental Take Permits; Klamath, Deschutes, Jefferson, Crook, Wasco, and Sherman Counties, Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: In accordance with the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), we, the U.S. Fish and Wildlife Service (Service), announce the availability of a habitat conservation plan (HCP) in support of incidental take permit (ITP) applications received from the Deschutes Basin Board of Control (DBBC), on behalf of its eight member irrigation districts, and the City of Prineville (applicants). The eight irrigation districts that make up the DBBC are Arnold, Central Oregon, Lone Pine, North Unit, Ochoco, Swalley, Three Sisters, and Tumalo. The applicants have submitted applications for ITPs to both the Service and the National Marine Fisheries Service for the species under each agency's jurisdiction. Applicants are seeking authorization for the incidental take of five species that is expected to result from the storage, release, diversion, and return of irrigation water by the DBBC member districts and groundwater withdrawals, effluent discharges, and

surface water diversions by the City of Prineville. Also available for review is the Service's draft environmental impact statement (DEIS), which was prepared, pursuant to NEPA, in response to the applications. We are seeking public comments on the HCP and DEIS.

DATES: We will accept comments received or postmarked on or before November 18, 2019. Comments submitted online at *https://www.regulations.gov/* (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Time on November 18, 2019.

Public Meetings: The Service will host two open house public meetings at the following times during the public comment and review period:

- *Bend, OR:* Tuesday, October 15, 2019, from 6 a.m. to 8 p.m.
- *Prineville, OR:* Wednesday, October 16, 2019, from 6 a.m. to 8 p.m.

ADDRESSES: *Obtaining Documents for Review:* The documents this notice announces, as well as any comments and other material that we receive, will be available for public inspection online in Docket No. FWS–R1–ES–2019–0091 at *http://www.regulations.gov/.* Documents will also be available at *https://www.fws.gov/Oregonfwo/articles.cfm?id=149489716.*

Submitting Comments: You may submit comments by the following methods:

- *Online: http://www.regulations.gov.* Follow instructions for submitting comments on Docket No. FWS–R1–ES–2019–0091.
- *Public meetings:* A computer will be available at the public meetings to allow attendees to submit comments. The meetings will be held at the following locations:
  - Mount Bachelor Village Resort & Event Center, 19717 Mt Bachelor Drive, Bend, OR 97702.
  - Carey Foster Hall, Crook County Fairgrounds, 1280 Main Street, Prineville, OR 97754.
- *Hard copy:* Submit by U.S. mail or hand delivery to Public Comments Processing, Attn: Docket No. FWS–R1–ES–2019–0091; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: JAO/1N, Falls Church, VA 22041–3803.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post online any personal information that you provide (see Public Availability of Comments under **SUPPLEMENTARY INFORMATION**). We request that you submit comments by only the methods described above.

Reviewing U.S. Environmental Protection Agency (EPA) comments on the draft HCP and DEIS: See EPA's Role in the EIS Process under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Bridget Moran, by telephone at 541–383–7146, or by email at *bridget_moran@fws.gov.* Hearing or speech impaired individuals may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service (Service) and National Marine Fisheries Service (NMFS) received incidental take permit (ITP) applications on August 30, 2019, from the Deschutes Basin Board of Control (DBBC) member districts (Arnold, Central Oregon, Lone Pine, North Unit, Ochoco, Swalley, Three Sisters, and Tumalo Irrigation Districts) and the City of Prineville (applicants) in accordance with the requirements of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicants prepared the draft Deschutes Basin habitat conservation plan (HCP) in support of the ITP applications and are seeking authorization for take of the federally threatened Oregon spotted frog (*Rana pretiosa*) and bull trout (*Salvelinus confluentus*) from the Service, and take of the federally threatened Middle Columbia River steelhead trout (*Oncorhynchus mykiss*) and the non-listed Middle Columbia River spring Chinook salmon (*Oncorhynchus tshawytscha*) and sockeye salmon (*O. nerka)* from the NMFS. Hereafter, these five species are collectively referred to as the ''covered species.''

The ITPs, if issued, would authorize take of the covered species that may occur incidental to the storage, release, diversion, and return of irrigation water by the DBBC member districts, and groundwater withdrawals, effluent discharges, and surface water diversions by the City of Prineville (the covered activities).

The HCP specifies the impacts that will likely result from the taking of covered species and describes the steps the applicants will take to minimize and mitigate such impacts. The HCP also discusses alternative actions to the taking that were considered by the applicants and the reasons why such alternatives are not being utilized. The HCP also describes the covered species' life history and ecology, as well as biological goals and objectives of the HCP, adaptive management, monitoring, and funding assurances.

The Service prepared a draft environmental impact statement (DEIS) in response to the ITP applications in accordance with the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We are making the HCP and DEIS available for public review and comment.

Background

All eight water districts are quasi-municipal corporations formed and operated according to Oregon State law to distribute water to irrigators (patrons) within designated geographic boundaries and in accordance with the individual water rights held by those patrons. The City of Prineville operates City-owned infrastructure and provides essential services—including public safety, municipal water supply, and sewage treatment—for more than 9,000 residents. The applicants have determined that continued operation of irrigation and essential services requires ITPs to address unavoidable take of listed species, which is ongoing.

The applicants have proposed a conservation program to avoid, minimize, and mitigate for impacts to the covered species. The HCP addresses the negative effects of the covered activities on the covered species by reducing or eliminating those effects to the maximum extent practicable, and by mitigating effects that cannot be eliminated altogether. In general, negative effects on listed species can result from direct harm or injury of individuals of the species, and through changes in habitat that interfere with the essential life activities of the species. Both types of effects are addressed in the HCP conservation measures. The covered activities affect the covered species primarily through changes in the hydrology (flow) of occupied waters associated with the storage, release, diversion, and return of irrigation water.

In the course of storing, releasing, diverting, and returning irrigation water, the applicants alter the hydrology of the Deschutes River and a number of its tributaries. In a similar fashion, the pumping of groundwater for municipal water supply by the City of Prineville affects the hydrology in one of those tributaries, the Crooked River. These changes in hydrology alter habitat conditions for the three species protected under the ESA, thereby creating the potential for incidental take of the species.

The activities covered by the HCP cause changes in surface water hydrology that alter the quantity and/or quality of aquatic habitats for the listed species. The covered activities modify the timing and magnitude of flow in the Deschutes River and a number of its tributaries through the storage, release, diversion, and return of irrigation water. In most cases, the hydrologic changes resulting from irrigation activities have

negative impacts on aquatic habitats for the covered species. When flows are reduced, the total area of usable habitat for aquatic species generally decreases and water temperatures typically increase to the extent that habitat quality is negatively impacted. The HCP's conservation measures will modify irrigation activities that reduce instream flow (storage and diversion of water) to address the negative effects. As a result, flows in the affected reaches will be higher than they were historically (over the last 50+ years) in the winter, and water temperatures (particularly peak summer temperatures) will be lower.

The applicants have continued to refine the HCP based on technical assistance from the Service and NMFS. The applicants recognize this continued assistance in their transmittal memo provided with the ITP applications, and note that they are considering certain additional measures analyzed in the DEIS (under Alternatives 3 and 4) that are not currently reflected in the proposed HCP, including the concept of a habitat improvement fund for projects in the Upper Deschutes, and the possibility of increasing winter flows below Wickiup Dam. The applicants may choose to incorporate these and/or additional elements analyzed in the DEIS into their HCP. Further discussions are also needed about the permit structure itself, including what happens if one or more permittees decide to relinquish their permit coverage. The Service and NMFS anticipate addressing these remaining issues after the public has had the opportunity to review and comment on both the HCP and the DEIS.

Proposed Action

We propose to issue a 30-year permit for incidental take of the Oregon spotted frog and bull trout if the HCP meets all section 10(a)(1)(B) permit issuance criteria. The permit would authorize take of these two covered species incidental to the storage, release, diversion, and return of irrigation water by the DBBC member districts and groundwater withdrawals, effluent discharges, and surface water diversions by the City of Prineville. NMFS will make an independent decision regarding coverage for incidental take of the three species under its jurisdiction.

Endangered Species Act

Section 9 of the ESA and its implementing regulations prohibit ''take'' of fish and wildlife species listed as endangered (16 U.S.C. 1538(a)(1)). In addition, section 4 of the ESA allows the Service and NMFS to issue regulations that prohibit the take of any fish and wildlife species listed as threatened (16 U.S.C. 1533(d)). Take prohibition has been extended, in whole or in part, to the three covered species that are listed as threatened. Under section 3 of the ESA, the term ''take'' means to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct'' (16 U.S.C. 1538). Under section 10(a) of the ESA, the Service may issue permits to authorize incidental take of listed fish and wildlife species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Section 10(a)(1)(B) of the ESA contains provisions for issuing ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

1. The taking will be incidental;
2. The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicant will ensure that adequate funding for the HCP will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicant will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

National Environmental Policy Act

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), the Service prepared a DEIS, in which we analyze the proposed action and a reasonable range of alternatives to the proposed action. Four alternatives are analyzed in the DEIS.

Alternative 1—No-action Alternative: No permit would be issued, and the applicant's HCP would not be implemented. Under Alternative 1, ongoing applicant activities would remain subject to take prohibition for listed species under the ESA. Ongoing applicant activities or future actions that may result in incidental take of federally listed species would need to be authorized through separate ITP applications submitted by each applicant under ESA section 10. This alternative assumes continuation of the actions covered in the current ESA section 7 biological opinion for the Upper Deschutes River to address take of the Oregon spotted frog, and of the actions covered in the current Service and NMFS ESA section 7 consultation documents for the Deschutes River Basin Projects to address effects to the Middle Columbia River steelhead trout and bull trout, as well as other predictable current and future conditions.

Alternative 2—Proposed Action, Deschutes Basin HCP: Under this alternative, the Service and NMFS would issue 30-year ITPs to the applicants for incidental take of covered species caused by covered activities in the plan area, and the applicants would implement the HCP. The HCP's conservation strategy modifies the timing and magnitude of the storage, release, and diversion of irrigation water. Over the 30-year period, flows are modified to mimic more natural hydrography to support the various life stages of the covered species.

Alternative 3—Enhanced Variable Streamflows: Under this alternative, the Service and NMFS would issue ITPs to the applicants for the same plan area, covered lands and waters, covered species, covered activities, and permit term as described for the proposed action, but with modifications to the HCP conservation strategy including increased fall and winter flows in the Deschutes River below Wickiup Dam, in-stream protection of uncontracted water releases on the Crooked River for fish and wildlife, and the inclusion of a habitat improvement fund for projects in the Upper Deschutes.

Alternative 4—Accelerated Schedule for Enhanced Variable Streamflows: Under this alternative, the Service and NMFS would issue ITPs to the applicants for the same plan area, covered lands and waters, covered species, and covered activities as described for the proposed action, but with a 20-year permit term and modifications to the HCP conservation strategy for an accelerated schedule for increases in fall and winter flows in the Deschutes River below Wickiup Dam, in-stream protection of additional uncontracted water releases on the Crooked River for fish and wildlife, and the habitat improvement fund for projects in the Upper Deschutes.

The environmental consequences of each alternative were analyzed to determine if significant impacts to the human environment would occur.

EPA's Role in the EIS Process

The EPA is charged with reviewing all Federal agencies' EISs and commenting on the adequacy and acceptability of the environmental impacts of proposed actions in EISs. Therefore, EPA is publishing a notice in the **Federal Register** announcing this EIS, as required under section 309 of the Clean Air Act. The publication date of EPA's notice of availability is the official beginning of the public comment

period. EPA's notices are published on Fridays.

EPA serves as the repository (EIS database) for EISs prepared by Federal agencies. All EISs must be filed with EPA. You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

Public Comments

You may submit your comments and materials by one of the methods in **ADDRESSES**. We specifically request information on the following:

1. Potential impacts to the human environment that may occur during the permit term;
2. Biological information and relevant data concerning the covered species and other wildlife;
3. Potential direct, indirect, and cumulative impacts that implementation of the proposed HCP's mitigation/minimization measures could have on the covered species, other endangered or threatened species, associated ecological communities or habitats for such species, and other aspects of the human environment;
4. Whether there are additional connected, similar, or reasonably foreseeable cumulative actions and their possible impacts on the human environment, including, without limitation, Oregon spotted frog, bull trout, Mid-Columbia steelhead, chinook salmon, and sockeye salmon, all of which were not identified in the DEIS;
5. The identification and evaluation of archaeological and historic resources that the proposed project may affect;
6. Other possible reasonable alternatives to the proposed permit action that the Service should consider, including additional or alternative avoidance, minimization, and mitigation measures; and
7. Other information relevant to the proposed HCP and impacts to the human environment.

Public Availability of Comments

We will post on *http://regulations.gov* all public comments and information received electronically. All comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Reasonable Accommodations

Persons needing reasonable accommodations in order to attend and participate in the public meetings should contact the Service's Bend Field Office, using one of the methods listed in **ADDRESSES** as soon as possible. In order to allow sufficient time to process requests, please make contact no later than one week before the public meetings. Information regarding this proposed action is available in alternative formats upon request.

Authority

We provide this notice in accordance with the requirements of section 10 of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA and its implementing regulations (40 CFR 1503.1 and 1506.6).

Robyn Thorson,

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 2019–21631 Filed 10–3–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2019–0090; FXIA16710900000–190–FF09A30000]

Foreign Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

DATES: We must receive comments by November 4, 2019.

ADDRESSES: *Obtaining Documents:* The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at *http://www.regulations.gov* in Docket No. FWS–HQ–IA–2019–0090.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet: http://www.regulations.gov.* Search for and submit comments on Docket No. FWS–HQ–IA–2019–0090.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2019–0090; U.S. Fish and Wildlife Service Headquarters, MS: PERMA, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Monica Thomas, by phone at 703–358–2104, via email at *DMAFR@fws.gov,* or via the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or fax, or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at *http://www.regulations.gov,* unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at *http://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

III. Permit Applications

We invite comments on the following applications.

Applicant: Wildlife Conservation Society, New York, NY; Permit No. 40902D

The applicant requests a permit to export one male and two female captive-bred red-ruffed lemurs (*Varecia rubra*) to Bermuda Aquarium, Museum and Zoo, Bermuda, for the purpose of enhancing the propagation or survival of the species. The notification is for a single export.

Applicant: Lawrence Lerner, Staten Island, NY; Permit No. 43911D

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for red siskin (*Carduelis cucullata*) to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: University of Kansas Biodiversity Institute, Lawrence, KS; Permit No. 677648

The applicant requests authorization to export and reimport nonliving museum specimens of endangered species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: U.S. Fish and Wildlife Service, Mexican Wolf Recovery Program, Albuquerque, NM; Permit No. 104074

The applicant requests renewal of their permit to export and re-export live Mexican wolves (*Canis lupus baileyi*) for breeding and re-introduction, as well as the export and re-export of biological samples for genetic studies, for the purpose of enhancement of the species and scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching *http://www.regulations.gov* for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to *regulations.gov* and search for ''12345A''.

V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

Monica Thomas,

Management Analyst, Branch of Permits, Division of Management Authority.

[FR Doc. 2019–21571 Filed 10–3–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOF02400.L16100000. LXSSC0100000.DO0000.19X]

Notice of Availability of the Draft Resource Management Plan and Associated Environmental Impact Statement for the Browns Canyon National Monument, CO

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended; the Federal Land Policy and Management Act of 1976, as amended; and the National Forest Management Act of 1976, as amended; the Bureau of Land Management (BLM) Royal Gorge Field Office (RGFO), Cañon City, Colorado, and U.S. Forest Service (USFS), Pike-San Isabel National Forests and Comanche-Cimarron National Grasslands (PSICC), Pueblo, Colorado, have prepared a joint Resource Management Plan (RMP) and Forest Plan (FP) amendment, supported by an Environmental Impact Statement (EIS), for the Browns Canyon National Monument (BCNM) and by this notice are announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft RMP–FP amendment/Draft EIS within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability of the Draft RMP–FP amendment/Draft EIS in the **Federal Register**. The BLM will announce future meetings or hearings and any other public participation activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: Comments related to the Draft BCNM RMP–FP amendment/Draft EIS must be submitted by any of the following methods:

- Electronic comments must be submitted via the BLM ePlanning website at *https://go.usa.gov/xn2eC.*
- Hard-copy comments must be submitted via mail or hand-delivered to BCNM RMP/EIS, 5575 Cleora Road, Salida, CO 81201.

Copies of the Draft BCNM RMP–FP amendment and Draft EIS are available at the RGFO, 3028 E. Main St., Cañon City, CO 81212, at the PSICC Salida Ranger District, 5575 Cleora Road, Salida, CO 81201, or on the BLM ePlanning website at *https://go.usa.gov/xn2eC.* Click the Documents & Reports

link on the left side of the screen to find the electronic version of these materials.

FOR FURTHER INFORMATION CONTACT: Joseph Vieira, Project Manager, telephone 719–246–9966; address 5575 Cleora Road, Salida, CO 81201; email *blm_co_brownscanyon@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 Mr. Vieira during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM and USFS have prepared the Draft BCNM RMP–FP amendment and Draft EIS to evaluate the management strategy for resources, resource uses, and special designations within the BCNM. The planning area is located in Chaffee County, Colorado, and encompasses approximately 21,600 acres. The BCNM RMP/FP amendment will determine management for approximately 9,790 acres of BLM-administered surface land and approximately 11,810 acres of national forest.

The formal public scoping process for the BCNM Draft RMP–FP amendment/Draft EIS began May 14, 2019, with the publication of a Notice of Intent in the **Federal Register** (84 FR 21352). The BLM and USFS held three open-house scoping meetings in June 2019. The BLM and USFS used public scoping comments to help identify planning issues and frame the scope of analysis in the Draft EIS. The BLM and USFS also used the scoping process to introduce the public to the preliminary alternatives and the Draft Basis for Analysis to obtain feedback on the alternatives and the analysis strategy.

Major planning issues considered in the Draft RMP–FP amendment/Draft EIS are conserving and protecting monument resources and objects or values including bighorn sheep, peregrine falcon, terrestrial and avian wildlife habitat, cultural and historical resources, geological features and riparian values; maintaining monument values and settings; understanding and addressing tribal values including religious and other significant sites; addressing existing uses such as livestock grazing; managing for sustainable outdoor recreation, visitor growth and visitor enjoyment. The Draft RMP–FP amendment also considers decisions regarding wild and scenic rivers, areas of critical environmental concern (ACECs), and management of lands with wilderness characteristics.

The Draft RMP–FP amendment/Draft EIS evaluates in detail the No Action Alternative (Alternative A) and two action alternatives (Alternatives B and C). The BLM identified Alternative C as the Preferred Alternative. This alternative, however, does not represent the final agency direction. After the public comment period closes, the BLM and USFS will prepare a Proposed RMP and Proposed FP amendment, which may reflect changes or adjustments based on information received during public comment on the Draft RMP–FP amendment/Draft EIS, new information, or changes in BLM or USFS policies or priorities. The Proposed RMP–FP amendment may include objectives and actions described in any of the alternatives analyzed in the Draft.

Alternative A continues existing management in the Planning Area, as reflected in decisions from the *Royal Gorge Resource Area Management Plan* (BLM 1996) and *Pike and San Isabel National Forests; Cimarron and Comanche National Grasslands Land and Resource Management Plan* (USFS 1984), as amended. In addition, Alternative A reflects management direction in Presidential Proclamation 9232. Alternative B focuses on protecting monument resources, objects, and values while providing primarily non-motorized recreation activities, such as hiking and boating, in a predominantly primitive and back-country setting. Alternative B limits future recreational infrastructure development while still allowing varied river-based and upland outdoor recreation experiences and outcomes. Alternative C focuses on a wider variety of river and upland recreation opportunities in backcountry, middle and front country settings to enhance the local economy and quality of life for residents and visitors. Alternative C includes protections for monument resources, objects, and values though emphasizes more proactive management of natural resources to address stressors and drivers, and a wider range of recreation opportunities and access as compared with management under Alternative B. Pursuant to 43 CFR 1610.7–2(b), this notice announces a concurrent public comment period on the proposed designation of ACECs. The BLM analyzed one potential ACEC meeting the relevance and importance criteria within the range of action alternatives:

Alternative B would retain the BCNM portion of the Browns Canyon ACEC in its current size (9,755 acres). The following management would apply: Avoid rights-of-way, restrict vehicles and bicycles to existing designated roads and trails and prohibit new route construction, and allow seasonal wildlife closures.

Please note that public comments and information submitted including names, street addresses, and email addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2)

Gregory P. Shoop,

Acting Colorado State Director.

[FR Doc. 2019–21560 Filed 10–3–19; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD08000.L16100000.DT0000. 19XL1109AF.LXSSB0010000 (MO#4500137107)]

Notice of Availability of the Record of Decision for the Approved Land Use Plan Amendment to the California Desert Conservation Area Plan for the West Mojave Route Network Project, California

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) announces the availability of the Record of Decision (ROD) for the West Mojave Route Network Project (WMRNP) Approved Land Use Plan Amendment (LUPA) for public lands located in Inyo, Kern, Los Angeles, Riverside, and San Bernardino counties, California.

DATES: The California State Director signed the ROD on October 3, 2019, which constitutes the final decision of the BLM, and the Approved LUPA takes effect immediately.

ADDRESSES: The ROD/Approved LUPA and associated Travel Management Plans (TMPs) are available electronically on the BLM ePlanning project website at *https://go.usa.gov/xE6YH*. Copies of the ROD/Approved LUPA and TMPs are available for public inspection at the BLM-Ridgecrest Field Office, 300 South Richmond Road, Ridgecrest, CA 93555; the BLM-Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311; and the BLM-California Desert District Office, 22835 Calle San Juan de Los Lagos, Moreno Valley, CA 92553.

FOR FURTHER INFORMATION CONTACT: Matt Toedtli, BLM Planning and Environmental Coordinator, telephone: 760–252–6026; address: 2601 Barstow Road, Barstow, CA 92311; email: *mtoedtli@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 Mr. Toedtli during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The ROD also approves a travel and transportation route network and nine associated TMPs. These implementation-level decisions for each of the nine individual travel management plans are subject to appeal pursuant to 43 CFR, part 4, subpart E.

The ROD contains the BLM's decisions and rationale, and a brief summary of alternatives considered, public involvement, required findings, and other information. The ROD includes three appendices: United States Fish and Wildlife Service Biological Opinion (Appendix A), an Errata to the Final Supplemental Environmental Impact Statement (Appendix B), and the WMRNP Programmatic Agreement (Appendix C).

The WMRNP includes both plan-level and implementation-level actions. The WMRNP ROD approves seven land use plan amendments to the motor vehicle access, recreation and livestock grazing elements within the California Desert Conservation Area Plan for the West Mojave planning area. It also approves nine travel management plans, including a designated route network and implementation strategies and actions.

The WMRNP ROD, Approved LUPA and Final Supplemental Environmental Impact Statement (EIS), including Errata, were developed pursuant to a U.S. District Court Order that partially remanded the 2006 West Mojave (WEMO) Plan Amendment ROD to the BLM and directed the BLM to reconsider route designation throughout the WEMO Planning Area, as well as other specified issues in the 2006 WEMO Plan. In response to public comments, updated information, and internal review, the BLM did not carry forward the Preferred Alternative identified in the Draft LUPA/Draft Supplemental EIS, published in March 2018. Rather, the Proposed LUPA/Final Supplemental EIS, published on April 26, 2019, identified Alternative 5 as the Selected Alternative. There were no inconsistencies with State- or local-plans, policies or programs identified during the Governor's consistency review of the Proposed LUPA/Final Supplemental EIS.

At the close of the protest period, 29 protests were received. The Director's Protest Summary Report containing Protest Resolution is available electronically at *https://www.blm.gov/programs/planning-and-nepa/public-participation/protest-resolution-reports*. Minor modifications were made to the Final Supplemental EIS to provide further clarification of the environmental impacts from the decisions. These minor modifications and changes in land status from the John D. Dingell, Jr. Conservation, Management, and Recreation Act (Pub. L. 116–9) resulted in an Errata to the WMRNP Final Supplemental EIS.

In response to changes in land status from Public Law 116–9 and comments received during the protest period, modifications were made to the travel and transportation management route network. The Selected Alternative has approximately 6,000 miles of OHV open and limited routes and 230 miles of OHV closed routes that include non-motorized and non-mechanized use designations.

Any party adversely affected by the approved route designations may appeal within 30 days of publication of this Notice of Availability pursuant to 43 CFR, part 4, subpart E. The appeal must be filed with the California Desert District Manager at the previously listed address (see **ADDRESSES**). Please consult the appropriate regulations (43 CFR, part 4, subpart E) for further appeal requirements.

Before including your phone number, email address, or other personal identifying information in your appeal, you should be aware that your entire appeal—including your personal identifying information—may be made publicly available at any time. While you can ask us in your appeal 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)

Danielle Chi,

Deputy State Director, Fire and Resources.

[FR Doc. 2019–21556 Filed 10–3–19; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L13200000 DS0000 LXSSK1700000 20X LLWYP07000]

Notice of Availability of the Final Supplemental Environmental Impact Statement and Potential Amendment to the Approved Resource Management Plan for the Buffalo Field Office, Wyoming

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) Wyoming prepared this Final Supplemental Environmental Impact Statement (EIS) for the 2015 Buffalo Field Office Approved Resource Management Plan (RMP). This effort is in response to a United States District Court of Montana opinion and order (*Western Organization of Resource Councils, et al.* v. *BLM;* 3/26/2018 and 7/31/2018). By this notice, the BLM is announcing the opening of the protest period.

DATES: To ensure that a protest will be considered, the BLM must receive protests on the Final Supplemental EIS by November 4, 2019.

ADDRESSES: Copies of the Final Supplemental EIS are available at the Buffalo Field Office at 1425 Fort Street, Buffalo, Wyoming 82834, and online at *http://go.usa.gov/xP6S3*.

All protests on the Final Supplemental EIS must be submitted in writing by any of the following methods:

- Website: *http://go.usa.gov/xP6S3*.
- *Regular Mail*: BLM Director (210), Attention: Protest Coordinator, P.O. Box 71383, Washington, DC 20024–1383.
- *Overnight Delivery:* BLM Director (210), Attention: Protest Coordinator, 20 M Street SE, Room 2134LM, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Thomas (Tom) Bills, RMP Supplemental EIS Project Manager; telephone: 307–

684–1133; email: *tbills@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 Mr. Bills during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The 2015 Buffalo Field Office Approved RMP provides a single, comprehensive land use plan that guides management of BLM-administered lands and minerals in the Buffalo Field Office, which include approximately 800,000 acres of BLM surface land and 4.7 million acres of BLM mineral estate in Campbell, Johnson, and Sheridan counties in north-central Wyoming.

Based on the above-referenced court decision, feedback from cooperating agencies and stakeholders, and public scoping, the BLM developed and analyzed a No Action Alternative and an Action Alternative, which are detailed in the Final Supplemental EIS. The alternatives focus solely on the allocation of lands open for leasing BLM-administered coal, in response to the court order.

The No Action Alternative represents the decision area from the 2015 RMP and brings forward all management decisions that precluded coal development in the 2015 RMP. It relies on the decisions from the 2001 coal-screening process that informed the 2015 RMP, but uses an updated 2018 coal production baseline. The BLM also used the 2019 U.S. Energy Information Administration development forecast to project development in the Buffalo Field Office over the 20-year planning period. The No Action Alternative makes available 686,896 acres for consideration of coal leasing, which includes approximately 73.66 billion tons of BLM-administered coal reserves.

The Action Alternative also uses the 2018 coal production baseline and the 2019 U.S. Energy Information Administration development forecast. In addition, the Action Alternative applies new coal screens (as described in 43 CFR 3420.1–4(e)), considers new scientific and GIS data, and evaluates issues identified through internal and public scoping. Based on these factors, the Action Alternative area makes available 455,467 acres for consideration of coal leasing, which includes approximately 52.24 billion tons of BLM-administered coal reserves.

The Proposed Plan is a modification of the Action Alternative that would make 495,251 acres of Federal coal available for consideration for leasing. This area includes all the acreage identified as available under the Action Alternative, as well as 40,847 additional acres that were included under the No Action Alternative. The BLM made this recommendation as a result of public, stakeholder, and cooperating agency input on the Draft Supplemental EIS as well as updated best-available information and special expertise provided by cooperating agencies and the public.

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, the BLM cannot guarantee that it will be able to do so.

(Authority: 43 CFR 1610.2(c), 40 CFR 1506.6)

Duane W. Spencer,

Acting State Director.

[FR Doc. 2019–21646 Filed 10–3–19; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L16100000 DS0000 LXSS036E0000 20X LLMTC020000]

Notice of Availability of the Proposed Amendment to the Approved Resource Management Plan for the Miles City Field Office, Montana, and the Associated Final Supplemental Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Montana Miles City Field Office has prepared a Proposed Resource Management Plan (RMP) Amendment and Final Supplemental Environmental Impact Statement (EIS) for the 2015 Miles City Field Office Approved RMP. This effort is in response to a United States District Court of Montana opinion and order (*Western Organization of Resource Councils, et al.* v. *BLM;* 3/26/2018 and 7/31/2018). By this notice, the BLM is announcing the opening of the protest period.

DATES: To ensure that a protest will be considered, the BLM must receive any protests on the Proposed RMP Amendment on or before the 30th day following the date the Environmental Protection Agency publishes its Notice of Availability of the Final Supplemental EIS in the **Federal Register**.

ADDRESSES: Copies of the Proposed RMP Amendment and Final Supplemental EIS are available at the Miles City Field Office, 111 Garryowen Road, Miles City, MT 59301, or may be viewed online at: *https://go.usa.gov/xmbE4.* All protests on the Proposed RMP Amendment must be in writing and submitted by any of the following methods:

Website: https://go.usa.gov/xmbE4.

Regular Mail: BLM Director (210), Attention: Protest Coordinator, P.O. Box 71383, Washington, DC 20024–1383.

Overnight Delivery: BLM Director (210), Attention: Protest Coordinator, 20 M Street SE, Room 2134LM, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Irma Nansel, RMP Supplemental EIS Project Manager, Miles City Field Office, telephone: (406) 233–3653, email: *inansel@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal 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 2015 Miles City Approved RMP provides a single, comprehensive land use plan that guides management of BLM-administered lands and minerals in the Miles City Field Office, which consists of approximately 2.7 million acres of BLM surface land and 10.6 million acres of BLM mineral estate across 17 counties in eastern Montana.

Based on the earlier-referenced court decision; feedback from cooperating agencies and stakeholders; and public scoping, the BLM developed and analyzed a No Action Alternative and two Action Alternatives, which are detailed in the Final Supplemental EIS.

The No Action Alternative represents the decision area from the 2015 RMP and brings forward all management decisions that precluded coal development in the 2015 RMP. It relies on the decisions from the 1985 Power River RMP and 1996 Big Dry RMP coal screening process. The No Action Alternative includes a total area of approximately 1,581,240 acres available

for further consideration for leasing of BLM-administered coal.

The Action alternatives applied the coal screens (43 CFR 3420.1–4(e)) using current data and evaluates the issues identified through internal and public scoping. The Action alternatives also address the NEPA deficiencies identified by the court order associated with the application of the multiple use screen. Alternative B considers the development of air resources as a multiple use screen in accordance with the Clean Air Act. Alternative C applies an air resource multiple use screen that encompasses greenhouse gas emission criteria limited to coal development tied to existing mining areas. Based on these factors, Alternative B contains approximately 1,214,380 acres acceptable for further consideration for leasing of BLM-administered coal; and Alternative C contains approximately 158,400 acres acceptable for further consideration for leasing of BLM-administered coal.

The BLM revised the reasonable foreseeable development scenario used in the 2015 Miles City RMP using current coal production from existing mines to forecast development over the 20-year planning period. The revised scenario was applied to all alternatives.

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, the BLM cannot guarantee that it will be able to do so.

(Authority: 40 CFR 1506.6 and 43 CFR 1610.2)

John Mehlhoff,

State Director.

[FR Doc. 2019–21558 Filed 10–3–19; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–GATE–28825; PPNEGATEB0, PPMVSCS1Z.Y00000]

Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee; Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee will meet as indicated below.

DATES: The meeting will take place on Friday, October 18, 2019. The meeting will begin at 9:00 a.m. until 3:00 p.m., with a public comment period at 11:30 a.m. (EASTERN).

ADDRESSES: The meeting will be held at the Sandy Hook Chapel, 35 Hartshorne Drive, Highlands, New Jersey 07732.

FOR FURTHER INFORMATION CONTACT: Daphne Yun, Acting Public Affairs Officer, Gateway National Recreation Area, 210 New York Avenue, Staten Island, New York 10305, or by telephone (718) 815–3651, or by email *daphne_yun@nps.gov.*

SUPPLEMENTARY INFORMATION: The Committee was established on April 18, 2012, by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906, and is regulated by the Federal Advisory Committee Act. The Committee provides advice to the Secretary, through the Director of the National Park Service, on matters relating to the Fort Hancock Historic District of Gateway National Recreation Area. All meetings are open to the public.

Purpose of the Meeting: The agenda will include an ethics overview for Committee members, ongoing lease updates (new leases, letters of intent, and building proposals), and general park updates. The final agenda will be posted on the Committee's website at *https://www.forthancock21.org.* The website includes meeting minutes from all prior meetings.

Interested persons may present, either orally or through written comments, information for the Committee to consider during the public meeting. Written comments will be accepted prior to, during, or after the meeting. Members of the public may submit written comments by mailing them to Daphne Yun, Acting Public Affairs Officer, Gateway National Recreation Area, 210 New York Avenue, Staten Island, New York 10305, or by email *daphne_yun@nps.gov.*

Due to time constraints during the meeting, the Committee is not able to read written public comments submitted into the record. Individuals or groups requesting to make oral comments at the public Committee meeting will be limited to no more than five minutes per speaker. All comments will be made part of the public record and will be electronically distributed to all Committee members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your written comments, you should be aware that your entire comment including your personal identifying information will be publicly available. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2019–21696 Filed 10–3–19; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–ADIR–PMSP–NPS0027718; PPWOIRADA1, PPMPSAS1Y.TY0000 (199); OMB Control Number 1024–0280]

Agency Information Collection Activities; Certification of Identity and Consent Form

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 3, 2019.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Phadrea Ponds, Acting NPS Information Collection Clearance Officer, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov;* or by telephone at 970–267–7231. Please reference OMB Control Number 1024–0280 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR by mail, contact Charis Wilson, NPS Freedom of Information Act (FOIA) Officer, 12795 W Alameda Parkway, P.O. Box 25287, Denver, CO 80225–0287; or by email at *charis_wilson@nps.gov;* or by telephone at 303–969–2959. Please reference OMB Control Number 1024–0280 in the subject line of your comments.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the NPS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the NPS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Under the Freedom of Information Act (FOIA), 5 U.S.C. 552, individuals may submit requests for full or partial disclosure of previously unreleased information and documents controlled by the NPS. To certify the identity of the requester, as required by 5 U.S.C. Section 552a (2006 & Supp. IV 2010), the NPS uses the Certification of Identity and Consent Form 10–945. In accordance with the Privacy Act (5 U.S.C. 552a(b)), the NPS maintains law enforcement incident reports in the Department of the Interior's Incident and Management Reporting System (IMARS), which is a Privacy Act System of Records (DOI–10).

The purpose of the collection is to request the extension of the currently approved Certification of Identity and Consent Form (10–945) that enables the NPS to collect information needed to respond to requests made under the FOIA and the Privacy Act of 1974. The form provides information needed to locate applicable incident reports associated with the request. Information includes sufficient personally identifiable information and/or source documents as applicable. Failure to provide the required information may result in the NPS inability to take action on requests.

The NPS uses Form 10–945, ''Certification of Identity and Consent'' to collect information needed to identify records unique to the requestor. The form collects the following information to verify the identity of the requester:

- Full name of requester;
- Case Number;
- Social Security Number;
- Current address;
- Date of birth; and
- Place of birth.

Title of Collection: Certification of Identity and Consent Form.

OMB Control Number: 1024–0280.

Form Number: NPS Form 10–945.

Type of Review: Extension of a currently approved collection.

Description of Respondents: Individuals requesting copies of law enforcement case incident reports maintained within the Department of Interior's Incident Management and Reporting System (IMARS).

Total Estimated Number of Annual Respondents: 2,000.

Total Estimated Number of Annual Responses: 2,000.

Estimated Completion Time per Response: 3 minutes.

Total Estimated Number of Annual Burden Hours: 100.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Acting Information Collection Clearance Officer, National Park Service.

[FR Doc. 2019–21682 Filed 10–3–19; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–COMP–NPS0027447; PPWOCOPP0, PPMPSD1YM0000 (199); OMB Control Number 1024–0279]

Agency Information Collection Activities; National Park Service Lost and Found Report

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 3, 2019.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Phadrea Ponds, Information Collection Clearance Officer, National Park Service, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov,* or by telephone at 970–267–7213. Please reference OMB Control Number 1024–0279 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR by mail, contact Marlene Haynes, Acting Bureau Office of Property and Fleet Management, National Park Service, 13461 Sunrise Valley Drive, Herndon, VA 20171–3272; or by email at *marlene_haynes@nps.gov;* or by telephone at 703–487–9311. Please reference OMB Control Number 1024–0279 in the subject line of your comments.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the NPS; (2) will this information be processed and used in a timely manner; (3) is the estimate

of burden accurate; (4) how might the NPS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Each year, more than 7,000 visitors to the various units of the National Park System file reports of lost or found items. Reporting of lost or found personal property in national parks is governed by 36 CFR 2.22, ''Disposition of Property'' which requires unattended property be impounded and deemed to be abandoned unless claimed by the owner or an authorized representative within 60 days. The 60-day period commences upon notification to the rightful owner of the property, if the owner can be identified, or from the time the property was placed in the superintendent's custody, if the owner cannot be identified.

Unclaimed property must be stored for a minimum period of 60 days and, unless claimed by the owner or an authorized representative, may be claimed by the finder, provided the finder is not an employee of the NPS. Found property not claimed by the owner, an authorized representative of the owner, or the finder, shall be deemed abandoned and disposed of in accordance with Title 41 Code of Federal Regulations.

In order to comply with the requirements of 36 CFR 2.22, the NPS uses NPS Form 10–166, ''Lost–Found Report,'' to allow the park to properly identify personal property reported as lost or found and to return found items to the legitimate owner, when possible, or to the finder if the item is not claimed by the owner or their authorized representative. NPS Form 10–166 collects the following information from the visitor filing the report:

- Park name, receiving station (if appropriate), and date item was lost or found;
- Name, address, city, state, zip code, email address, and contact phone numbers (cell and home);
- Type of item, detailed description of item, and location where the item was last seen or found; and
- Photograph of item (if available).

Title of Collection: National Park Service Lost and Found Report.

OMB Control Number: 1024–0279.

Form Number: NPS Form 10–166.

Type of Review: Extension of a currently approved collection.

Description of Respondents: Visitors of NPS units who file reports of lost or found items.

Total Estimated Number of Annual Respondents: 7,500.

Total Estimated Number of Annual Responses: 7,500.

Estimated Completion Time per Response: 5 minutes.

Total Estimated Number of Annual Burden Hours: 625.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Acting, Information Collection Clearance Officer, National Park Service.

[FR Doc. 2019–21681 Filed 10–3–19; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–WM–PSB–NPS0027720; PPWOWMADH2 199 PPMPSAS1Y.YH0000 (199); OMB Control Number 1024–0282]

Agency Information Collection Activities; National Park Service Background Clearance Initiation Request

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 3, 2019.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Phadrea Ponds, Acting NPS Information Collection Clearance Officer, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov;* or by telephone at 970–267–7231. Please reference OMB Control Number 1024–0282 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR by mail contact Shean Rheams, Security Administrator, National Park Service, 1201 Eye Street NW, Washington, DC 20005; or by email at *shean_rheames@nps.gov;* or by telephone at 202–354–1974. Please reference OMB Control Number 1024–0282 in the subject line of your comments.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the NPS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the NPS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The NPS, as delegated by the U.S. Office of Personnel

Management (OPM), is authorized to request information to determine the suitability of applicants for Federal employment and non-Federal personnel proposed to work under contractor and/or agreement who require access to NPS property and/or to receive DOIAccess personal identity verification (PIV) badges. Suitability determinations are authorized under Executive Orders 10450, ''Security requirements for Government employment'' and 10577, ''Amending the Civil Service Rules and authorizing a new appointment system for the competitive service''; sections 3301, 3302, and 9101 of Title 5, U.S.C.; and parts 2, 5, 731, and 736 of Title 5, CFR, and Federal information processing standards. Section 1104 of Title 5 allows OPM to delegate personnel management functions to other Federal agencies, extending these capabilities to the NPS.

To conform with regulations mandated by the OPM and the Department of the Interior (DOI), NPS requires all applicants for Federal employment and non-Federal personnel requiring access to NPS property and/or receive a DOIAccess PIV badge to be processed for a suitability background investigation, in accordance with Executive Order 10450 and the Homeland Security Presidential Directive (HSPD–12). To collect information pursuant to this requirement, the NPS Personnel Security Branch uses the Electronic Questionnaires for Investigations Processing (E–QIP) System. As part of this process, electronic submission of the Standard Form 85, for suitability background investigations (NACI), or the Standard Form 85P, for Public Trust, is now required. The information collected is protected in accordance with the Privacy Act, and maintained in a secure system of records (Interior-DOI–45, ''Personnel Security Files—Interior'', 47 FR 11036).

The NPS uses Form 10–152, ''Background Clearance Initiation Request'' to create E–QIP accounts necessary to initiate background investigations for all individuals requiring access to NPS property and/or to receive a DOIAccess PIV badge. The OPM and DOI programs initiating background investigations have published System of Records Notices in the **Federal Register** describing the systems in which the records will be maintained.

The information collected by NPS Form 10–152 includes detailed information for each proposed candidate requiring a background clearance, to include:

- Full legal name;
- Social Security Number;
- Date and place of birth;
- Country of citizenship;
- Contact phone number;
- Email address;
- Home address;
- Whether proposed candidate has ever been investigated by another Federal agency; and
- If the candidate was investigated by another Federal agency, they must provide the name of that agency and the date of the investigation.

Additional information required on Form 10–152 for non-Federal personnel includes:

- Name of proposed candidate's company;
- Contract/agreement number; and
- Contract/agreement periods of performance.

Title of Collection: National Park Service Background Clearance Initiation Request.

OMB Control Number: 1024–0282.

Form Number: NPS 10–152, ''Background Clearance Initiation Request''.

Type of Review: Extension of a currently approved collection.

Description of Respondents: Candidates for Federal employment, as well as contractors, partners, and other non-Federal candidates proposed to work for the NPS under a Federal contract or agreement who require access to NPS property and/or a DOIAccess PIV badge.

Total Estimated Number of Annual Respondents: 6,500.

Total Estimated Number of Annual Responses: 6,500.

Estimated Completion Time per Response: 7 minutes.

Total Estimated Number of Annual Burden Hours: 758.

Respondent's Obligation: Mandatory.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Acting Information Collection Clearance Officer, National Park Service.

[FR Doc. 2019–21683 Filed 10–3–19; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–622 and 731–TA–1448 (Final)]

Dried Tart Cherries From Turkey; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–622 and 731–TA–1448 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of dried tart cherries from Turkey, provided for in subheadings 0813.40.30, 0813.40.90, 0813.50.00, 2006.00.20, 2006.00.50, and 2008.60.00 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: September 27, 2019.

FOR FURTHER INFORMATION CONTACT: Celia Feldpausch 202–205–2387, Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as dried tart cherries, which may also be referred to as, *e.g.,* dried sour cherries or dried red tart cherries. Dried tart cherries may be processed from any variety of tart cherries. Tart cherries are generally classified as Prunus cerasus. Types of tart cherries include, but are not limited

to, Amarelle, Kutahya, Lutowka, Montmorency, Morello, and Oblacinska. Dried tart cherries are covered by the scope of this investigation regardless of the horticulture method through which the cherries were produced (*e.g.,* organic or not), whether or not they contain any added sugar or other sweetening matter, whether or not they are coated in oil or rice flour, whether infused or not infused, and regardless of the infusion ingredients, including sugar, sucrose, fruit juice, and any other infusion ingredients. The scope includes partially rehydrated dried tart cherries that retain the character of dried fruit. The subject merchandise covers all shapes, sizes, and colors of dried tart cherries, whether pitted or unpitted, and whether whole, chopped, minced, crumbled, broken, or otherwise reduced in size. The scope covers dried tart cherries in all types of packaging, regardless of the size or packaging material.

Included in the scope of this investigation are dried tart cherries that otherwise meet the definition above that are packaged with non-subject products, including, but not limited to, mixtures of dried fruits and mixtures of dried fruits and nuts, where the smallest individual packaging unit of any such product contains a majority (*i.e.,* 50 percent or more) of dried tart cherries by dry net weight. Only the dried tart cherry components of such products are covered by this investigation; the scope does not include the non-subject components of such products.

Included in the scope of this investigation are dried tart cherries that have been further processed in a third country, including but not limited to processing by stabilizing, preserving, sweetening, adding oil or syrup, coating, chopping, mincing, crumbling, packaging with non-subject products, or other packaging, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the dried tart cherries.

Excluded from the scope of this investigation are dried tart cherries that have been incorporated as an ingredient in finished bakery and confectionary items (cakes, cookies, candy, granola bars, *etc.*).

The subject merchandise is currently classifiable under 0813.40.3000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subject merchandise may also enter under subheadings 0813.40.9000, 0813.50.0020, 0813.50.0060, 2006.00.2000, 2006.00.5000, and 2008.60.0060. The HTSUS subheadings set forth above are provided for convenience and U.S. customs purposes only. The written description of the scope is dispositive.

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that certain benefits which constitute subsidies within the meaning of section 703 of the Act (19 U.S.C. 1671b) are being provided to manufacturers, producers, or exporters in Turkey of dried tart cherries, and that such products are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b) (84 FR 51109 and 84 FR 51112, September 27, 2019). The investigations were requested in petitions filed on April 23, 2019, by the Dried Tart Cherry Trade Committee.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on November 19, 2019, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, December 3, 2019, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before November 29, 2019. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on December 2, 2019, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is November 25, 2019. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is December 9, 2019. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before December 9, 2019. On January 6, 2020, the Commission will make available to parties all information on which they have not had an opportunity to

comment. Parties may submit final comments on this information on or before January 9, 2020, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: October 1, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–21644 Filed 10–3–19; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1110]

Certain Strontium-Rubidium Radioisotope Infusion Systems, and Components Thereof Including Generators; Commission Determination To Review in Part a Final Initial Determination Finding No Section 337 Violation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part a final initial determination (''FID'') of the presiding administrative law judge (''ALJ'') finding no violation of section 337 of the Tariff Act of 1930, as amended.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 1, 2018, based on a complaint, as amended, filed by Bracco Diagnostics Inc. of Monroe Township, New Jersey (''Complainant'' or ''Bracco''). *See* 83 FR 19112–13 (May 1, 2018). The complaint, as amended, alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) (''section 337''), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain strontium-rubidium radioisotope infusion systems, and components thereof including generators, by reason of infringement of U.S. Patent Nos. 9,814,826; 9,750,869; and 9,750,870 (collectively, ''the asserted patents''). *See id.* The notice of investigation names Jubilant DraxImage Inc. of Kirkland, Québec, Canada; Jubilant Pharma Limited of Singapore; and Jubilant Life Sciences of Noida, Uttar Pradesh, India (collectively, ''Respondents'' or ''Jubilant'') as respondents in this investigation. *See id.* The Office of Unfair Import Investigations is also a party to this investigation. *See id.*

On February 8, 2019, the ALJ issued an ID (Order No. 27) finding by summary determination that Jubilant's RUBY Rubidium Elution System Version 3.0 directly infringes the asserted patents. *See* Order No. 27 (Feb. 8, 2019), *unreviewed,* Comm'n Notice (Mar. 8, 2019). In addition, the ALJ determined that Jubilant's RUBY Rubidium Elution System Version 3.1 and the RUBY Rubidium Elution System Version 4 do not directly infringe the asserted patents. *See id.* The ID (Order No. 27) declined to reach indirect infringement on summary determination. *See id.*

The ALJ conducted an evidentiary hearing on February 11–12 and 15–17, 2019, and on August 1, 2019, issued the FID finding no violation of section 337. Specifically, the FID finds that the domestic industry requirement is satisfied and that all the asserted claims are infringed but invalid as obvious over the prior art. In addition, the ALJ issued a Recommended Determination (''RD'') recommending, should the Commission find a section 337 violation, that the Commission issue a limited exclusion order (''LEO'') barring entry of articles that infringe the asserted claims. The RD does not recommend that the Commission issue a cease and desist order or impose a bond during the period of Presidential review. Furthermore, as directed by the Commission, the RD provides findings with respect to the public interest and recommends a determination that the public interest factors do not preclude entry of the proposed LEO.

On August 14, 2019, both Bracco and the Commission's Investigative Attorney (''IA'') filed petitions for review of the FID. Bracco petitions for review of the FID's findings with respect to invalidity, while the IA petitions for review of the FID's findings with respect to domestic industry. On August 22, 2019, the parties filed responses to the respective petitions.

The Commission has determined to review the FID in part. Specifically, the Commission has determined to review the FID's findings with respect to invalidity and domestic industry. The Commission has determined not to review the remainder of the FID. At this time, the Commission does not request any briefing from the parties.

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: September 30, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–21609 Filed 10–3–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0005]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application and Permit for Importation of Firearms, Ammunition, and Defense Articles—ATF Form 6—Part I (5330.3A)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection was previously published in the **Federal Register**, on August 1, 2019, allowing for a 60-day comment period. Comments are encouraged and will be accepted for an additional 30 days until November 4, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any other additional information, please contact: Desiree M. Dickinson, ATF Firearms and Explosives Imports Branch either by mail at 244 Needy Road, Martinsburg, WV 25405, or by email at *desiree.dickinson@atf.gov,* or by telephone at 304–616–4584. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, with change, of a currently approved collection.

(2) *The Title of the Form/Collection:* Application and Permit for Importation of Firearms, Ammunition and Defense Articles.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 6—Part I (5330.3A).

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Individuals or households, Federal Government, State, Local or Tribal Government.

Abstract: The Application and Permit for Importation of Firearms, Ammunition, and Defense Articles—ATF Form 6—Part I (5330.3A) allows ATF to determine if the article(s) described on the application qualifies for importation. It also serves as authorization for the importer.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 10,000 respondents will utilize the form, and it will take each respondent 39 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 6,500 hours, which is equal to 10,000 (# of respondents) * 1 (# of responses per respondents) * .65 (39 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: October 1, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–21700 Filed 10–3–19; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0055]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Identification of Explosive Materials

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection was previously published in the **Federal Register**, on August 1, 2019 allowing for a 60-day comment period. Comments are encouraged and will be accepted for an additional 30 days until November 4, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any other additional information, please contact: Anita Scheddel, Program Analyst, ATF Explosives Industry Programs Branch, either by mail at 99 New York Ave. NE, Washington, DC 20226, or by email at *eipbinformationcollection@atf.gov,* or by telephone at 202–648–7158. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning

the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *The Title of the Form/Collection:* Identification of Explosive Materials.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: Marking of explosives enables law enforcement entities to more effectively trace explosives from the manufacturer through the distribution chain, to the end purchaser. This process is used as a tool in criminal enforcement activities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 2,153 respondents will respond to this information collection approximately 520 times, and it will take each respondent approximately three (3) seconds to provide responses twice per day.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 932.9 or 933 hours, which is equal to 2,153 (# of respondents) * 260 (number of workdays) * 0.00166667 hours (total six (6) seconds to respond each day).

(7) *An Explanation of the Change in Estimates:* The adjustment associated with this collection is a decrease in the number of respondents by 52. Consequently, the total responses and burden hours have reduced by 27,040 and 23 hours respectively, since the last renewal in 2016.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: October 1, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–21699 Filed 10–3–19; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On September 27, 2019, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States* v. *Mahogany Company of Mays Landing, Inc.,* Civil Action No. 1:19–cv–18481–RMB–AMD. In the filed complaint, the United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), alleges that Mahogany Company of Mays Landing, Inc. (''Mahogany'') is liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), for past response costs EPA incurred to respond to releases and threatened releases of hazardous substances into the environment at the Superior Barrel and Drum Site located in Gloucester County, New Jersey. The proposed consent decree requires Mahogany to pay $375,000, in five annual installments, with interest, to EPA, in settlement of the United States' claim for past response costs against Mahogany.

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. *Mahogany Company of Mays Landing, Inc.,* D.J. Ref. No. 90–11–3–11831/2. 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 $5.00 (25 cents per page reproduction cost), payable to the United States Treasury.

Jeffrey Sands,

Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 2019–21578 Filed 10–3–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

On September 27, 2019, the Department of Justice lodged a proposed consent decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States* v. *Cassidy Painting Inc., et al.,* Civil Action No. 1:19–cv–18472–RMB–AMD. In the filed complaint, the United States, on behalf of the U.S. Environmental Protection Agency (''EPA''), alleges that the defendants are liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), for past response costs EPA incurred to respond to releases and threatened releases of hazardous substances into the environment at the Superior Barrel and

Drum Site located in Gloucester County, New Jersey. The proposed consent decree requires the group of defendants to pay $3.4 million, plus interest from July 1, 2019, to EPA, in settlement of the United States' claim for past response costs against these defendants.

The group of defendants is composed of Cassidy Painting Inc., Cleveland Steel Container Corporation, Coating Development Group, Inc., Congoleum Corporation, Durand Glass Manufacturing Company, LLC, Expert Management Inc., Atlantic Associates International Incorporated, d/b/a Hibrett Puratex, Incineration Recycling Services, Inc., Johnson Matthey Inc., LCRES Holdings, Inc., LCR Embedded Systems, Inc., LCR Electronics, Inc., Martin Corp., National Casein of New Jersey, National Chemical Laboratories of Pa., Inc., Occidental Chemical Corporation, Ocean Yachts, Inc., Polymeric Systems Inc., PRC-DeSoto International, Inc., Puritan Products, Inc., Recycle Inc. East, R.H. Sheppard Co., Inc., Richland Glass Co., Inc.,

Rohm and Haas Company, The Sherwin-Williams Company, Stem Brothers, Inc., Straight Arrow Products, Inc., Thermoseal Industries LLC, Trex Properties LLC, United Asphalt Co., VP Racing Fuels, Inc., and The Worthington Steel Company.

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. *Cassidy Painting Inc., et al.,* D.J. Ref. No. 90–11–3–11831. 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 $12.00 (25 cents per page reproduction cost), payable to the United States Treasury.

Jeffrey Sands,

Assistant Section Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 2019–21575 Filed 10–3–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Survey of Occupational Injuries and Illnesses

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) revision titled, ''Survey of Occupational Injuries and Illnesses,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before November 4, 2019.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1220-003* (this link will only become active on the day following publication of this notice) or by contacting Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–BLS, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Frederick Licari by telephone at 202–693–8073, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Survey of Occupational Injuries and Illnesses. The Survey of Occupational Injuries and Illnesses is the primary indicator of the Nation's progress in providing every working man and woman safe and healthful working conditions. The survey measures the overall rate of work injuries and illnesses by industry. Survey data are also used to evaluate the effectiveness of Federal and State programs and to prioritize scarce resources. Respondents include employers who maintain OSHA records in accordance with the Occupational Safety and Health Act and employers who are normally exempt from OSHA recordkeeping. Each year a sample of exempt employers is required to keep records and participate in the Survey. This information collection is a revision because several of the associated documents have been updated. Section 24 (a) of the Occupational Safety and Health Act of 1970 authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB, under the PRA, approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1220–0045. The current approval is scheduled to expire on December 31, 2019; however, the DOL notes that existing information collection requirements submitted to the OMB will receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 14, 2019 (84 FR 27806).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty-(30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1220–0045. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–BLS.

Title of Collection: Survey of Occupational Injuries and Illnesses.

OMB Control Number: 1220–0045.

Affected Public: Businesses or other for-profits; Not-for-profit institutions; Farms; State, Local or Tribal Governments.

Total Estimated Number of Respondents: 232,400.

Total Estimated Number of Responses: 232,400.

Total Estimated Annual Time Burden: 195,060 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D)).

Dated: September 27, 2019.

Frederick Licari,

Departmental Clearance Officer.

[FR Doc. 2019–21611 Filed 10–3–19; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Mathematical and Physical Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name And Committee Code: Advisory Committee for Mathematical and Physical Sciences (#66).

Date and Time:

October 23, 2019; 8:30 a.m. to 5:00 p.m.

October 24, 2019; 8:30 a.m. to 12:00 p.m.

Place: NSF, 2415 Eisenhower Avenue, Alexandria, VA 22314 (Open Meeting).

To attend the meeting in person, all visitors must contact the Directorate for MPS at least 48 hours prior to the meeting to arrange for a visitor's badge. All visitors must access NSF via the Visitor Center entry adjacent to the south building entrance on Eisenhower Avenue on the day of the meeting to receive a visitor's badge. It is suggested that visitors allow time to pass through security screening.

Type of Meeting: Open.

Contact Person: Nadège Aoki, National Science Foundation, 2415 Eisenhower Avenue, Room C 9015B, Alexandria, Virginia 22314; Telephone: 703/292–4934.

Summary of Minutes: Minutes and meeting materials will be available on the MPS Advisory Committee website at *http://www.nsf.gov/mps/advisory.jsp* or can be obtained from contact person listed above.

Purpose of Meeting: To provide advice, recommendations and counsel on major goals and policies pertaining to MPS programs and activities.

Agenda

Wednesday, October 23, 2019

—Call to Order and Official Opening of the Meeting—Anne Kinney, Assistant Director, MPS
—FACA and COI Briefing—Tomasz Durakiewicz, MPS
—Approval of Prior Meeting Minutes (2 meetings)—Catherine T. Hunt, MPSAC Chair
—UPDATE: MPS—Anne Kinney, Assistant Director, MPS
—AST COV Report Presentation—Roger Brissenden, Harvard-Smithsonian Center for Astrophysics
—AST COV Report discussion and vote on acceptance—MPSAC Chair
—DMR COV Report Presentation—Melissa Hines, Cornell University
—DMR COV Report discussion and vote on acceptance—MPSAC Chair
—MPS Broadening Participation Working Group, report and discussion
—Unstructured lunch conversations: Broadening Participation
—DISCUSSION: Broadening Participation—Carol Bessel
—Presentation by Carol Lynn Alpert, Director, Strategic Projects Group, Boston Museum of Science ''Broadening Participation: Quantum Physics for All''
—Preparation for Meeting with NSF Director and COO
—Meeting and discussion with NSF Director and COO
—Closing remarks and adjourn for the day

Thursday, October 24, 2019

—Call to Order and Official Opening of the 2nd Day—Anne Kinney, Assistant Director, MPS
—FACA Briefing—Tomasz Durakiewicz, MPS
—Key Questions from May Meeting of MPS AC—reminder—Anne Kinney, Assistant Director, MPS
—DISCUSSION: Key Questions
—SynBio Subcommittee: Reminder, charge, short discussion—Germano Iannacchione
—SynBio Subcommittee: Vote—MPSAC Chair
—Magnetic Science and Facilities—Linda Sapochak
—Recap and revisit of the meeting + action items for the next meeting
—Adjourn—Anne Kinney, Assistant Director, MPS

Dated: October 1, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–21678 Filed 10–3–19; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket No. PI2020–1; Order No. 5260]

Public Inquiry

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is suggesting modifications and enhancements to the current estimation methodology to account specifically for recent Postal Service data changes, and for any other aspects of the monopolies estimation methodology. This document informs the public of this proceeding and the technical conference, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 1, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Background
III. Comments
IV. Ordering Paragraphs

I. Introduction

In its Annual Report, the Commission estimates both a value for the Postal Service combined letter and mailbox monopolies, which are jointly referred to as the postal monopoly, and a separate value for the mailbox monopoly alone.[1] The current methodology estimates the hypothetical lost profit to the Postal Service if potential competitors were allowed to enter and compete in the Postal Service's letter and mailbox monopolies. FY 2018 Annual Report at 53–54. The Commission is soliciting comments and suggestions for modifications and enhancements to the current estimation methodology to account specifically for recent Postal Service data changes, and for any other aspects of the monopolies estimation methodology.[2]

II. Background

On December 19, 2008, the Commission transmitted to Congress and to the President a *Report on Universal Postal Service and the Postal Monopoly*[3] as required by section 702 of the Postal Accountability and Enhancement Act (PAEA), Public Law 109–435, 120 Stat. 3218 (2006).[4] In its Report, the Commission first estimated the annual value of the combined letter and mailbox monopolies to be $3.48 billion and the value of the mailbox monopoly alone to be $1.33 billion for FY 2007. *See* Report at 144; Order No. 152. Since then, although not required to do so by statute, the Commission also publishes in its Annual Report updated estimates for the values of both the combined letter and mailbox monopolies and the mailbox monopoly alone using the base case assumptions and methodology outlined in its Report. *See* Report at 143–152. The estimates for the value of the monopolies vary each year depending on changes in delivery costs, volumes, and revenues. *See, e.g.,* FY 2018 Annual Report at 53.

Section 702(a)(1) of the PAEA uses the term ''postal monopoly'' to include both the Postal Service's monopoly on the delivery of mail (letter monopoly) and on access to mailboxes (mailbox monopoly). The letter monopoly is the Postal Service's exclusive right to carry and deliver most addressed, paper-based correspondence.[5] The mailbox monopoly is the Postal Service's exclusive right to deliver to and collect from mailboxes. 18 U.S.C. 1725. For the estimated values of both the combined letter and mailbox monopolies and the mailbox monopoly alone, profits under the status quo are calculated and then compared with profits without the monopoly element under review, leaving all elements of the universal service obligation (USO) in place.[6]

The estimated value of the combined letter and mailbox monopolies is a hypothetical estimate of the potential profit that the Postal Service would lose if both the letter and mailbox monopolies were lifted, and the Postal Service were subject to competition for mail currently covered by the letter and mailbox monopolies.[7] The Commission also estimates the value of the mailbox monopoly alone because some mail is outside the letter monopoly.[8] For example, it is lawful for private parties to deliver Periodicals, unaddressed saturation mail, catalogs over 24 pages, letters over 12.5 ounces, and parcels as these products are all not subject to the letter monopoly. FY 2018 Annual Report at 54.

Therefore, to estimate the hypothetical value of the mailbox monopoly alone, the current methodology calculates the potential decrease in Postal Service profits that would result from eliminating the mailbox monopoly while retaining the letter monopoly. *Id.* at 53–54. The current methodology for estimating the value of both the combined letter and mailbox monopolies and the mailbox monopoly alone has been in use since FY 2009.[9] This methodology examines Postal Service data on city and rural delivery routes to see if a private delivery firm (or entrant) could profitably deliver a portion of mail, which is termed ''contestable'' mail.[10] The current methodology assumes that entry from a competitor would potentially occur on all routes that are most profitable for the competitor.[11]

In the 2009 Annual Report, the Commission stated that the estimated values of the monopolies ''should be viewed as upper bounds for several reasons.'' FY 2009 Annual Report at 32. The Commission acknowledged the possibility that entry by a competitor may only occur on profitable routes that are co-located (*e.g.,* multiple profitable routes are sufficiently close together to make entry into that geographic area attractive). *Id.* Given that possibility, and the current methodology that evaluates entry for each route regardless of the extent of route clustering, the Commission noted that the estimated monopoly values are likely overstated. *Id.* Additionally, the current estimation methodology does not account for any carrier route sorting costs required by potential entrants for five digit sorted letter mail entering the system at the sectional center facility or the destination delivery unit. *Id.* The Commission noted that inclusion of these costs would also lower the extent of entry to some degree. *Id.*

On December 15, 2017, the Commission approved a methodology change to the City Carrier Cost System (CCCS).[12] In the CCCS, the Postal

[1] *See* PRC *Annual Report to the President and Congress Fiscal Year 2018,* January 10, 2019, at 53–54 (FY 2018 Annual Report).

[2] In this proceeding as in previous related Dockets, the Commission continues to solicit comments and participation of interested parties on the methodology to estimate the value of the Postal Service monopolies. *See* Docket No. PI2008–3, Notice and Order Providing An Opportunity to Comment, April 18, 2008 (Order No. 71); Docket No. PI2009–1, Notice and Order Providing an Opportunity for Comment, December 19, 2008 (Order No. 152).

[3] PRC *Report on Universal Postal Service and the Postal Monopoly,* December 19, 2008 (Report). The Commission was assisted in this undertaking by a team of experts assembled by the School of Public Policy at George Mason University (GMU) and by GMU's Center for Social Science Research.

[4] Section 702(a)(1) of the PAEA requires the Commission to submit a report to the President and Congress on ''universal postal service and the postal monopoly in the United States . . . including the monopoly on the delivery of mail and on access to mailboxes.''

[5] *Id.* The letter monopoly is codified in the Private Express Statutes. *See* 18 U.S.C. 1693–1699; 39 U.S.C. 601–606.

[6] Report at 143. The Postal Service's obligation to provide ''universal service'' is often referred to as the USO. ''Universal postal service'' is the term commonly used to refer to postal service to all parts of the country. *See United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.,* 540 U.S. 736, at 741 (2004) (*citing* 39 U.S.C. 101, 403); Order No. 71.

[7] FY 2018 Annual Report at 53; *see* Report at 144.

[8] Report at 148. The value of the letter monopoly alone (retaining the mailbox monopoly) is not separately estimated. Without access to mailboxes, it is unlikely that the entrant could successfully capture mail directed to a specific person or address because those mailpieces are delivered to and collected from mailboxes. FY 2018 Annual Report at 53.

[9] *See* PRC *Annual Report to the President and Congress,* Fiscal Year 2009, January 8, 2010, at 32–33 (FY 2009 Annual Report); Order No. 152.

[10] *See* Report, folder ''Appendices.zip,'' folder ''USO Appendices,'' PDF file ''Appendix F Section 4.pdf,'' *Quantitative Analysis of the Value of the Postal and Mailbox Monopolies,* Robert H. Cohen (Analysis of Postal and Mailbox Monopolies), at 4, available at: *https://www.prc.gov/prc-reports?keys=USO&field_report_type_value=All&=Apply.*

[11] *Id. See* Report for a detailed description of the estimation methodology, SAS programs, workbooks and data files used for the Analysis of Postal and Mailbox Monopolies, folder ''Workpapers and Data Files AppendixF4.zip,'' folder ''Workpapers and Data Files Appendix F4,'' Word file ''WorkpaperF4.doc.''

[12] *See* Docket No. RM 2017–3, Order on Analytical Principals Used In Periodic Reporting

Service replaced the delivery point sequence (DPS) manual mail sampling for the route with a sampling method that evaluates a sample of digital images from Delivery Barcode sequence second pass operations within a ZIP Code.[13] This new methodology creates issues related to calculating the profitability for DPS mail on city carrier routes in the current estimation methodology.[14] As such, the Commission is soliciting comments and suggestions for modifications and enhancements to the current estimation methodology for both the combined letter and mailbox monopolies value, as well as the mailbox monopoly alone value, to account for the recent CCCS data changes, as well as any other potential modifications to the methodology for estimating the values of the monopolies.

III. Comments

The Commission invites public comment concerning its methodology to estimate the values of both the combined letter and mailbox monopolies and the mailbox monopoly alone reported in its Annual Report. Interested persons are invited to comment on any or all aspects of potential methodology changes. Comments are due November 1, 2019. The Commission does not anticipate the need for reply comments at this time. Material filed in this docket will be available for review on the Commission's website, *http://www.prc.gov*.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. PI2020–1 for the purpose of considering potential methodological changes to the computation of the estimated values of both the combined letter and mailbox monopolies and the mailbox monopoly alone.

2. Interested persons may submit written comments on any or all aspects of the Commission's estimation methodology no later than November 1, 2019.

3. Lawrence Fenster is designated to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Darcie S. Tokioka,

Acting Secretary.

[FR Doc. 2019–21679 Filed 10–3–19; 8:45 am]

BILLING CODE 7710–FW–P

(Proposal Nine), December 15, 2017 (Order No. 4278).

[13] *See* Docket No. ACR2018, Library Reference USPS–FY18–34, December 28, 2018, at 1, 28–32.

[14] The current estimation methodology uses the delivery volumes on all evaluated rural routes and uses a sample of city routes in the CCCS to estimate all city routes delivered volumes. *See* Report, Analysis of Postal and Mailbox Monopolies, at 9.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87154; File No. SR CboeBYX–2019–014]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Order Approving a Proposed Rule Change To Make Permanent the Exchange's Pilot Retail Price Improvement Program, Rule 11.24, Which is Set To Expire on September 30, 2019, and Order Granting Limited Exemption Pursuant to Rule 612(c) of Regulation NMS

September 30, 2019.

I. Introduction

On August 22, 2019, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to make permanent Exchange Rule 11.24, which sets forth the Exchange's Pilot Retail Price Improvement (''RPI'') Program (''Program'').[3] The proposed rule change was published for comment in the **Federal Register** on August 29, 2019.[4] The Commission received no comment letters on the proposed rule change. In connection with the proposed rule change, the Exchange requests exemptive relief from Rule 612 of Regulation NMS,[5] which, among other things, prohibits a national securities exchange from accepting or ranking orders priced greater than $1.00 per share in an increment smaller than $0.01 (''Sub-Penny Rule'').[6] The Commission is issuing this order approving the proposed rule change and granting the Exchange limited exemptive relief pursuant to Rule 612(c) of Regulation NMS.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) (''RPI Approval Order'') (SR–BYX–2012–019).

[4] *See* Securities Exchange Act Release No. 86742 (August 23, 2019), 84 FR 45575 (''Notice'').

[5] 17 CFR 242.612(c).

[6] *See* note 11 *infra*.

II. Description of the Proposed Rule Change

The Exchange proposes to make the Program permanent. In the Notice, the Exchange sets forth and discusses its analysis of the Program and basis for permanent approval.

Overview of the Program

The Program is designed to attract retail order flow to the Exchange, and allow such order flow to receive potential price improvement.[7] All Regulation NMS securities traded on the Exchange are eligible for the RPI Program. The Program is limited to trades occurring at prices equal to or greater than $1.00 per share.[8]

Exchange Rule 11.24 sets forth the rules governing the Program. Exchange Rule 11.24(a) contains the defined terms for the Program. It defines a ''Retail Member Organization'' (or ''RMO'') as a Member (or a division thereof) that has been approved by the Exchange to submit Retail Orders. Under Exchange Rule 11.24(b)(1), to qualify as an RMO, a Member of the Exchange must conduct a retail business or route retail orders on behalf of another broker-dealer. Exchange Rule 11.24(b)(2) sets forth the process for a Member to apply to become an RMO, which includes an attestation from the Member that substantially all orders that it submits as Retail Orders will qualify as such. Exchange Rule 11.24(c) sets forth when and how the Exchange would remove a Member's RMO Status (*i.e.,* disqualification), and Exchange Rule 11.24(d) sets forth the process for a Member to appeal a disapproval of its RMO application or an RMO disqualification under Exchange Rule 11.24(c).

Exchange Rule 11.24(a) defines the terms ''Retail Order'' [9] and ''Retail Price Improvement Order'' (''RPI Order'' or collectively, ''RPI Interest'').[10] Both

[7] *See* Notice, *supra* note 4, at 45575.

[8] Exchange Rule 11.24(h).

[9] Under Exchange Rule 11.24(a)(2), a ''Retail Order'' is defined as an agency order or riskless principal that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. A Retail Order is an Immediate or Cancel (''IOC'') Order and shall operate in accordance with Rule 11.24(f). A Retail Order may be an odd lot, round lot, or mixed lot.

[10] Under Exchange Rule 11.24(a)(3), an RPI Order is consists of non-displayed interest on the Exchange that is priced better than the Protected NBB or Protected NBO by at least $0.001 and that is identified as such (''RPI interest''). The System will monitor whether RPI buy or sell interest,

Continued

Retail Orders and RPI Orders are non-display orders. A Retail Order must be submitted by an RMO, and an RPI Order must provide price improvement of at least $0.001 to Retail Orders. RPI Orders may only execute against Retail Orders, and an RPI Order may only execute against a Retail Order if it provides price improvement of at least $0.001 better than the national best bid or offer (NBBO).[11]

Under Exchange Rule 11.24(e), the Exchange disseminates an identifier when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System (''Retail Liquidity Identifier''). The Retail Liquidity Identifier is disseminated through consolidated data streams (*i.e.,* pursuant to the Consolidated Tape Association Plan/ Consolidated Quotation System, or CTA/CQS, for Tape A and Tape B securities, and The Nasdaq Stock Market, LLC (''Nasdaq'') UTP Plan for Tape C securities) as well as through proprietary Exchange data feeds. The Retail Liquidity Identifier reflects the symbol and the side (buy or sell) of the RPI interest, but does not include the price or size of the RPI interest.

Under Exchange Rule 11.24(f), an RMO can designate how a Retail Order interacts with available contra-side interest. Under Exchange Rule 11.24(f), Retail Orders can be designated as either Type-1 or Type-2. A Type 1-designated Retail Order interact with available contra-side RPI Orders and any other price improving contra-side interest but will not interact with other available contra-side interest in the System that is not offering price improvement or route to other markets. The portion of a Type-1 Retail Order that does not execute against contra-side RPI Orders or other price improving liquidity will be immediately and automatically cancelled. A Type 2-designated Retail Order will interact first with available contra-side RPI Orders and other price improving liquidity and them any remaining portion of the Retail Order will be executed as an Immediate-or-Cancel (''IOC'') Order pursuant to Rule 11.9(b)(1). A Type2-designated Order can either be submitted as a BYX Only Order or as an order eligible for routing pursuant to Rule 11.13(a)(2).

Exchange Rule11.24(g) sets forth the priority and order allocation rules for how RPI Orders are ranked against both RPI and non-RPI orders when the Exchange receives a contra-side Retail Order. Competing RPI Orders in the same security are ranked and allocated according to price then time of entry into the Exchange's System. Executions occur in price/time priority in accordance with Exchange Rule 11.12. When an RPI executes against a Retail Order, any remaining unexecuted RPI interest will be available to interact with other incoming Retail Orders if such interest is at an eligible price, but any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with its Retail Order designation under Exchange Rule 11.24(f).

Exchange Rule 11.24(h) currently provides that the program is a pilot set to expire the earlier of approval of this proposal or September 30, 2019. The Exchange proposes to eliminate this provision of the rule and make the Program permanent based on its analysis of the Program.

Analysis of the Program

As more fully set forth in the Notice, the Exchange submitted data and analysis to support its proposal for making the Program permanent.[12] The Exchange stated that the Program provided $4.5 million in price improvement to retail investors during its review period, January 2016 and June 2018.[13] The Exchange also asserted that it has achieved its goal of attracting retail order flow to the Exchange, noting there has been consistent retail investor interest in the Program, which has provided tangible price improvement to those retail investors through a competitive pricing process over the course of the pilot.[14] The Exchange stated that it has not received any complaints or negative feedback concerning the Program.[15]

In addition, the Exchange undertook a difference-in-difference (''DID'') analysis to also analyze the Program's impact on the broader market.[16] The Exchange noted that the introduction of the Program applied to all stocks traded on the Exchange and, therefore, control stocks in the strict sense were not available. To account for this, the Exchange identified stocks with relatively high levels of participation in the Program for use as the ''treatment'' group, and used stocks with low participation in the Program as the ''control'' group.[17] The Exchange sought to enhance the validity of the DID analysis by otherwise making the treatment group and the control group as similar as possible. The Exchange divided the analysis into two parts: Active securities and less active securities. The active securities consist of stocks with consolidated average daily volume (''CADV'') of 500,000 shares or more. The less active securities consist of stocks with CADV of between 50,000 and 500,000 shares.[18] Within each subgroup, the Exchange conducted what it describes as a ''matched pair'' process to identify a smaller set of treatment and control groups that are as similar as possible across three market quality statistics: (i) Consolidated average daily share volume; (ii) average price; and (iii) average BBO spread across exchanges.[19] To conduct the analysis of the Program's effect on overall market quality, the Exchange compared those statistics during a pre-treatment period (October 2012 to December 2012) against those statistics from January 2013 to December 2013 and January 2017 to December 2018, obtaining a set of four DID regression analyses.[20]

Based on results for each sample group in the Exchange's regression analysis, the Exchange concluded that the overall results were not statistically significant to support a conclusion that the introduction of the Program caused spreads to widen.[21] In fact, the Exchange's regressions suggested some narrowing of spreads between the pretreatment period and the post

adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders. An RPI Order remains non-displayed in its entirety (the buy or sell interest, the offset, and the ceiling or floor). An RPI Order may also be entered in a sub-penny increment with an explicit limit price. Any User is permitted, but not required, to submit RPI Orders. An RPI Order may be an odd lot, round lot or mixed lot.

[11] In the RPI Approval Order, the Commission also granted the Exchange's request for exemptive relief from the Sub-Penny Rule. *See* RPI Approval Order, *supra* note 3, at 71658. In conjunction with this proposal to make the Program Permanent, the Exchange has submitted a separate written request for exemptive relief from the Sub-Penny Rule. *See* Letter from Adrian Griffith, Assistant General Counsel, Cboe, to Vanessa Countryman, Secretary, Securities and Exchange Commission dated September 23, 2019.

[12] *See* Notice, *supra* note 4, at 45579–45599.

[13] *See id.* at 45575.

[14] *See id.* at 45579.

[15] *See id.*

[16] A DID statistical technique allows studying the differential effect of a treatment on data measured between a treatment group and a control group. The two groups are measured during two or more different time periods, usually a period before ''treatment'' and at least one time period after ''treatment,'' that is, a time period after which the treatment group is impacted but the control group is not. For each group, the difference between a measure in the pre-treatment and the treatment period is computed. Those differences for a measure for the two groups are then compared to each other by taking the difference between them.

[17] *See id.* at 45585–86 for a full description of the Exchange's methodology.

[18] *See id.* at 45586.

[19] *See id.*

[20] *See id.*

[21] *See id.*

treatment periods, however the Exchange stated that these observations could not necessarily be attributed to the Program, but did support a conclusion that the Program did not result in wider spreads.[22]

The Exchange also analyzed available size and found a decrease in the average bid and ask size on BYX in treatment securities observed from 2017–2018 with less liquid securities relative to the control group—6.54 round lots on the bid side and 13.22 round lots on the ask side.[23] The Exchange stated that it believes these changes may have been caused by factors unrelated to the Program and noted that the average BYX bid and ask sizes materially increased during the course of the pilot for securities in both the treatment and control groups.[24] The Exchange concluded that the regression results are consistent with a finding that the Program did not materially harm depth on BYX.[25]

Overall, the based on its analysis, including its DID analysis, as well as the small size of the Program, the Exchange concluded that the Program did not have a negative impact on market quality.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to make permanent the Program, Exchange Rule 11.24, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[26] In particular, the Commission finds that the proposed rule change is consistent with Sections 6(b)(5)[27] and 6(b)(8)[28] of the Exchange Act. Section 6(b)(5) of the Exchange Act requires that the rules of a national securities exchange be designed, among other things, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Exchange Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission approved the Program on a pilot basis to allow the Exchange and market participants to gain valuable practical experience with the Program during the pilot period, and to allow the Commission to determine whether modifications to the Program were necessary or appropriate prior to any Commission decision to approve or disapprove the Program on a permanent basis. The Program's pilot period was originally scheduled to end on January 11, 2014, and the Exchange filed to extend the operation of the pilot on several occasions.[29] The pilot is now set to expire on September 30, 2019, and the Exchange proposes to make the Program permanent.

As set forth in the RPI Approval Order, the Exchange agreed to provide the Commission with a significant amount of data to assist the Commission's evaluation of the Program prior to any permanent approval of the Program.[30] Specifically, the Exchange represented that it would ''produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.''[31] The Commission expected the Exchange to monitor the scope and operation of the Program and study the data produced during that time with respect to such issues.[32]

After careful consideration, the Commission believes that the Exchange's Program data and analysis about price improvement for retail investors and the DID analysis support the Exchange's conclusion that the Program provides meaningful price improvement to retail investors on a regulated exchange venue and has not demonstrably caused harm to the broader market. As noted above, the Exchange demonstrated that during the operation of the Program, retail orders received price improvement on the Exchange. Furthermore, in undertaking the DID analysis, the Exchange examined whether spreads on the Exchange widened to the detriment of the broader market, and concluded that they did not.[33] Based on the foregoing, and after careful consideration of the Exchange's analysis of the data generated by the Program, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act.

IV. Limited Exemption from the Sub-Penny Rule

Pursuant to its authority under Rule 612(c) of Regulation NMS,[34] the Commission hereby grants the Exchange a limited exemption from the Sub-Penny Rule to operate the Program. For the reasons discussed below, the Commission determines that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.

When the Commission adopted the Sub-Penny Rule in 2005, the Commission identified a variety of problems caused by sub-pennies that the Sub-Penny Rule was designed to address:

- If investors' limit orders lose execution priority for a nominal amount, investors may over time decline to use them, thus depriving the markets of liquidity.
- When market participants can gain execution priority for a nominal amount, important customer protection rules such as exchange priority rules and the Manning Rule[35] could be undermined.
- Flickering quotations that can result from widespread sub-penny pricing could make it more difficult for broker-dealers to satisfy their best execution obligations and other regulatory responsibilities.
- Widespread sub-penny quoting could decrease market depth and lead to higher transaction costs.

[22] *See id.* at 45588.

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78f(b)(8).

[29] *See* Securities Exchange Act Release Nos. 71249 (January 7, 2014), 79 FR 2229 (January 13, 2014) (SR–BYX–2014–001); 74111 (January 22, 2015), 80 FR 4598 (January 28, 2015) (SR–BYX–2015–05); 76965 (January 22, 2016), 81 FR 4682 (January 27, 2016) (SR–BYX–2016–01); 78180 (June 28, 2016), 81 FR 43306 (July 1, 2016) (SR–BatsBYX–2016–15); 81368 (August 10, 2017), 82 FR 38960 (August 16, 2017) (SR–BatsBYX–2017–18); 84830 (December 17, 2018), 83 FR 65769 (December 21, 2018) (SR–CboeBYX–2018–025); 86206 (June 26, 2019), 84 FR 31650 (July 2, 2019) (SR–CboeBYX–2019–010).

[30] *See* RPI Approval Order, *supra* note 3, at 71657.

[31] *See id.*

[32] *See id.*

[33] *See supra* notes 21 and 22 and accompanying text. The Commission also notes that it recently approved on a permanent basis two other exchange's substantially similar retail price improvement program based on a similar type of DID analysis. *See* Securities Exchange Act Release Nos. 85160 (February 15, 2019), 84 FR 5754 (February 22, 2019) (SR–NYSE–2018–28) (approving the New York Stock Exchange's Retail Liquidity Program on a permanent basis and granting a limited exemption to the Sub-Penny Rule); and 86194 (June 25, 2019), 84 FR 31373 (July 1, 2019) (approving the Nasdaq BX's Retail Liquidity Program on a permanent basis and granting a limited exemption to the Sub-Penny Rule).

[34] 17 CFR 242.612(c).

[35] *See* Financial Industry Regulatory Authority Rule 5320 (Prohibition Against Trading Ahead of Customer Orders).

• Decreasing depth at the inside could cause institutions to rely more on execution alternatives away from the exchanges, potentially increasing fragmentation in the securities markets.[36]

The Commission believes that the limited exemption granted today should continue to promote competition between exchanges and OTC market makers in a manner that is reasonably designed to minimize the problems that the Commission identified when adopting the Sub-Penny Rule. Under the Program, sub-penny prices will not be disseminated through the consolidated quotation data stream, which should avoid quote flickering and its reduced depth at the inside quotation.

Furthermore, the Commission does not believe that granting this limited exemption and approving the proposal would reduce incentives for market participants to display limit orders. As noted in the RPI Approval Order, market participants that displayed limit orders at the time were not able to interact with marketable retail order flow because that order flow was almost entirely routed to internalizing OTC market makers that offered sub-penny executions.[37] The Program has attracted a small volume from the OTC market makers. As a result, enabling the Exchange to continue to compete for retail order flow through the Program should not materially detract from the current incentives to display limit orders, while potentially resulting in greater order interaction and price improvement for marketable retail orders on a public national securities exchange. To the extent that the Program may raise Manning and best execution issues for broker-dealers, these issues are already presented by the existing practices of OTC market makers.

This permanent and limited exemption from the Sub-Penny Rule is limited solely to the operation of the Program by the Exchange. This exemption does *not* extend beyond the scope of Exchange Rule 11.24. In addition, this exemption is conditioned on the Exchange continuing to conduct the Program, in accordance with Exchange Rule 11.24 and substantially as described in the Exchange's request for exemptive relief and the proposed rule change.[38] Any changes in Exchange Rule 11.24 may cause the Commission to reconsider this exemption.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[39] that the proposed rule change (SR–CboeBYX–2019–014) be, and it hereby is, approved.

It is further ordered that, pursuant to Rule 612(c) under Regulation NMS, that the Exchange shall be exempt from Rule 612(a) of Regulation NMS with respect to the operation of the Program as set forth in Exchange Rule 11.24 as described herein.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21597 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[36] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Adopting Order for Regulation NMS).

[37] *See* RPI Approval Order, *supra* note 3, at 71658.

[38] *See supra* note 9.

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12) and 17 CFR 200.30–3(a)(83).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87160; File No. SR–NASDAQ–2019–078]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay the Protocol "Ouch To Trade Options"

September 30, 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 September 17, 2019, The Nasdaq Stock Market LLC ("Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the protocol "Ouch to Trade Options" or "OTTO" on The Nasdaq Options Market LLC ("NOM").

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq filed a rule change[3] which adopted a new protocol "Ouch to Trade Options" or "OTTO"[4] and proposed to rename and modify the current OTTO protocol as "Quote Using Orders" or "QUO."[5] The Exchange subsequently filed a rule change to amend Chapter VI, Section 6(e), titled "Detection of Loss of Communication" which describes the impact to NOM protocols in the event of a loss of a communication. The Exchange accounted for both the new OTTO and renamed and modified QUO within this rule. Similarly, the Exchange amended Chapter VI, Section 8, "Nasdaq Opening and Halt Cross" to account for the new OTTO and renamed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83888 (August 20, 2018), 83 FR 42954 (August 24, 2018) (SR–NASDAQ–2018–069) ("Prior Rule Change"). In the Prior Rule Change the Exchange stated that it would issue an Options Trader Alert introducing the new OTTO protocol in Q4 of 2018.

[4] As modified by the Prior Rule Change, OTTO is an interface that allows Participants and their Sponsored Customers to connect, send, and receive messages related to orders to and from the Exchange. Features include the following: (1) Options symbol directory messages (*e.g.,* underlying); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) order messages; and (6) risk protection triggers and cancel notifications. *See* NOM Rules at Chapter VI, Section 21(a)(i)(C).

[5] QUO is an interface that allows NOM Market Makers to connect, send, and receive messages related to single-sided orders to and from the Exchange. Order Features include the following: (1) Options symbol directory messages (*e.g.,* underlying); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) order messages; and (6) risk protection triggers and cancel notifications. Orders submitted by NOM Market Makers over this interface are treated as quotes. *See* NOM Rules at Chapter VI, Section 21(a)(i)(D).

and modified QUO within this rule. Finally, the Exchange amended Chapter VI, Section 19, ''Data Feeds and Trade Information'' to amend ''OTTO DROP'' to ''QUO DROP'' and noted within Chapter VI, Section 18(a)(1) related to Order Price Protection rule or ''OPP'' that OPP shall not apply to orders entered through QUO.[6]

Both the Prior Rule Change and the Subsequent Rule Change indicated the aforementioned rule changes would be implemented for QUO and OTTO in Q4 of 2018 with the date announced via an Options Traders Alert. The Exchange filed a rule change implementing QUO and delaying the introduction of the OTTO functionality until Q3 2019 by announcing the date of implementation via an Options Traders Alert.[7] The Exchange further delayed the implementation of OTTO functionality until Q3 2019.[8] At this time, the Exchange proposes to further delay the implementation of OTTO functionality until Q2 2020. The Exchange will issue an Options Trader Alert notifying Participants when this functionality will be available.

The Exchange proposes this delay to allow the Exchange additional time to implement this functionality and for Participants to sign-up for this new port and test with the Exchange.

2. Statutory Basis

The Exchange believes that its proposal 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 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 by delaying the OTTO functionality to allow the Exchange additional time to implement this functionality and for Participants to sign-up for this new port and test with the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange's proposal to delay the adoption of the OTTO functionality does not impose an undue burden on competition. Delaying the OTTO functionality will allow the Exchange additional time to implement this functionality and for Participants to sign-up for this new port and test with the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

A proposed rule change filed under Rule 19b–4(f)(6)[11] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the waiver will allow the Exchange additional time to implement this functionality and for Participants to sign-up for this new port and test with the Exchange and ensure a successful implementation of the OTTO. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change as operative upon filing.[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 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–NASDAQ–2019–078 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2019–078. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2019–078 and

[6] *See* Securities Exchange Act Release No. 84559 (November 9, 2019), 83 FR 57774 (November 16, 2018) (SR–NASDAQ–2018–085) (''Subsequent Rule Change'').

[7] *See* Securities Exchange Act Release No. 84723 (December 4, 2018), 83 FR 63692 (December 11, 2018) (SR–NASDAQ–2018–097). The Exchange proposed to immediately implement QUO as of the effectiveness of SR–NASDAQ–2018–097 and delay the implementation of OTTO by issuing an Options Trader Alert announcing the implementation date in Q1 2019. The QUO implementation became effective upon filing on November 26, 2018.

[8] *See also* Securities Exchange Act Release No. 85386 (March 21, 2019), 84 FR 11597 (March 27, 2019) (SR–NASDAQ–2019–016).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] 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).

should be submitted on or before October 25, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21587 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87153; File No. SR–NYSEArca–2019–67]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Period for the Exchange Retail Liquidity Program Until October 31, 2019

September 30, 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 September 26, 2019, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot period for the Exchange's Retail Liquidity Program (the ''Retail Liquidity Program'' or the ''Program''), which is currently scheduled to expire on September 30, 2019, until October 31, 2019. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the pilot period of the Retail Liquidity Program, currently scheduled to expire on September 30, 2019,[3] until October 31, 2019.

Background

In December 2013, the Commission approved the Retail Liquidity Program on a pilot basis.[4] The Program is designed to attract retail order flow to the Exchange, and allows such order flow to receive potential price improvement. The Program is currently limited to trades occurring at prices equal to or greater than $1.00 per share. Under the Program, Retail Liquidity Providers (''RLPs'') are able to provide potential price improvement in the form of a non-displayed order that is priced better than the Exchange's best protected bid or offer (''PBBO''), called a Retail Price Improvement Order (''RPI''). When there is an RPI in a particular security, the Exchange disseminates an indicator, known as the Retail Liquidity Identifier, indicating that such interest exists. Retail Member Organizations (''RMOs'') can submit a Retail Order to the Exchange, which would interact, to the extent possible, with available contra-side RPIs.

The Retail Liquidity Program was approved by the Commission on a pilot basis. Pursuant to NYSE Arca Rule 7.44–E(m), the pilot period for the Program is scheduled to end on September 30, 2019.

Proposal To Extend the Operation of the Program

The Exchange established the Retail Liquidity Program in an attempt to attract retail order flow to the Exchange by potentially providing price improvement to such order flow. The Exchange believes that the Program promotes competition for retail order flow by allowing Exchange members to submit RPIs to interact with Retail Orders. Such competition has the ability to promote efficiency by facilitating the price discovery process and generating additional investor interest in trading securities, thereby promoting capital formation. The Exchange believes that extending the pilot is appropriate because it will allow the Exchange and the Commission additional time to analyze data regarding the Program that the Exchange has committed to provide and consider the Exchange's filing to make the filing permanent.[5] As such, the Exchange believes that it is appropriate to extend the current operation of the Program.[6] Through this filing, the Exchange seeks to amend NYSE Arca Rule 7.44–E(m) and extend the current pilot period of the Program until October 31, 2019.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that extending the pilot period for the Retail Liquidity Program is consistent with these principles because the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders. Additionally, as previously stated, the competition promoted by the Program may facilitate the price discovery process and potentially generate additional investor interest in trading securities. The extension of the pilot period will allow the Commission and the Exchange to continue to monitor the Program for its potential effects on public price

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86198 (June 26, 2019), 84 FR 31648 (July 2, 2019) (SR–NYSEArca–2019–45).

[4] *See* Securities Exchange Act Release No. 71176 (December 23, 2013), 78 FR 79524 (December 30, 2013) (SR–NYSEArca–2013–107) (''RLP Approval Order'').

[5] *See id.,* 78 FR at 79529; *see also* Securities Exchange Act Release No. 86870 (September 4, 2019), 84 FR 47575 (September 10, 2019) (SR–NYSEArca–2019–63) (filing to make Rule 7.44–E, which sets forth the Exchange's Retail Liquidity Program, permanent).

[6] Concurrently with this filing, the Exchange has submitted a request for an extension of the exemption under Regulation NMS Rule 612 previously granted by the Commission that permits it to accept and rank the undisplayed RPIs. *See* Letter from Martha Redding, Asst. Corporate Secretary, NYSE Group, Inc. to Secretary, Securities and Exchange Commission, dated September 26, 2019.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

discovery, and on the broader market structure.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change simply extends an established pilot program for an additional month, thus allowing the Retail Liquidity Program to enhance competition for retail order flow and contribute to the public price discovery process.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were 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 [9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) [13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because waiver would allow the pilot period to continue uninterrupted after its current expiration date of September 30, 2019, thereby avoiding any potential investor confusion that could result from temporary interruption in the pilot program. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

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–NYSEArca–2019–67 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–2019–67. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2019–67, and should be submitted on or before October 25, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21591 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement in this case.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87167; File No. SR–PEARL–2019–23]

Self-Regulatory Organizations; MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–PEARL–2019–23) to modify the amount

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–PEARL–2019–23; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–PEARL–2019–23.

II. Description of the Proposed Rule Change

The Exchange proposes to amend the amount of its ORF from $0.0028 to $0.0020 per contract.[8] The Exchange assesses the ORF to each MIAX PEARL member for all options transactions that are cleared or ultimately cleared by the member which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of members' customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to decrease the amount of its ORF ''[i]n light of recent market volumes on the Exchange and changes to the Exchange's regulatory costs.'' [11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements'' [15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs.'' [19] In determining the amount of the proposed ORF, the Exchange said that it considered: (1) Historical and projected volume changes and shifts in the industry and on the Exchange, and (2) changes to the Exchange's regulatory cost structure.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because the fees are imposed on ''all members on all their transactions that clear as customer at OCC'' and therefore members are charged based on the amount of customer business they conduct.[21] In addition, the Exchange stated that the regulatory costs relating to monitoring members with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.'' [26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with

[3] *See* Securities Exchange Act Release No. 86607 (August 8, 2019), 84 FR 40441 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40441.

[9] *See id.* The ORF is collected by OCC on behalf of MIAX PEARL from either (1) a member that was the ultimate clearing firm for the transaction or (2) a non-member that was the ultimate clearing firm where a member was the executing clearing firm for the transaction. *See id.*

[10] *Id.* at 40442.

[11] *See id.* at 40443.

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 15 U.S.C. 78s(b)(1).

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40443.

[20] *See id.* at 40441.

[21] *See id.* at 40443.

[22] *See id.* at 40443–44.

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[29] and 19(b)(2)(B) of the Act[30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities;''[32] (emphasis added);
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers''[33] (emphasis added); and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].''[34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder. . .is on the [SRO] that proposed the rule change.''[38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8,

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . . to satisfy the Exchange Act standards'').

[36] *See* Notice, *supra* note 3, at 40444. *See also* SIFMA Letter, *supra* note 6, at 2.

[37] *See* SIFMA Letter, *supra* note 6, at 2.

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–PEARL–2019–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–PEARL–2019–23. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–PEARL–2019–23 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–PEARL–2019–23, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

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[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87172; File No. SR–CboeEDGX–2019–051]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe EDGX Exchange, Inc. (''EDGX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–CboeEDGX–2019–051) to modify the amount of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–CboeEDGX–2019–051; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–CboeEDGX–2019–051.

II. Description of the Proposed Rule Change

The Exchange proposes to increase the amount of its ORF from $0.0001 to $0.0002 per contract.[8] The Exchange assesses the ORF to each member for options transactions cleared by the member that are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of member's customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to increase the amount of its ORF ''based on the Exchange's estimated projections for its regulatory costs, balanced with recent options volumes.'' [11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86611 (August 8, 2019), 84 FR 40447 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40447.

[9] *See id.* The ORF is collected by OCC on behalf of the Exchange from either the clearing member or the non-clearing member that ultimately clears the transaction. *See id.*

[10] *See id.* at 40447–48.

[11] *See id.* at 40447.

[12] 15 U.S.C. 78s(b)(3)(C).

Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements'' [15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''is necessary to offset the anticipated regulatory costs, [ ] which, in combination with other regulatory fees and fines, still is not expected to exceed the Exchange's total regulatory costs.'' [19] In determining the amount of the proposed ORF, the Exchange said that it considered recent options volume, anticipated regulatory costs, and projected regulatory fees and fines.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because higher fees are assessed ''to those members that require more Exchange regulatory services based on the amount of customer options business they conduct.'' [21] In addition, the Exchange stated that the regulatory costs relating to monitoring members with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.'' [26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C) [29] and 19(b)(2)(B) of the Act [30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and

[13] 15 U.S.C. 78s(b)(1).

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40448.

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

other persons using its facilities;'' [32] (emphasis added);

• Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers'' [33] (emphasis added); and

• Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or elaborate on the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–CboeEDGX–2019–051 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–CboeEDGX–2019–051. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . . to satisfy the Exchange Act standards'').

[36] *See* Notice, *supra* note 3, at 40448. *See also* SIFMA Letter, *supra* note 6, at 2.

[37] *See* SIFMA Letter, *supra* note 6, at 2.

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–CboeEDGX–2019–051 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–CboeEDGX–2019–051, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21599 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87169; File No. SR–MIAX–2019–35]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, Miami International Securities Exchange, LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–MIAX–2019–35) to modify the amount of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–MIAX–2019–35; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–MIAX–2019–35.

II. Description of the Proposed Rule Change

The Exchange proposes to amend the amount of its ORF from $0.0029 to $0.0020 per contract.[8] The Exchange assesses the ORF to each MIAX member for all options transactions that are cleared or ultimately cleared by the member which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of members' customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to decrease the amount of its ORF ''[i]n light of recent market volumes on the Exchange and changes to the Exchange's regulatory costs.'' [11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements'' [15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs.'' [19] In determining the amount of the proposed ORF, the Exchange said that it considered: (1) Historical and projected volume changes and shifts in the industry and on the Exchange, and (2) changes to the Exchange's regulatory cost structure.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86608 (August 8, 2019), 84 FR 40456 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40456.

[9] *See id.* The ORF is collected by OCC on behalf of MIAX from either (1) a member that was the ultimate clearing firm for the transaction or (2) a non-member that was the ultimate clearing firm where a member was the executing clearing firm for the transaction. *See id.* at 40456–57.

[10] *Id.* at 40457.

[11] *See id.* at 40458.

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 15 U.S.C. 78s(b)(1).

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40458.

[20] *See id.* at 40456.

discriminatory because the fees are imposed on ''all members on all their transactions that clear as customer at OCC'' and therefore members are charged based on the amount of customer business they conduct.[21] In addition, the Exchange stated that the regulatory costs relating to monitoring members with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.'' [26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C) [29] and 19(b)(2)(B) of the Act [30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities;'' [32] (emphasis added);
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers'' [33] (emphasis added); and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is

[21] *See id.* at 40458–59.

[22] *See id.* at 40459.

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . . to satisfy the Exchange Act standards'').

[36] *See* Notice, *supra* note 3, at 40459. *See also* SIFMA Letter, *supra* note 6, at 2.

assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–MIAX–2019–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–MIAX–2019–35. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–MIAX–2019–35 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–MIAX–2019–35, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

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[37] *See* SIFMA Letter, *supra* note 6, at 2.

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87166; File No. SR–CboeBYX–2019–012]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BYX fee schedule to introduce a Small Retail Broker Distribution Program (the ''Program''). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207 (''Notice'').

[5] 15 U.S.C. 78s(b)(3)(C).

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to introduce a pricing program that would allow certain Distributors [6] to purchase top of book market data from the Exchange at discounted fees. Currently, the Exchange offers two top of book data feeds that provide quote and trade information. First, the Exchange charges a fee of $1,000 per month for external distribution of BYX Top Feed [7] and a fee of $1 per month for each Professional User and $0.025 per month for each Non-Professional User.[8] Second, the Exchange charges $5,000 per month for external distribution of Cboe One Summary Feed [9] and a Data Consolidation Fee of $1,000 per month. The Exchange also charges a fee $10 per month for each Professional User and $0.25 for each Non-Professional User.

Under the Exchange's proposal, Distributors that qualify for the Program would be charged a discounted fee of $250 per month for the distribution of BYX Top and $3,500 per month for the distribution of Cboe One Summary Feed. Distributors that qualify for the Program would also be charged a discounted Data Consolidation Fee of $350 for Cboe One Summary Feed. The Exchange would continue to charge the current Professional and Non-Professional User fees for both data feeds.

In order to qualify for the Program, a Distributor must meet the following criteria for each respective data feed: (i) Distributor is a broker-dealer distributing BYX Top Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (ii) more than 50% of the Distributor's total subscriber population must consist of Non-Professional subscribers, inclusive of any subscribers not receiving BYX Top Data/Cboe One Summary Feed; and (iii) Distributor distributes BYX Top Data/Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[10] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[11] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

The Exchange asserts that the proposed fees for the Program ''are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from BYX and its affiliated exchanges to their retail investor clients.'' [12] The Exchange also asserts that the ''proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors.'' [13] Finally, the Exchange states that while the proposed fees are limited to smaller firms that distribute data to no more than 5,000 Non-Professional data users, it does not believe that the proposed fees for the Program are inequitable or unfairly discriminatory.[14]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[15] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [16]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [17] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [18] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[19]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[20]

Therefore, the Commission finds that it is appropriate in the public interest,

[6] A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. *See* BYX Fee Schedule.

[7] BYX Top is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered in the Exchange. *See* Notice, *supra* note 4, 84 FR at 43207.

[8] A ''Professional User'' of an Exchange market data product is any user other than a Non-Professional User. *See* BYX Fee Schedule. A ''Non-Professional User'' of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. *Id.*

[9] Cboe One Summary Feed is a data feed that offers top of book quotations and execution information based on equity orders submitted to the Exchange and its affiliated equities exchanges, *i.e.,* Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe EDGA Exchange, Inc. *See* Notice, *supra* note 4, 84 FR at 43207.

[10] 15 U.S.C. 78s(b)(3)(C).

[11] 15 U.S.C. 78s(b)(1).

[12] *See* Notice, *supra* note 4, 84 FR at 43210.

[13] *Id.*

[14] *Id.*

[15] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[16] *See id.*

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(8).

[20] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[21]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)[22] and 19(b)(2)(B) of the Act[23] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[24] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,''[25]
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,''[26] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].''[27]

As noted above, the proposal establishes new discounted fees for Distributors of the Exchange's two top of book data feeds. The Commission notes that the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price top of book data products is constrained by (i) competition among other national securities exchanges that offer similar data products to their customers; and (ii) real-time consolidated data disseminated by the securities information processors.[28] The Exchange also states that the proposed Program would reduce fees charged to small retail brokers that provide access to two top of book data products, the BYX Top Feed and the Cboe One Summary Feed.[29] However, the rationale provided does not address how the proposed fee is an equitable allocation of reasonable fees other than to note that large brokers and vendors currently benefit from lower fees and enterprise licenses and that the proposed fees would ''ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing . . .''[30]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[31] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[32] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[33]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[34]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[35]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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–CboeBYX–2019–012 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–CboeBYX–2019–012. 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

[21] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 15 U.S.C. 78s(b)(2)(B).

[25] 15 U.S.C. 78f(b)(4).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78f(b)(8).

[28] *See* Notice, *supra* note 4, 84 FR at 43211.

[29] *See id.* at 43209.

[30] *See id.* at 43211.

[31] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[32] *See id.*

[33] *See id.*

[34] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[35] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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–CboeBYX–2019–012 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[36] that File No. SR–CboeBYX–2019–012 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changeshould be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21588 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[36] 15 U.S.C. 78s(b)(3)(C).

[37] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87171; File No. SR–C2–2019–018]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe C2 Exchange, Inc. (''C2'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–C2–2019–018) to modify the amount of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–C2–2019–018; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–C2–2019–018.

II. Description of the Proposed Rule Change

The Exchange proposes to increase the amount of its ORF from $0.0012 to $0.0013 per contract.[8] The Exchange assesses the ORF to each Trading Permit Holder (''TPH'') for options transactions cleared by the TPH that are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of TPH's customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to increase the amount of its ORF ''based on the Exchange's estimated projections for its regulatory costs, balanced with recent options volumes.'' [11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements'' [15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86605 (August 8, 2019), 84 FR 40452 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40453.

[9] *See id.* The ORF is collected by OCC on behalf of the Exchange from either the Clearing Trading Permit Holder (''CTPH'') or the non-CTPH that ultimately clears the transaction. *See id.*

[10] *See id.* at 40453.

[11] *See id.*

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 15 U.S.C. 78s(b)(1).

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''is necessary to offset the anticipated regulatory costs, [ ] which, in combination with other regulatory fees and fines, still is not expected to exceed the Exchange's total regulatory costs.''[19] In determining the amount of the proposed ORF, the Exchange said that it considered recent options volume, anticipated regulatory costs, and projected regulatory fees and fines.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because higher fees are assessed ''to those TPHs that require more Exchange regulatory services based on the amount of customer options business they conduct.''[21] In addition, the Exchange stated that the regulatory costs relating to monitoring TPHs with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring TPHs that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.''[26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[29] and 19(b)(2)(B) of the Act[30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities;''[32] (emphasis added);
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers''[33] (emphasis added); and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].''[34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40453.

[20] *See id.*

[21] *See id.* at 40453–54

[22] *See id.* at 40454.

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . . to satisfy the Exchange Act standards'').

options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or elaborate on the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder. . .is on the [SRO] that proposed the rule change.'' [38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–C2–2019–018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–C2–2019–018. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–C2–2019–018 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–C2–2019–018, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21586 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[36] *See* Notice, *supra* note 3, at 40454. *See also* SIFMA Letter, *supra* note 6, at 2.

[37] *See* SIFMA Letter, *supra* note 6, at 2.

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87163; File No. SR–CboeEDGX–2019–048]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGX fee schedule to introduce a Small Retail Broker Distribution Program (the ''Program''). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to introduce a pricing program that would allow certain Distributors[6] to purchase top of book market data from the Exchange at discounted fees. Currently, the Exchange offers two top of book data feeds that provide quote and trade information. First, the Exchange charges a fee of $1,500 per month for external distribution of EDGX Top Feed[7] and a fee of $4 per month for each Professional User and $0.10 per month for each Non-Professional User.[8] Second, the Exchange charges $5,000 per month for external distribution of Cboe One Summary Feed[9] and a Data Consolidation Fee of $1,000 per month. The Exchange also charges a fee $10 per month for each Professional User and $0.25 for each Non-Professional User.

Under the Exchange's proposal, Distributors that qualify for the Program would be charged a discounted fee of $750 per month for the distribution of EDGX Top and $3,500 per month for the distribution of Cboe One Summary Feed. Distributors that qualify for the Program would also be charged a discounted Data Consolidation Fee of $350 for Cboe One Summary Feed. The Exchange would continue to charge the current Professional and Non-Professional User fees for both data feeds.

In order to qualify for the Program, a Distributor must meet the following criteria for each respective data feed: (i) Distributor is a broker-dealer distributing EDGX Top Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (ii) more than 50% of the Distributor's total subscriber population must consist of Non-Professional subscribers, inclusive of any subscribers not receiving EDGX Top Data/Cboe One Summary Feed; and (iii) Distributor distributes EDGX Top Data/Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[10] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[11] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

The Exchange asserts that the proposed fees for the Program ''are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from EDGX and its affiliated exchanges to their retail investor clients.''[12] The Exchange also asserts that the ''proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors.''[13] Finally, the Exchange states that while the proposed fees are limited to smaller firms that distribute data to no more than 5,000 Non-Professional data users, it does not believe that the proposed fees for the Program are inequitable or unfairly discriminatory.[14]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[15] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.''[16]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86678 (August 14, 2019), 84 FR 43246 (''Notice'').

[5] 15 U.S.C. 78s(b)(3)(C).

[6] A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. *See* EDGX Fee Schedule.

[7] EDGX Top is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered in the Exchange. *See* Notice, *supra* note 4, 84 FR at 43246.

[8] A ''Professional User'' of an Exchange market data product is any user other than a Non-Professional User. *See* EDGX Fee Schedule. A ''Non-Professional User'' of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. *Id.*

[9] Cboe One Summary Feed is a data feed that offers top of book quotations and execution information based on equity orders submitted to the Exchange and its affiliated equities exchanges, *i.e.,* Cboe EDGA Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe BYX Exchange, Inc. *See* Notice, *supra* note 4, 84 FR at 43246.

[10] 15 U.S.C. 78s(b)(3)(C).

[11] 15 U.S.C. 78s(b)(1).

[12] *See* Notice, *supra* note 4, 84 FR at 43248.

[13] *Id.*

[14] *See id.* at 43249.

[15] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[16] *See id.*

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[17] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[18] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[19]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[20]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[21]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)[22] and 19(b)(2)(B) of the Act[23] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[24] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,''[25]
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,''[26] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].''[27]

As noted above, the proposal establishes new discounted fees for Distributors of the Exchange's two top of book data feeds. The Commission notes that the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price top of book data products is constrained by (i) competition among other national securities exchanges that offer similar data products to their customers; and (ii) real-time consolidated data disseminated by the securities information processors.[28] The Exchange also states that the proposed Program would reduce fees charged to small retail brokers that provide access to two top of book data products, the EDGX Top Feed and the Cboe One Summary Feed.[29] However, the rationale provided does not address how the proposed fee is an equitable allocation of reasonable fees other than to note that large brokers and vendors currently benefit from lower fees and enterprise licenses and that the proposed fees would ''ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing . . .''[30]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[31] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[32] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[33]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[34]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(8).

[20] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[21] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 15 U.S.C. 78s(b)(2)(B).

[25] 15 U.S.C. 78f(b)(4).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78f(b)(8).

[28] *See* Notice, *supra* note 4, 84 FR at 43247–43248.

[29] *See id.* at 43248.

[30] *Id.*

[31] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[32] *See id.*

[33] *See id.*

[34] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

request for an opportunity to make an oral presentation.[35]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGX–2019–048 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2019–048. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2019–048 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[36] that File No. SR–CboeEDGX–2019–048 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21600 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[35] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[36] 15 U.S.C. 78s(b)(3)(C).

[37] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87165; File No. SR–CboeEDGA–2019–013]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGA fee schedule to introduce a Small Retail Broker Distribution Program (the ''Program''). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to introduce a pricing program that would allow certain Distributors[6] to purchase the Cboe One Summary Feed[7] from the Exchange at discounted fees. Currently, the Exchange charges $5,000 per month for external distribution of Cboe One Summary Feed, and a Data Consolidation Fee of $1,000 per month. The Exchange also charges a fee $10 per month for each Professional User and $0.25 for each Non-Professional User.[8]

Under the Exchange's proposal, Distributors that qualify for the Program would be charged a discounted fee of $3,500 per month for the distribution of Cboe One Summary Feed. Distributors that qualify for the Program would also be charged a discounted Data Consolidation Fee of $350 for Cboe One

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86676 (August 14, 2019), 84 FR 43218 (''Notice'').

[5] 15 U.S.C. 78s(b)(3)(C).

[6] A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. *See* EDGA Fee Schedule.

[7] Cboe One Summary Feed is a data feed that offers top of book quotations and execution information based on equity orders submitted to the Exchange and its affiliated equities exchanges, *i.e.,* Cboe EDGX Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe BYX Exchange, Inc. *See* Notice, *supra* note 4, 84 FR at 43218.

[8] A ''Professional User'' of an Exchange market data product is any user other than a Non-Professional User. *See* EDGA Fee Schedule. A ''Non-Professional User'' of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. *Id.*

Summary Feed. The Exchange would continue to charge the current Professional and Non-Professional User fees for Cboe One Summary Feed.

In order to qualify for the Program, a Distributor must meet the following criteria: (i) Distributor is a broker-dealer distributing Cboe One Summary Feed Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (ii) more than 50% of the Distributor's total subscriber population must consist of Non-Professional subscribers, inclusive of any subscribers not receiving Cboe One Summary Feed; and (iii) Distributor distributes Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[9] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[10] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

The Exchange asserts that the proposed fees for the Program ''are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from EDGA and its affiliated exchanges to their retail investor clients.'' [11] The Exchange also asserts that the ''proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors.'' [12] Finally, the Exchange states that while the proposed fees are limited to smaller firms that distribute data to no more than 5,000 Non-Professional data users, it does not believe that the proposed fees for the Program are inequitable or unfairly discriminatory.[13]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [15]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[19]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[20]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C) [21] and 19(b)(2)(B) of the Act [22] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[23] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,'' [24]
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,'' [25] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [26]

As noted above, the proposal establishes new discounted fees for Distributors of the Exchange's Cboe One Summary data feed. The Commission notes that the Exchange's statements in support of the proposed rule change are

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 15 U.S.C. 78s(b)(1).

[11] *See* Notice, *supra* note 4, 84 FR at 43220.

[12] *Id.*

[13] *See id.* at 43221.

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[20] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78f(b)(5).

[26] 15 U.S.C. 78f(b)(8).

general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price these products is constrained by (i) competition among other national securities exchanges that offer similar data products to their customers; and (ii) real-time consolidated data disseminated by the securities information processors.[27] The Exchange also states that the proposed Program would reduce fees charged to small retail brokers that provide access to the Cboe One Summary Feed.[28] However, the rationale provided does not address how the proposed fee is an equitable allocation of reasonable fees other than to note that large brokers and vendors currently benefit from lower fees and enterprise licenses and that the proposed fees would ''ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing . . . ''[29]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[30] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[31] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[32]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[33]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[34]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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–CboeEDGA–2019–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2019–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written 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–CboeEDGA–2019–013 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[35] that File No. SR–CboeEDGA–2019–013 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21596 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[27] *See* Notice, *supra* note 4, 84 FR at 43221.

[28] *See id.*

[29] *Id.*

[30] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[31] *See id.*

[32] *See id.*

[33] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[34] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[35] 15 U.S.C. 78s(b)(3)(C).

[36] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87164; File No. SR–CboeBZX–2019–069]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BZX fee schedule to introduce a Small Retail Broker Distribution Program (the ''Program''). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to introduce a pricing program that would allow certain Distributors[6] to purchase the Cboe One Summary Feed[7] from the Exchange at discounted fees. Currently, the Exchange charges $5,000 per month for external distribution of Cboe One Summary Feed, and a Data Consolidation Fee of $1,000 per month. The Exchange also charges a fee $10 per month for each Professional User and $0.25 for each Non-Professional User.[8]

Under the Exchange's proposal, Distributors that qualify for the Program would be charged a discounted fee of $3,500 per month for the distribution of Cboe One Summary Feed. Distributors that qualify for the Program would also be charged a discounted Data Consolidation Fee of $350 for Cboe One Summary Feed. The Exchange would continue to charge the current Professional and Non-Professional User fees for Cboe One Summary Feed.

In order to qualify for the Program, a Distributor must meet the following criteria: (i) Distributor is a broker-dealer distributing Cboe One Summary Feed Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (ii) more than 50% of the Distributor's total subscriber population must consist of Non-Professional subscribers, inclusive of any subscribers not receiving Cboe One Summary Feed; and (iii) Distributor distributes Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[9] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[10] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

The Exchange asserts that the proposed fees for the Program ''are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from BZX and its affiliated exchanges to their retail investor clients.''[11] The Exchange also asserts that the ''proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors.''[12] Finally, the Exchange states that while the proposed fees are limited to smaller firms that distribute data to no more than 5,000 Non-Professional data users, it does not believe that the proposed fees for the Program are inequitable or unfairly discriminatory.[13]

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.''[15]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86667 (August 14, 2019), 84 FR 43233 (''Notice'').

[5] 15 U.S.C. 78s(b)(3)(C).

[6] A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. *See* BZX Fee Schedule.

[7] Cboe One Summary Feed is a data feed that offers top of book quotations and execution information based on equity orders submitted to the Exchange and its affiliated equities exchanges, *i.e.,* Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe BYX Exchange, Inc. *See* Notice, *supra* note 4, 84 FR at 43233.

[8] A ''Professional User'' of an Exchange market data product is any user other than a Non-Professional User. *See* BZX Fee Schedule. A ''Non-Professional User'' of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. *Id.*

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 15 U.S.C. 78s(b)(1).

[11] *See* Notice, *supra* note 4, 84 FR at 43235.

[12] *Id.*

[13] *See id.* at 43236.

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

dealers;[17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[19]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[20]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)[21] and 19(b)(2)(B) of the Act[22] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[23] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,''[24]
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,''[25] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].''[26]

As noted above, the proposal establishes new discounted fees for Distributors of the Exchange's Cboe One Summary data feed. The Commission notes that the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price these products is constrained by (i) competition among other national securities exchanges that offer similar data products to their customers; and (ii) real-time consolidated data disseminated by the securities information processors.[27] The Exchange also states that the proposed Program would reduce fees charged to small retail brokers that provide access to the Cboe One Summary Feed.[28] However, the rationale provided does not address how the proposed fee is an equitable allocation of reasonable fees other than to note that large brokers and vendors currently benefit from lower fees and enterprise licenses and that the proposed fees would ''ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing . . .''[29]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[30] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[31] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[32]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[33]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[34]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[20] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[22] 15 U.S.C. 78s(b)(2)(B).

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78f(b)(5).

[26] 15 U.S.C. 78f(b)(8).

[27] *See* Notice, *supra* note 4, 84 FR at 43236.

[28] *See id.*

[29] *Id.*

[30] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[31] *See id.*

[32] *See id.*

[33] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[34] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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–CboeBZX–2019–069 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–CboeBZX–2019–069. 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–CboeBZX–2019–069 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[35] that File No. SR–CboeBZX–2019–069 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21593 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87168; File No. SR–EMERALD–2019–29]

Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–EMERALD–2019–29) to modify the amount of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–EMERALD–2019–29; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–EMERALD–2019–29.

II. Description of the Proposed Rule Change

The Exchange proposes to increase the amount of its ORF from $0.00060 to $0.0013 per contract.[8] The Exchange assesses the ORF to each MIAX Emerald member for all options transactions that are cleared or ultimately cleared by the member which are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of members' customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to increase the amount of its ORF ''[i]n light of recent market volumes on the Exchange and changes to the Exchange's regulatory costs.''[11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule

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[35] 15 U.S.C. 78s(b)(3)(C).

[36] 17 CFR 200.30–3(a)(57) and (58).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86606 (August 8, 2019), 84 FR 40449 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40449.

[9] *See id.* The ORF is collected by OCC on behalf of MIAX Emerald from either (1) a member that was the ultimate clearing firm for the transaction or (2) a non-member that was the ultimate clearing firm where a member was the executing clearing firm for the transaction. *See id.*

[10] *Id.* at 40450.

[11] *See id.* at 40451.

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 15 U.S.C. 78s(b)(1).

change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements'' [15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; [17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs.'' [19] In determining the amount of the proposed ORF, the Exchange said that it considered: (1) Historical and projected volume changes and shifts in the industry and on the Exchange, and (2) changes to the Exchange's regulatory cost structure.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because the fees are imposed on ''all members on all their transactions that clear as customer at OCC'' and therefore members are charged based on the amount of customer business they conduct.[21] In addition, the Exchange stated that the regulatory costs relating to monitoring members with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.'' [26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C) [29] and 19(b)(2)(B) of the Act [30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities;'' [32] (emphasis added);
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers'' [33] (emphasis added); and

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40451.

[20] *See id.* at 40449.

[21] *See id.* at 40451.

[22] *See id.*

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

• Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder. . .is on the [SRO] that proposed the rule change.'' [38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–EMERALD–2019–29 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–EMERALD–2019–29. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–EMERALD–2019–29 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . .to satisfy the Exchange Act standards'').

[36] *See* Notice, *supra* note 3, at 40451. *See also* SIFMA Letter, *supra* note 6, at 2.

[37] *See* SIFMA Letter, *supra* note 6, at 2.

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–EMERALD–2019–29, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21592 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87170; File No. SR–CBOE–2019–040]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, Cboe Exchange, Inc. (''Cboe'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–CBOE–2019–040) to modify the amount of its Options Regulatory Fee (''ORF'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86604 (August 8, 2019), 84 FR 40445 (August 14, 2019) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] *See* Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association (''SIFMA''), dated August 27, 2019 (''SIFMA Letter'').

Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) Temporarily suspending File No. SR–CBOE–2019–040; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR–CBOE–2019–040.

II. Description of the Proposed Rule Change

The Exchange proposes to increase the amount of its ORF from $0.0045 to $0.0046 per contract.[8] The Exchange assesses the ORF to each Trading Permit Holder (''TPH'') for options transactions cleared by the TPH that are cleared by the Options Clearing Corporation (''OCC'') in the ''customer'' range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of TPH's customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to increase the amount of its ORF ''based on the Exchange's estimated projections for its regulatory costs, balanced with recent options volumes.''[11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

[7] 15 U.S.C. 78s(b)(3)(C).

[8] *See* Notice, *supra* note 3, at 40445.

[9] *See id.* The ORF is collected by OCC on behalf of the Exchange from either the Clearing Trading Permit Holder (''CTPH'') or the non-CTPH that ultimately clears the transaction. *See id.*

[10] *See id.* at 40445–46.

[11] *See id.* at 40445.

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 15 U.S.C. 78s(b)(1).

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements''[15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[17] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF ''is necessary to offset the anticipated regulatory costs, [ ] which, in combination with other regulatory fees and fines, still is not expected to exceed the Exchange's total regulatory costs.''[19] In determining the amount of the proposed ORF, the Exchange said that it considered recent options volume, anticipated regulatory costs, and projected regulatory fees and fines.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because higher fees are assessed ''to those TPHs that require more Exchange regulatory services based on the amount of customer options business they conduct.''[21] In addition, the Exchange stated that the regulatory costs relating to monitoring TPHs with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring TPHs that

[14] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[15] *See id.*

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Notice, *supra* note 3, at 40446.

[20] *See id.*

[21] *See id.*

do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should ''include quantitative data showing anticipated revenues, costs and profitability'' and describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the ''customer'' range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its ''authority to act on activities occurring outside its own market.'' [26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C) [29] and 19(b)(2)(B) of the Act [30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities;'' [32] (emphasis added);
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be ''designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers'' [33] (emphasis added); and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the ''customer'' range and the costs of regulating activity that occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or elaborate on the ''material portion'' of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is ''much more labor-intensive'' and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, *e.g.,* customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the ''customer'' range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is

[22] *See id.*

[23] *See* SIFMA Letter, *supra* note 6, at 1–2.

[24] *See id.* at 2.

[25] *See id.*

[26] *See id.*

[27] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[28] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[32] 15 U.S.C. 78f(b)(4).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(b)(8).

[35] *See, e.g.,* SIFMA Letter, *supra* note 6, at 2 (arguing that the Exchange has ''not provided enough information . . . to satisfy the Exchange Act standards'').

[36] *See* Notice, *supra* note 3, at 40446. *See also* SIFMA Letter, *supra* note 6, at 2.

[37] *See* SIFMA Letter, *supra* note 6, at 2.

consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2019. Rebuttal comments should be submitted by November 8, 2019. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[42]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 No. SR–CBOE–2019–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–CBOE–2019–040. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR–CBOE–2019–040 and should be submitted on or before October 25, 2019. Rebuttal comments should be submitted by November 8, 2019.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR–CBOE–2019–040, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–21595 Filed 10–3–19; 8:45 am]

BILLING CODE 8011–01–P

[38] 17 CFR 201.700(b)(3).

[39] *See id.*

[40] *See id.*

[41] *See* 15 U.S.C. 78f(b)(4), (5), and (8).

[42] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30–3(a)(57) and (58).

DEPARTMENT OF STATE

[Public Notice: 10920]

Notice of Availability of the Draft Supplemental Environmental Impact Statement for the Proposed Keystone XL Pipeline; Public Meeting Announcement

ACTION: Notice; solicitation of comments.

SUMMARY: The U.S. Department of State (Department) announces the availability for public review and comment of the *Draft Supplemental Environmental Impact Statement (Draft SEIS) for the Proposed Keystone XL Pipeline.* The Draft SEIS—consistent with the National Environmental Policy Act (NEPA) of 1969—updates the 2014 *Final Supplemental Environmental Impact Statement,* analyzes the impacts related to changes in the Project since 2014, and incorporates current information and new studies, as applicable. In connection with the publication of the Draft SEIS, the Department plans to hold a public meeting in Billings, Montana, on Tuesday, October 29.

DATES: The Department invites members of the public, government agencies, tribal governments, and all other interested parties to comment on the Draft SEIS during the 45-day public comment period, ending on November 18, 2019. Comments provided by agencies and organizations should list a designated contact person. All comments received during the public comment period may be publicized; they will be neither private nor edited to delete either identifying or contact information. Commenters should omit information that they do not want disclosed. Any party who will either solicit or aggregate other people's comments should convey this cautionary note.

The Department plans to hold a public meeting on Tuesday, October 29, 2019, at the Billings Hotel & Convention Center, 1223 Mullowney Lane, Billings, MT 59101, from 4:30 p.m. to 7:30 p.m. MDT. This open house-style gathering

will afford members of the public the opportunity to speak with Department officials, learn more about the proposed Keystone XL Pipeline project, and provide comments on the Draft SEIS. Further details will be available at *https://www.state.gov/releases-keystone-xl-pipeline.*

ADDRESSES: Comments may be submitted at *https://www.regulations.gov* by entering docket number DOS–2019–0033 or the title of this Notice into the search field, and then following the prompts.

FOR FURTHER INFORMATION CONTACT: Ross Alliston, Keystone XL Program Manager, Office of Environmental Quality and Transboundary Issues, U.S. Department of State, 2201 C Street NW, Washington, DC 20520. (202) 647–4828, *AllistonMR@state.gov.*

SUPPLEMENTARY INFORMATION: On May 25, 2018, the Department issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Keystone XL Pipeline Mainline Alternative Route in Nebraska* (83 FR 24383), which provided for a 30-day public scoping period. On July 30, 2018, the Department issued a *Notice of Availability of the Draft Environmental Assessment for the Proposed Keystone XL Pipeline Mainline Alternative Route in Nebraska* (83 FR 36659), which provided for a 30-day public comment period. On September 17, 2018, the Department issued a *Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Proposed Keystone XL Pipeline Mainline Alternative Route in Nebraska* (83 FR 46989). On September 24, 2018, the Department issued a *Notice of Availability of the Draft Supplemental Environmental Impact Statement for the Proposed Keystone XL Pipeline Mainline Alternative Route in Nebraska* (83 FR 48358), which provided for a 45-day public comment period.

The Department published a Notice of Intent (NOI) in the **Federal Register** (FR) on December 3, 2018, to announce its intent to prepare a new SEIS for the proposed Keystone XL Pipeline (83 FR 62398). The Department will consider comments received during this comment period—as well as from both previous comment periods referenced above—in the Final SEIS document.

Availability of the Draft SEIS: Copies of the Draft SEIS have been distributed to state and federal government agencies, tribal governments, and other interested parties. The Draft SEIS is available online at *https://www.state.gov/releases-keystone-xl-pipeline.* Printed copies may be obtained by either contacting Ross Alliston at the above address or visiting the below-listed libraries:

Library	Address
Montana	
Fallon County Library	6 West Fallon Avenue, Baker, MT 59313.
Glasgow City-County Library	408 3rd Avenue South, Glasgow, MT 59230.
Glendive Public Library	200 S Kendrick Avenue, Glendive, MT 59330.
McCone County Library	1101 C Avenue, P.O. Box 49, Circle MT 59215.
Phillips County Library	10 South 4th Street East, P.O. Box 840, Malta, MT 59538.
Prairie County Library	309 Garfield Avenue, P.O. Box 275, Terry, MT 59349.
South Dakota	
Bison Public Library	300 W Carr Street, Bison, SD 57620.
Faith Public and School Library	204 W Fifth St., P.O. Box 172, Faith, SD 57626.
Haakon County Public Library	140 S Howard Avenue, P.O. Box 481, Philip, SD 57567.
Northwest Regional Library	410 Ramsland St., P.O. Box 26, Buffalo, SD 57720.
Newell Public Library	208 Girard Avenue, P.O. Box 54, Newell, SD 57760.
Presho Public Library	108 Main Street, P.O. Box 118, Presho, SD 57568.
Tripp County Library—Grossenburg Memorial	442 Monroe Street, Winner, SD 57580.
Wall Community Library	407 Main Street, P.O. Box 131, Wall, SD 57790.
Nebraska	
Atkinson Public Library	210 West State Street, P.O. Box 938, Atkinson, NE 68713.
Clarkson Public Library	318 Pine Street, P.O. Box 17, Clarkson, NE 68629.
Columbus Public Library	2504 14th Street, Columbus, NE 68601.
Crete Public Library	305 East 13th Street, Crete, NE 68333.
David City Public Library	399 N 5th Street, David City, NE 68632.
Davies Memorial Library	612 Thayer Street, P.O. Box 276, Butte, NE 68722.
Fairbury Public Library	601 7th Street, Fairbury, NE 68352.
Keya Paha County Library	118 Main Street, P.O. Box 134, Springview, NE 68778.
Neligh Public Library	710 Main Street, Neligh, NE 68756.
Norfolk Public Library	308 West Prospect Avenue, Norfolk, NE 68701.
Seward Memorial Library	233 South 5th Street, Seward, NE 68434.
Stanton Public Library	1009 Jackpine Street, P.O. Box 497, Stanton, NE 68779.

Robert D. Wing,

Acting Director, Office of Environmental Quality and Transboundary Issues, Department of State.

[FR Doc. 2019–21702 Filed 10–3–19; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice: 10916]

Notice of Determinations; Additional Culturally Significant Object Imported for Exhibition Determinations: ''Marino Marini: Arcadian Nudes'' Exhibition

SUMMARY: On September 25, 2019, notice was published on page 50560 of the **Federal Register** (volume 84, number 186) of determinations pertaining to certain objects to be included in an exhibition entitled ''Marino Marini: Arcadian Nudes.'' Notice is hereby given of the following determinations: I hereby determine that a certain additional object to be included in the exhibition ''Marino Marini: Arcadian Nudes,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The additional object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the additional exhibit object at the Center for Italian Modern Art, New York, New York, from on or about October 17, 2019, until on or about June 13, 2020, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Chi D. Tran, Paralegal Specialist, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

Matthew R. Lussenhop,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2019–21632 Filed 10–3–19; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Continuation and Request for Nominations for the Trade and Environment Policy Advisory Committee

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for applications.

SUMMARY: The Office of the United States Trade Representative (USTR) is establishing a new two-year charter term and accepting applications from qualified individuals interested in serving as a member of the Trade and Environment Policy Advisory Committee (TEPAC). The TEPAC is a trade advisory committee that provides general policy advice to the U.S. Trade Representative on trade policy matters that have a significant impact on the environment.

DATES: USTR will accept nominations on a rolling basis for membership on the TEPAC for the two-year charter term beginning on September 30, 2019, and expiring on September 29, 2021.

FOR FURTHER INFORMATION CONTACT: Molly Foley, Director for Intergovernmental Affairs and Public Engagement, *Molly.L.Foley@ustr.eop.gov,* or (202) 395–2870, or Amanda Mayhew, *Amanda.B.Mayhew@ustr.eop.gov,* Office for Environment and Natural Resources, or (202) 395–9629.

SUPPLEMENTARY INFORMATION:

I. Background

Section 135(c)(1) of the Trade Act of 1974, as amended (19 U.S.C. 2155(c)(1)), authorizes the President to establish individual general trade policy advisory committees for industry, labor, agriculture, services, investment, defense, small business, and other interests, as appropriate, to provide general policy advice. The President delegated that authority to the U.S. Trade Representative in Executive Order 11846, section 4(d), issued on March 27, 1975. Pursuant to this authority, the U.S. Trade Representative established a new two-year charter term for the TEPAC, which began on September 30, 2019, and ends on September 29, 2021.

The TEPAC is a trade advisory committee established to provide general policy advice to the U.S. Trade Representative on trade policy matters that have a significant impact on the environment. More specifically, the TEPAC provides general policy advice with respect to the effect on the environment of implementation of trade agreements; negotiating objectives and bargaining positions before entering into trade agreements; the operation of any trade agreement once entered into, and other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.

The TEPAC meets as needed, at the call either of the U.S. Trade Representative or his/her designee, or two-thirds of the TEPAC members, depending on various factors such as the level of activity of trade negotiations and the needs of the U.S. Trade Representative.

II. Membership

The TEPAC is composed of not more than 35 members, including, but not limited to, representatives from environmental interest groups, industry (including the environmental technology and environmental services industries), agriculture, academia, consumer groups, services, non-governmental organizations, and others with expertise in trade and environment matters. The U.S. Trade Representative appoints all TEPAC members for a term of two-years or until the TEPAC charter expires, and they serve at his/her discretion. Individuals can be reappointed for any number of terms. The U.S. Trade Representative makes appointments without regard to political affiliation and with an interest in ensuring balance in terms of sectors, demographics, and other factors relevant to USTR's needs. USTR intends for the TEPAC to be broadly representative of key sectors and groups of the economy with an interest in trade and environmental policy issues.

TEPAC members serve without either compensation or reimbursement of expenses. Members are responsible for all expenses they incur to attend meetings or otherwise participate in TEPAC activities.

The U.S. Trade Representative appoints TEPAC members to represent their sponsoring U.S. entity's interests on trade and the environment, and thus USTR's foremost consideration for applicants is their ability to carry out the goals of section 135(c) of the Trade Act of 1974, as amended. Other criteria

include the applicant's knowledge of and expertise in international trade issues as relevant to the work of the TEPAC and USTR. USTR anticipates that almost all TEPAC members will serve in a representative capacity with a limited number serving in an individual capacity as subject matter experts. These members, known as special government employees, are subject to conflict of interest rules and will have to complete a financial disclosure report.

III. Request for Nominations

USTR is soliciting nominations for membership on the TEPAC. To apply for membership, an applicant must meet the following eligibility criteria:

1. The applicant must be a U.S. citizen.
2. The applicant cannot be a full-time employee of a U.S. governmental entity.
3. If serving in an individual capacity, the applicant cannot be a federally registered lobbyist.
4. The applicant cannot be registered with the U.S. Department of Justice under the Foreign Agents Registration Act.
5. The applicant must be able to obtain and maintain a security clearance.
6. For representative members, who will comprise the overwhelming majority of the TEPAC, the applicant must represent a U.S. organization whose members (or funders) have a demonstrated interest in issues relevant to trade and the environment or have personal experience or expertise in trade and the environment.
7. For eligibility purposes, a ''U.S. organization'' is an organization established under the laws of the United States, that is controlled by U.S. citizens, by another U.S. organization (or organizations), or by a U.S. entity (or entities), determined based on its board of directors (or comparable governing body), membership, and funding sources, as applicable. To qualify as a U.S. organization, more than 50 percent of the board of directors (or comparable governing body) and more than 50 percent of the membership of the organization to be represented must be U.S. citizens, U.S. organizations, or U.S. entities. Additionally, at least 50 percent of the organization's annual revenue must be attributable to nongovernmental U.S. sources.
8. For members who will serve in an individual capacity, the applicant must possess subject matter expertise regarding international trade and environmental issues.

In order to be considered for TEPAC membership, interested persons should submit the following to Molly Foley, *Molly.L.Foley@ustr.eop.gov:*

- Name, title, affiliation, and contact information of the individual requesting consideration.
- If applicable, a sponsor letter on the organization's letterhead containing a brief description of the manner in which international trade affects the organization and why USTR should consider the applicant for membership.
- The applicant's personal resume.
- An affirmative statement that the applicant and the organization he or she represents meet all eligibility requirements.

USTR will consider applicants who meet the eligibility criteria based on the following factors: Ability to represent the sponsoring U.S. entity's or U.S. organization's and its subsector's interests on trade and environmental matters; knowledge of and experience in trade and environmental matters relevant to the work of the TEPAC and USTR; and ensuring that the TEPAC is balanced in terms of points of view, demographics, geography, and entity or organization size.

Sam Scales,

Deputy Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Engagement, Office of the United States Trade Representative.

[FR Doc. 2019–21669 Filed 10–3–19; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2019–0095]

Deepwater Port License Application: West Delta LNG LLC

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of intent; notice of public meeting; request for comments.

SUMMARY: The U.S. Coast Guard (USCG), in coordination with the Maritime Administration (MARAD), will prepare an environmental impact statement (EIS) as part of the environmental review of the West Delta LNG LLC (Applicant) deepwater port license application. The application proposes the ownership, construction, operation and eventual decommissioning of an offshore natural gas export deepwater port known as West Delta LNG (West Delta LNG) that would be located in Federal waters approximately 10.5 nautical miles off the coast of Plaquemines Parish, Louisiana in a water depth of approximately 57 to 60 feet. The deepwater port would allow for the loading of liquefied natural gas (LNG) trading carriers.

This Notice of Intent (NOI) requests public participation in the scoping process, provides information on how to participate and announces an informational open house and public meeting in Belle Chasse, Louisiana. Pursuant to the criteria provided in the Deepwater Port Act of 1974, as amended, 33 U.S.C. 1501 *et seq.* (the Act), Louisiana is the designated Adjacent Coastal State for this application.

DATES: There will be one public scoping meeting held in connection with the West Delta LNG deepwater port application. The meeting will be held in Belle Chasse, Louisiana on Tuesday, October 29, 2019, from 6:00 p.m. to 8:00 p.m. The public meeting will be preceded by an informational open house from 4:00 p.m. to 6:00 p.m.

The public meeting may end later than the stated time, depending on the number of persons wishing to speak. Additionally, materials submitted in response to this request for comments on the West Delta LNG deepwater port license application must reach the Federal Docket Management Facility as detailed below by Wednesday, November 6, 2019.

ADDRESSES: The open house and public meeting in Belle Chasse, Louisiana will be held at the Belle Chasse Auditorium, 8398 Highway 23, Belle Chasse, Louisiana, 70037, phone: (504) 208–1455. The public docket for the West Delta LNG deepwater port license application is maintained by the U.S. Department of Transportation, Docket Management Facility, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

The license application is available for viewing at the *Regulations.gov* website: *http://www.regulations.gov* under docket number MARAD–2019–0095.

We encourage you to submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* If you submit your comments electronically, it is not necessary to also submit a hard copy. If you cannot submit material using *http://www.regulations.gov,* please contact either Mr. Matthew Layman, USCG or Ms. Yvette Fields, MARAD, as listed in the following **FOR FURTHER INFORMATION CONTACT** section of this document, which also provides alternate instructions for submitting written comments. Additionally, if you go to the online docket and sign up for email

alerts, you will be notified when comments are posted. Anonymous comments will be accepted. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. The Federal Docket Management Facility's telephone number is 202–366–9317 or 202–366–9826, the fax number is 202–493–2251.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Layman, U.S. Coast Guard, telephone: 202–372–1421, email: *Matthew.D.Layman@uscg.mil,* or Ms. Yvette Fields, Maritime Administration, telephone: 202–366–0926, email: *Yvette.Fields@dot.gov.* For questions regarding viewing the Docket, call Docket Operations, telephone: 202–366–9317 or 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Meeting and Open House

We encourage you to attend the informational open house and public meeting to learn about, and comment on, the proposed deepwater port. You will have the opportunity to submit comments on the scope and significance of the issues related to the proposed deepwater port that should be addressed in the EIS.

Speaker registrations will be available at the door. Speakers at the public scoping meeting will be recognized in the following order: Elected officials, public agencies, individuals or groups in the sign-up order and then anyone else who wishes to speak.

In order to allow everyone a chance to speak at a public meeting, we may limit speaker time, extend the meeting hours, or both. You must identify yourself, and any organization you represent, by name. Your remarks will be recorded and/or transcribed for inclusion in the public docket.

You may submit written material at the public meeting, either in place of, or in addition to, speaking. Written material should include your name and address and will be included in the public docket.

Public docket materials will be made available to the public on the Federal Docket Management Facility website (see **ADDRESSES**).

Our public meeting location is wheelchair-accessible and compliant with the Americans with Disabilities Act. If you plan to attend the open house or public meeting and need special assistance such as sign language interpretation, non-English language translator services or other reasonable accommodation, please notify the USCG or MARAD (see **FOR FURTHER INFORMATION CONTACT**) at least 5 business days in advance of the public meeting. Include your contact information as well as information about your specific needs.

Request for Comments

We request public comment on this proposal. The comments may relate to, but are not limited to, the environmental impact of the proposed action. All comments will be accepted. The public meeting is not the only opportunity you have to comment on the West Delta LNG deepwater port license application. In addition to, or in place of, attending a meeting, you may submit comments directly to the Federal Docket Management Facility during the public comment period (see **DATES**). We will consider all comments and material received during the 30-day scoping period.

The license application, comments and associated documentation, as well as the draft and final EISs (when published), are available for viewing at the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2019–0095.

Public comment submissions should include:

- Docket number MARAD–2019–0095.
- Your name and address.

Submit comments or material using only one of the following methods:

- Electronically (preferred for processing) to the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2019–0095.
- By mail to the Federal Docket Management Facility (MARAD–2019–0095), U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- By personal delivery to the room and address listed above between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.
- By fax to the Federal Docket Management Facility at 202–493–2251.

Faxed, mailed or hand delivered submissions must be unbound, no larger than 8½ by 11 inches and suitable for copying and electronic scanning. The format of electronic submissions should also be no larger than 8½ by 11 inches. If you mail your submission and want to know when it reaches the Federal Docket Management Facility, please include a stamped, self-addressed postcard or envelope.

Regardless of the method used for submitting comments, all submissions will be posted, without change, to the FDMS website (*http://www.regulations.gov*) and will include any personal information you provide. Therefore, submitting this information to the docket makes it public. You may wish to read the Privacy and Use Notice that is available on the FDMS website and the Department of Transportation Privacy Act Notice that appeared in the **Federal Register** on April 11, 2000 (65 FR 19477), see Privacy Act. You may view docket submissions at the Federal Docket Management Facility or electronically on the FDMS website.

Background

Information about deepwater ports, the statutes, and regulations governing their licensing, including the application review process, and the receipt of the current application for the proposed West Delta LNG deepwater port appears in the West Delta LNG Notice of Application, Thursday, September 26, 2019 edition of the **Federal Register** (84 FR 50880). The ''Summary of the Application'' from that publication is reprinted below for your convenience.

Consideration of a deepwater port license application includes review of the proposed deepwater port's impact on the natural and human environment. For the proposed deepwater port, USCG and MARAD are the co-lead Federal agencies for determining the scope of this review, and in this case, it has been determined that review must include preparation of an EIS. This NOI is required by 40 CFR 1501.7. It briefly describes the proposed action, possible alternatives and our proposed scoping process. You can address any questions about the proposed action, the scoping process or the EIS to the USCG or MARAD project managers identified in this notice (see **FOR FURTHER INFORMATION CONTACT**).

Proposed Action and Alternatives

The proposed action requiring environmental review is the Federal licensing of the proposed deepwater port described in ''Summary of the Application'' below. The alternatives to licensing the proposed port are: (1) Licensing with conditions (including conditions designed to mitigate environmental impact), (2) evaluation of proposed deepwater port and onshore site/pipeline route alternatives or (3) denying the application, which for purposes of environmental review is the ''no-action'' alternative.

Scoping Process

Public scoping is an early and open process for identifying and determining

the scope of issues to be addressed in the EIS. Scoping begins with this notice, continues through the public comment period (see **DATES**), and ends when USCG and MARAD have completed the following actions:

- Invites the participation of Federal, state, and local agencies, any affected Indian tribe, the Applicant, and other interested persons;
- Determines the actions, alternatives and impacts described in 40 CFR 1508.25;
- Identifies and eliminates from detailed study, those issues that are not significant or that have been covered elsewhere;
- Identifies other relevant permitting, environmental review and consultation requirements;
- Indicates the relationship between timing of the environmental review and other aspects of the application process; and
- At its discretion, exercises the options provided in 40 CFR 1501.7(b).

Once the scoping process is complete, USCG and MARAD will prepare a draft EIS. When complete, MARAD will publish a **Federal Register** notice announcing public availability of the Draft EIS. (If you want that notice to be sent to you, please contact the USCG or MARAD project manager identified in **FOR FURTHER INFORMATION CONTACT**). You will have an opportunity to review and comment on the Draft EIS. The USCG, MARAD and other appropriate cooperating agencies will consider the received comments and then prepare the Final EIS. As with the Draft EIS, we will announce the availability of the Final EIS and give you an opportunity for review and comment. The Act requires a final public hearing be held in the Adjacent Coastal State. Its purpose is to receive comments on matters related to whether or not a deepwater port license should be issued to the applicant by the Maritime Administrator. The final public hearing will be held in Belle Chasse, Louisiana after the Final EIS is made available for public review and comment.

Summary of the Application

The application proposes the ownership, construction, operation and eventual decommissioning of a deepwater port terminal in the Gulf of Mexico to export domestically produced natural gas. In the nominal design case, the Venice Pretreatment Plant would process approximately 750 million standard cubic feet per day (MMscfd) of feed natural gas for the proposed West Delta LNG deepwater port. Based on an estimated production unit availability of 95.4 percent and an allowance for consumption of feed gas during the liquefaction process, the proposed West Delta LNG deepwater port would nominally produce 5.0 MMtpa of LNG for export. In the optimized case, the proposed project would process approximately 900 MMscfd of feed natural gas to produce approximately 6.1 MMtpa of LNG for export, or the equivalent of 306 billion standard cubic feet per year of LNG.

The trading carriers calling on the West Delta LNG deepwater port would have nominal cargo capacities ranging from 30,000 cubic meters (m^3) to 180,000 m^3. For trading carriers of 180,000 m^3 capacity, the Applicant anticipates a steady state loading rate of 12,000 m^3 that would allow a 24-hour turnaround period, including time for berthing, system connections, and custody transfer administration. For LNG trading carriers of 30,000 m^3 capacity, the Applicant anticipates a shorter loading and turnaround time of 14 hours. The overall project would consist of offshore and marine components as well as onshore components as described below.

Offshore and Marine Components of the Deepwater Port

The West Delta LNG deepwater port offshore and marine components would consist of an LNG production and storage unit, a loading platform and marine berth unit and support facilities, as described below:

- The proposed deepwater port will consist of thirteen (13) fixed bridge connected platforms with piles in Outer Continental Shelf West Delta Lease Block 44, approximately 10.5 nautical miles off the coast of Plaquemines Parish, Louisiana in a water depth of approximately 57 to 60 feet, with the gas arrival platform located at latitude 29° 04′ 56.11″ N and longitude 89° 39′ 16.00″ W. Eleven (11) bridges would connect the platforms and marine berth and provide for piping, electrical, instrument/automation, and personnel transit between platforms.
- The LNG production and storage unit will contain a gas arrival platform where liquefaction-ready gas would be supplied by the Venice Pretreatment Plant described below and a proposed 30-inch subsea pipeline that would terminate at the gas arrival platform. The production platform will consist of three (3) LNG production platforms capable of accommodating a total of six (6) liquefaction trains (two [2] trains per platform), with each liquefaction train system consisting of one (1) 0.83–MMtpa liquefaction unit and one (1) ethane extraction system. Additionally, the West Delta LNG deepwater port would have five (5) LNG storage platforms outfitted with three (3) 20,000 m^3 FSP storage tanks providing 60,000 m^3 of LNG per storage platform for a total storage capacity of 300,000 m^3. A flare tripod platform equipped with a flare stack, smokeless tips, and ignition system(s) and scrubbers would be provided to safely burn all vented gas.
- The West Delta LNG loading platform and marine berthing facilities will contain a loading arm system located on the LNG loading platform that would be used to load LNG onto a single LNG trading carrier. The loading and marine berth would be capable of handling LNG trading carriers with nominal capacities ranging from 30,000 m^3 up to 180,000 m^3. The West Delta LNG deepwater port would include six (6) mooring dolphins and four (4) breasting dolphins. Breasting dolphins and mooring dolphins are marine structures used for berthing and mooring of vessels.
- The support facilities will contain an accommodation platform for West Delta LNG personnel and shall include living quarters for up to 36 people, a control station, helideck, and an auxiliary command room. All main power and essential power, other than the dedicated emergency generator located on the accommodations platform would be created and distributed from the utilities platform.
- The loading platform is connected to offshore LNG tankers with a 180,000 m^3 nominal capacity for loading by two (2) 16-inch (40.6-centimeter) diameter standard liquid arms; one (1) hybrid (liquid/vapor) 16-inch diameter arm; and one (1) 16-inch diameter standard vapor arm. Depending on manifold restrictions, two (2) liquid arms and one (1) vapor arm would be used to load the 30,000 m^3 nominal capacity LNG trading carriers.

Onshore Components of the Deepwater Port

The West Delta LNG deepwater port onshore components would consist of the proposed Venice Pretreatment Plant which would be located in Plaquemines Parish, Louisiana within the grounds of an existing 121-acre onshore natural gas processing facility known as the Venice Gas Complex. The onshore components are as follows:

- The Venice Pretreatment Plant would receive natural gas from offshore Gulf of Mexico midstream pipelines and/or interstate pipeline feed gas from pipelines already interconnected with the Venice Gas Complex. The natural gas would be pre-treated to meet liquefaction specifications, compressed

onshore, and sent to the West Delta LNG offshore deepwater port.

• The proposed Venice Pretreatment Plant would contain the following major components for the pre-treatment and processing of sourced natural gas: Cryogenic trains to process offshore-sourced gas, natural gas compressors, gas pretreatment packages, power generation units driven by gas turbines, waste heat recovery units, utilities to support the new gas pretreatment and compression equipment and a flare to combust waste gas from the pretreatment process.

The onshore components connect to the offshore components by a single pipeline. This pipeline would be constructed to transfer the liquefaction-ready gas from the proposed onshore Venice Pretreatment Plant to the West Delta LNG deepwater port. The proposed pipeline's outgoing onshore assembly is a 4.3 statute mile 30-inch diameter connection from the Venice Pretreatment Plant (measured from the proposed pig launcher to the high water mark) where this pipeline becomes the subsea pipeline supplying the offshore deepwater port. At this point, the pipeline continues, extending 15.5 statute miles beyond the high water mark to terminate at the proposed West Delta LNG offshore deepwater port.

Privacy Act

The electronic form of all comments received into the FDMS can be searched by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). The Department of Transportation Privacy Act Statement can be viewed in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78) or by visiting *http://www.regulations.gov.*

(Authority: 49 CFR 1.93).

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2019–21567 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2019–0138]

Privacy Act of 1974; Department of Transportation (DOT), Federal Motor Carrier Safety Administration (FMCSA) DOT/FMCSA 009—National Registry of Certified Medical Examiners (National Registry) System of Records

AGENCY: Office of the Departmental Chief Information Officer, Office of the Secretary of Transportation, DOT.

ACTION: Notice of a Modified System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Transportation proposes to update and reissue a current Department of Transportation's system of records titled, ''Department of Transportation Federal Motor Carrier Safety Administration 009—National Registry of Certified Medical Examiners System of Records.'' This system of records allows the Department of Transportation/Federal Motor Carrier Safety Administration to collect and maintain records on Medical Examiners registering on the National Registry website and applying for Federal Motor Carrier Safety Administration Medical Examiner certification, certified Medical Examiner designated administrative assistants and authorized representatives who have registered on the National Registry to perform reporting functions on behalf of a certified Medical Examiner, and commercial motor vehicle drivers examined by Federal Motor Carrier Safety Administration certified Medical Examiners listed on the National Registry. The categories of records collected and maintained in this system include several pieces of personally identifiable information as detailed in the ''Categories of Records in the System'' section of this system of records notice. The information for the record subjects is collected and used as part of the process of establishing and maintaining a current national registry of Medical Examiners that are certified by FMCSA to perform medical examinations of interstate commercial motor vehicle drivers and issue Medical Examiner's Certificates as outlined in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The specifics regarding the information collected and how the Agency uses the information is more thoroughly detailed below and in the associated Privacy Impact Assessment on DOT's website at *https://www.transportation.gov/privacy.*

In addition to non-substantive changes to simplify the formatting and text of the previously published notice, we are revising this notice to reflect the following changes resulting from publication of the Medical Examiner's Certification Integration final rule (80 FR 22790) and the Process for Department of Veterans Affairs (VA) Physicians to be Added to the National Registry of Certified Medical Examiners final rule (83 FR 26846). These changes include inclusion of additional information in the categories of records to address information collected using the CMV Driver Medical Examination Results Form, MCSA–5850 (2126–0006), addition of the Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, as an authority for the system, addition of one new routine use for the sharing of CMV driver information to State Driver's Licensing Agencies, deletion of four routine uses duplicative of Department-wide general routine uses, and reduction in the retention disposition for records maintained in this system.

This updated system will be included in the Department of Transportation's inventory of record systems.

DATES: Written comments should be submitted on or before November 4, 2019. The Department may publish an amended SORN in light of any comments received. This new system will be effective November 4, 2019.

ADDRESSES: You may submit comments, identified by docket number DOT–OST–2019–0138 by any of the following methods:

• *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

• *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2019–0138. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if

submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT:

For general questions please contact: Charles A. Horan III, Director, Office of Carrier, Driver, and Vehicle Safety Standards, Federal Motor Carrier Safety Administration, Department of Transportation, Washington, DC 20590, 202.366.2362, *charles.horan@dot.gov.*

For privacy issues please contact: Claire W. Barrett, Departmental Chief Privacy Officer, Privacy Office, Department of Transportation, Washington, DC 20590; *privacy@dot.gov;* or 202.527.3284.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Transportation (DOT)/Federal Motor Carrier Safety Administration (FMCSA) proposes to update and reissue a current DOT system of records titled, ''Department of Transportation Federal Motor Carrier Safety Administration DOT/FMCSA 009—National Registry of Certified Medical Examiners (National Registry) System of Records.'' This system of records is being updated as a result of changes to and use of the records collected through the publication of the Medical Examiner's Certification Integration final rule (80 FR 22790). This system of records collects information under the Paperwork Reduction Act using the commercial motor vehicle (CMV) Driver Medical Examination Results Form, MCSA–5850 (electronic), Office of Management and Budget (OMB) Control No. 2126–0006, under the information collection titled ''Medical Qualification Requirements.''

FMCSA developed the National Registry to improve highway safety and driver health by focusing on Medical Examiner (ME) performance through requiring MEs to be trained and certified to determine effectively whether a CMV driver's health meets the Federal Motor Carrier Safety Regulations (FMCSRs). The MEs must demonstrate an understanding of the physical qualifications standards in the FMCSRs and how they relate to the medical demands of operating a CMV and how to apply those standards in a uniform and consistent manner when making the determination whether an individual driver meets the standards.

To be listed as a certified ME on the National Registry, an ME must be licensed, certified, or registered to perform medical examinations in accordance with applicable State laws and regulations, register on the National Registry website, successfully complete required training on FMCSA's physical qualification standards and guidelines, and pass a certification test. Once certified, MEs are listed on FMCSA's National Registry website where their contact information and national registry number is made available to assist CMV drivers in locating and contacting FMCSA certified MEs.

All interstate CMV drivers are required to obtain their Medical Examiner's Certificates (MECs) from a certified ME listed on the National Registry. Therefore, once certified, MEs perform medical examinations on interstate CMV drivers who are required to receive a medical examination at least once every two years. Certified MEs and their designated Medical Examiner Administrative Assistants (MEAAs) transmit driver medical examination results to FMCSA via the CMV Driver Medical Examination Results Form, MCS. A–5850 (2126–0006), once a month, view previously submitted CMV driver medical examination results, and edit the ME's contact information. Other authorized representatives designated by the certified ME are only able to simultaneously upload (bulk upload) multiple CMV Driver Medical Examination Results from their medical system to the National Registry. FMCSA uses the CMV driver medical examination results (MEC information) to monitor ME competence and performance in evaluating the CMV driver health and fitness and to detect irregularities in examination procedures.

As part of the Medical Examiner's Certification Integration final rule, beginning June 22, 2018, the FMCSA certified ME or his or her designated MEAA will be required to transmit to FMCSA, through the National Registry, by midnight (local time) of the next calendar day following the exam, the results of all CMV driver medical examinations that they have performed in accordance with the FMCSRs, via the CMV Driver Medical Examination Results Form, MCSA–5850. In addition, certified MEs will be allowed to transmit to FMCSA, through the National Registry, the results of all CMV driver medical examinations that they have performed in accordance with the FMCSRs with any applicable State variances, via the CMV Driver Medical Examination Results Form, MCSA–5850. As a result of these added collections, the driver's address, optional email address, and results of examinations performed in accordance with the FMCSRs with any applicable State variances, have been added to the CMV Driver Medical Examination Results Form, MCSA–5850. For commercial driver's license (CDL) holders, FMCSA will electronically transmit MEC information from the National Registry to the State Driver's Licensing Agencies (SDLAs) for examinations conducted in accordance with the FMCSRs as well as those in accordance with the FMCSRs with any applicable State variances. FMCSA will also electronically transmit medical variance information for all CMV drivers from the National Registry to the SDLAs.

We are updating this system of records notice to reflect non-substantive changes to simplify the formatting and text of the previously published notice and to reflect the following changes:

Categories of Records

- Added collection of the CMV driver's address for the Agency to contact the driver regarding their certification during the oversight and audit process for the program. This has been added to the CMV Driver Medical Examination Results Form, MCSA–5850 (2126–0006).
- Added optional collection of CMV driver's email address for general correspondence with the driver regarding his/her certification. This has been added to the CMV Driver Medical Examination Results Form, MCSA–5850 (2126–0006).
- Added optional collection of CMV driver examination results when performed in accordance with the FMCSRs with any applicable State variances for electronic transmission at the request of several States. This has been added to the CMV Driver Medical Examination Results Form, MCSA–5850 (2126–0006).
- Added the issued and expiration dates for medical variances for electronic transmission to the SDLAs and posting to the driver's record.

Authority

- Added the Fixing America's Surface Transportation Act (FAST Act) as an authority for the system. The FAST Act requires that the Department establish a process that allows veteran operators to obtain their DOT medical certification exams from a Department of Veterans

Affairs physician. Information maintained on Medical Examiners and CMV drivers obtained through these processes would be the same as that for other examiners and drivers. Although the details of this process will not be finalized until publication of the final rule, the FAST Act requires that a process be established, and thus, we are including the FAST Act authority in this SORN in anticipation of the eventual establishment of the process mandated by the FAST Act and inclusion of this information in this system.

Routine Uses of Records Maintained in the System

• Added a routine use for the electronic transfer of MEC information for commercial driver's license (CDL) holders and medical variance information for all CMV drivers from the National Registry to the SDLAs for posting to the driver's record. This includes information collected from both the ME and the CMV driver. This routine use is compatible with the purposes of the system as it allows State and Federal enforcement officials to be able to view the most current and accurate information regarding the medical status of the CDL holder, all information on the MEC, and the medical variance information to include the issued and expiration dates.

• Deleted four routine uses addressing sharing records with contractors and oversight bodies because they are duplicative of the Department's general routine uses applicable to all systems.

Retention and Disposal

• Reduced the retention and disposal of information collected to retain records for the least amount of time necessary and to maintain consistency with the FMCSRs (49 CFR 383.73(j)(ii) and 391.43(i))

This updated system will be included in DOT's inventory of record systems.

II. Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the Federal Government collects, maintains, and uses personally identifiable information (PII) in a System of Records. A ''System of Records'' is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a System of Records Notice (SORN) identifying and describing each System of Records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individuals to whom a Privacy Act record pertains can exercise their rights under the Privacy Act (*e.g.,* to determine if the system contains information about them and to contest inaccurate information).

In accordance with 5 U.S.C. 552a(r), DOT has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

Department of Transportation Federal Motor Carrier Safety Administration DOT/FMCSA 009—National Registry of Certified Medical Examiners (National Registry)

SECURITY CLASSIFICATION:

Unclassified, Sensitive.

SYSTEM LOCATION:

Records are maintained by FMCSA, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Carrier, Driver and Vehicle Safety, (202) 366–2362, *charles.horan@dot.gov,* Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) sections 4116(a) (codified as amended at 49 U.S.C. 31149) and 4116(b) (codified as amended at 49 U.S.C. 31136(a)(3)). Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94.

PURPOSE(S) OF THE SYSTEM:

The National Registry program is designed to produce trained, certified medical examiners who fully understand the medical standards in the Federal Motor Carrier Safety Regulations (FMCSRs), to create a registry of these trained and certified medical examiners, and to ensure that the most current and accurate information regarding the medical status of CMV drivers is known.

This system of records allows the DOT/FMCSA to collect and maintain records on MEs registering on the National Registry website and applying for FMCSA ME certification, designated MEAAs and authorized representatives who have registered on the National Registry to perform reporting functions on behalf of a certified ME, and CMV drivers examined by FMCSA certified MEs listed on the National Registry.

The purpose of this system and how FMCSA uses the information collected and maintained in the National Registry system is described below by categories of individuals covered by the system.

Information collected from MEs registering on the National Registry website and applying for FMCSA ME certification:

FMCSA compares the ME's contact and medical licensing information provided by the ME during registration to the State's medical licensing data in order to ensure the data provided by the ME is valid.

FMCSA uses ME contact and employer information to communicate with the ME regarding their information in the National Registry and their application and certification status.

FMCSA uses ME contact information, medical licensing information, training information, certification testing information, and identification information to evaluate the ME's eligibility for certification. In addition, FMCSA may request and review ME supporting documentation for eligibility of certification. FMCSA also reviews the ME certification test answers in order to validate the test grade and score provided by the test center and to ensure that the test center properly graded and scored the test.

FMCSA uses the ME's contact and employer information to list eligible FMCSA certified MEs on the National Registry website where the general public can search for certified MEs.

Information collected from designated MEAAs and authorized representatives who have registered on the National Registry to perform reporting functions on behalf of a certified ME:

The FMCSA uses designated MEAA's and authorized representatives' contact and employer information to communicate with the designated MEAA or authorized representative regarding their information in the National Registry.

Information collected from CMV drivers examined by FMCSA certified MEs listed on the National Registry:

FMCSA uses the CMV driver's medical examination results (MEC information) to monitor certified ME competence and performance in evaluating the CMV driver's health and to detect irregularities in examination procedures.

FMCSA uses the CMV driver's identity information and state driver's license information to analyze the relationship between the driver's

medical examination results and public safety.

FMCSA uses the CMV driver's medical examination results, ME determination, and medical variance information to periodically review a representative sample of the Medical Examination Report (MER) Forms associated with the name and numerical identifiers of applicants transmitted for errors, omissions, or other indications of improper certification.

FMCSA uses the CMV driver's identity information to contact the driver regarding their certification during the oversight and audit process for the program as well as for general correspondence with the driver.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system of records include:

- Medical examiners (MEs) registering on the National Registry website and applying for FMCSA ME certification.
- ME Administrative Assistants (MEAAs) and authorized representatives who have registered on the National Registry and been designated by a certified ME to perform reporting functions on behalf of the ME.
- Commercial motor vehicle (CMV) drivers examined by FMCSA certified MEs listed on the National Registry.

CATEGORIES OF RECORDS IN THE SYSTEM:

The National Registry of Certified Medical Examiners system collects, processes, transmits, and stores the following types of information:

ME Personally Identifiable Information (PII) Collection for Registration and Certification Process

- Contact Information/Place of Business (physical location where ME will perform licensed CMV driver medical examinations)
  - Full name (first, last, middle initial)
  - Primary email address
  - Business name
  - Business address
  - Business telephone number
  - Business fax number (optional)
  - Business email address (optional)
  - Business website address (optional)
  - Business hours of operation (optional)
- Employer Information
  - Employer name
  - Employer address
  - Employer telephone number
  - Employer fax number (optional)
  - Employer email address (optional)
- Medical Licensing Information (used to validate medical credentials)
  - Medical profession
  - License, certificate or registration number
  - Medical license State of issue
  - Medical license expiration date

ME PII Collection for Certification Training

- Training Information
  - Provider name
  - Training provider address or website (optional)
  - Date training completed
  - Training expiration date
  - Organization that accredited the training (optional)
  - Type of training (optional)

ME PII Collection for Certification Testing

- Identity Verification Information
  - Type of ME photo ID
  - Expiration date of ME photo ID
  - National registry number issued by FMCSA
  - Medical credential or license
  - Training certification
- Test Information
  - Test delivery organization name
  - Test delivery organization ID
  - Test center name
  - Test center ID
  - Test type
  - Test ID
  - Date of certification test
  - Certification test questions
  - Certification test answers
  - Test center grade (pass fail)
  - Test center score (numeric)

ME PII Collection Regarding Certification Decision/Status

- Test Results
  - FMCSA test grade (pass/fail)
  - FMCSA test score (numeric)

MEAAs PII Collection to Register with the National Registry System

- Identity Information
  - Full name (first, last, middle initial)
  - National registry number issued by FMCSA
- ME Business Relationship
  - Business address
  - Business telephone number
  - Business email address
  - Business website link information
  - Name of certified ME that designated the AA
  - National registry number of certified ME that designated the AA

CMV Drivers PII Collection for Reporting Medical Examination Results to the National Registry System via the MCSA–5850

- Identity Verification Information
  - Full name (first, last, middle initial)
  - Date of birth
  - Driver's mailing address
  - Driver's email address (optional)
- State Driver's License Information
  - License number
  - License issuing State
  - CDL status
- Medical Examination Results
  - Date of examination
  - Examination Result (medically qualified in accordance with the FMCSRs, medically qualified in accordance with the FMCSRs and any applicable State variances, medically unqualified, pending determination, incomplete examination)
  - Medical Examiner's Certificate expiration date
  - Driver restrictions/variances
  - Driver waiver/exemption type

CMV Driver PII Collection for Medical Variances (exemptions, skills performance evaluation certificates and grandfathered exemptions)

- Identity Verification Information
  - Full name (first, last, middle initial)
  - Date of Birth
- Medical Variance Information
  - Type
  - Issue date
  - Expiration date

RECORD SOURCE CATEGORIES:

Information about the ME is obtained from the ME during the registration and certification process. Information about the MEAA is obtained from the MEAA during the registration process. Information about any authorized representative providing bulk upload services is obtained from the representative during the application process. Information about the CMV driver is provided by the driver at the time of medical examination to the ME.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOT as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

System-Specific Routine Uses

1. To State Medical Boards for the purposes of verifying ME license information and status. (State Medical Boards are the authoritative repositories for ME license information and, as such, already have access to ME licensing information and the verification of the same by the Department does not constitute a disclosure under the Privacy Act. This Routine Use is included in this Notice in an effort by the Department to be transparent to the public regarding the way it which it will use personal information maintained in the National Registry system of records.)

2. To the test centers who use ME identification information, contact information, medical licensing information, employer contact information, and training information to

verify the ME's identity and eligibility to take the ME certification test and to transmit certification test information to the National Registry.

3. To FMCSA certified MEs or designated MEAAs and authorized representatives to submit/update CMV driver medical examination results data to FMCSA for CMV driver examinations they have conducted and to search for previous CMV driver medical examination results.

4. To the general public to perform searches on the National Registry website for the purpose of locating and contacting FMCSA certified MEs.

5. To the SDLAs medical examination results (MEC information) of CLP/CDL applicants/holders and medical variance information (exemptions, skills performance evaluation certificates and grandfathered exemptions) for all CMV drivers, for posting to the driver's record.

Department General Routine Uses

6. One or more records from a system of records may be disclosed routinely to the National Archives and Records Administration (NARA) in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

7. DOT may make available to another agency or instrumentality of any government jurisdiction, including State and local governments, listings of names from any system of records in DOT for use in law enforcement activities, either civil or criminal, or to expose fraudulent claims, regardless of the stated purpose for the collection of the information in the system of records. These enforcement activities are generally referred to as matching programs because two lists of names are checked for match using automated assistance. This routine use is advisory in nature and does not offer unrestricted access to systems of records for such law enforcement and related antifraud activities. Each request will be considered on the basis of its purpose, merits, cost effectiveness and alternatives using Instructions on reporting computer matching programs to the Office of Management and Budget, OMB, Congress, and the public, published by the Director, OMB, dated September 20, 1989.

8. DOT may disclose records from this system, as a routine use, to the Office of Government Information Services for the purpose of (a) resolving disputes between FOIA requesters and Federal agencies and (b) reviewing agencies' policies, procedures, and compliance in order to recommend policy changes to Congress and the President.

9. DOT may disclose records from the system, as a routine use, to contractors and their agents, experts, consultants, and others performing or working on a contract, service, cooperative agreement, or other assignment for DOT, when necessary to accomplish an agency function related to this system of records.

10. DOT may disclose records from this system, as a routine use, to an agency, organization, or individual for the purpose of performing audit or oversight operations related to this system of records, but only such records as are necessary and relevant to the audit or oversight activity. This routine use does not apply to intra-agency sharing authorized under Section (b)(1) of the Privacy Act.

11. DOT may disclose from this system, as a routine use, records consisting of, or relating to, terrorism information (6 U.S.C. 485(a)(5)), homeland security information (6 U.S.C. 482(f)(1)), or Law enforcement information (Guideline 2 Report attached to White House Memorandum, ''Information Sharing Environment'', November 22, 2006) to a Federal, State, local, tribal, territorial, foreign government and/or multinational agency, either in response to its request or upon the initiative of the Component, for purposes of sharing such information as is necessary and relevant for the agencies to detect, prevent, disrupt, preempt, and mitigate the effects of terrorist activities against the territory, people, and interests of the United States of America, as contemplated by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458) and Executive Order 13388 (October 25, 2005).

OMB-Required Routine Uses

12. In the event that a system of records maintained by DOT to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto.

13. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to a DOT decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

14. A record from this system of records may be disclosed, as a routine use, to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

15. Routine Use for Agency Disclosure in Other Proceedings. It shall be a routine use of records in this system to disclose them in proceedings before any court or adjudicative or administrative body before which DOT or any agency thereof, appears, when—(a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof in his/her official capacity, or (c) Any employee of DOT or any agency thereof in his/her individual capacity where DOT has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that the proceeding is likely to affect the United States, is a party to the proceeding or has an interest in such proceeding, and DOT determines that use of such records is relevant and necessary in the proceeding, provided, however, that in each case, DOT determines that disclosure of the records in the proceeding is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

16. Routine Use for Disclosure for Use in Litigation. It shall be a routine use of the records in this system of records to disclose them to the Department of Justice or other Federal agency conducting litigation when—(a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof, in his/her official capacity, or (c) Any employee of DOT or any agency thereof, in his/her individual capacity where the Department of Justice has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that litigation is likely to affect the United States, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or other Federal agency conducting the litigation is deemed by DOT to be relevant and necessary in the litigation, provided, however, that in each case,

DOT determines that disclosure of the records in the litigation is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

17. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual. In such cases, however, the Congressional office does not have greater rights to records than the individual. Thus, the disclosure may be withheld from delivery to the individual where the file contains investigative or actual information or other materials which are being used, or are expected to be used, to support prosecution or fines against the individual for violations of a statute, or of regulations of the Department based on statutory authority. No such limitations apply to records requested for Congressional oversight or legislative purposes; release is authorized under 49 CFR 10.35(9).

18. DOT may disclose records from the system, as a routine use to appropriate agencies, entities, and persons when (1) DOT suspects or has confirmed that there has been a breach of the system of records, (2) DOT has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOT (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DOT's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

19. DOT may disclose records from the system, as a routine use to another Federal agency or Federal entity, when DOT determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach. DOT may disclose records from this system, as a routine use, to the Office of Government Information Services for the purpose of (a) resolving disputes between FOIA requesters and Federal agencies and (b) reviewing agencies' policies, procedures, and compliance in order to recommend policy changes to Congress and the President.

20. DOT may disclose records from this system, as a routine use, to contractors and their agents, experts, consultants, and others performing or working on a contract, service, cooperative agreement, or other assignment for DOT, when necessary to accomplish an agency function related to this system of records.

21. DOT may disclose records from this system, as a routine use, to an agency, organization, or individual for the purpose of performing audit or oversight operations related to this system of records, but only such records as are necessary and relevant to the audit or oversight activity. This routine use does not apply to intra-agency sharing authorized under Section (b)(1), of the Privacy Act. 15. DOT may disclose from this system, as a routine use, records consisting of, or relating to, terrorism information (6 U.S.C. 485(a)(5)), homeland security information (6 U.S.C. 482(f)(1)), or Law enforcement information (Guideline 2 Report attached to White House Memorandum, ''Information Sharing Environment, November 22, 2006) to a Federal, State, local, tribal, territorial, foreign government and/or multinational agency, either in response to its request or upon the initiative of the Component, for purposes of sharing such information as is necessary and relevant for the agencies to detect, prevent, disrupt, preempt, and mitigate the effects of terrorist activities against the territory, people, and interests of the United States of America, as contemplated by the Intelligence Reform and Terrorism Prevention Act of 2004, (Pub. L. 108–458) and Executive Order, 13388 (October 25, 2005).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically and/or on paper in secure facilities. Electronic records may be stored on magnetic disc, tape, digital media, DVD, and CD–ROM.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by searching using the following fields:

- ME name, ME city and state, ME zip code, business name, employer name, medical profession, and/or national registry number.
- MEAA name, name of designating certified ME, national registry number of designating certified ME, and/or national registry number.
- CMV driver's last name, and exam start and end date range.

RETENTION AND DISPOSAL:

In an effort to retain records for the least amount of time necessary and to maintain consistency with the FMCSRs (49 CFR 383.73(j)(ii) and 391.43(i)), the DOT has updated the retention and disposal schedule to reduce the amount of time records are retained from a range of 16 and 60 years to a range of one to six years depending on the record type and purpose. Records will be retained and disposed in accordance with the National Registry of Certified Medical Examiners, #DAA–0557–2015–0001, approved by the National Archives and Records Administration (NARA) on February 16, 2016. The categories of records stored has been streamlined to provide a clear description of the records covered by the National Registry system of records. Below are the categories in the approved schedule. Details can be found by searching and viewing the approved schedule referenced above on the NARA website, *http://www.archives.gov.*

1. Records of Certified MEs will be retained for the time the ME is on the National Registry plus 6 years following removal from the National Registry.
2. Records of MEs that are registered but have not completed the certification process or are ineligible for certification by DOT will be retained for 6 years following removal from the National Registry.
3. Records of MEAAs and third parties designated by a certified ME will be retained for 1 year from the date the individual is no longer authorized to perform duties in the National Registry system on behalf of the Certified ME.
4. Records of CMV Drivers will be retained concurrent with the records of the ME who performed the driver's medical examination.
5. National Registry PII and MER Records of CMV Drivers will be retained for 3 years from the date the medical examination report records are provided to FMCSA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DOT automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

FMCSA ensures that PII in the National Registry system is protected by reasonable security safeguards against loss or unauthorized access, destruction, usage, modification, or disclosure. These safeguards incorporate standards and practices required for Federal information systems under the Federal Information System Management Act and are detailed in Federal Information Processing Standards Publication 200, Minimum Security Requirements for Federal Information and Information Systems, dated March 2006, NIST Special Publication 800–53 Rev. 3, and Recommended Security Controls for Federal Information Systems and Organizations, dated August 2009. FMCSA has a comprehensive information security program that contains management, operational, and technical safeguards that are appropriate for the protection of PII. These safeguards are designed to achieve the following objectives:

- Ensure the security, integrity, and confidentiality of PII
- Protect against any reasonably anticipated threats or hazards to the security or integrity of PII
- Protect against unauthorized access to or use of PII

The National Registry is more thoroughly in the associated Privacy Impact Assessment (PIA). The PIA can be found on the DOT Privacy website at *http://transportation.gov/privacy.* This updated system will be included in DOT's inventory of record systems.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

NOTIFICATION PROCEDURES:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the DOT FOIA officer whose contact information can be found at *http://www.transportation.gov/foia* under ''Contact Us.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Departmental Freedom of Information Act Office, U.S. Department of Transportation, Room W94–122, 1200 New Jersey Ave. SE, Washington, DC 20590, ATTN: Privacy Act request.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 49 CFR part 10. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Freedom of Information Act Officer, *http://www.transportation.gov/foia* or 202.366.4542. In addition you should provide the following:

An explanation of why you believe the Department would have information on you;

- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DOT component agency may have responsive records; and

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

HISTORY:

77 FR 24247—April 23, 2012.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

Issued in Washington, DC, on September 27, 2019.

Claire W. Barrett,

Departmental Chief Privacy Officer.

[FR Doc. 2019–21412 Filed 10–3–19; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Joint notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the OCC, the Board, and the FDIC (the ''agencies'') may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has approved the agencies' publication for public comment of a proposal to revise and extend the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051) and the Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101), which are currently approved collections of information. The proposed revisions to the Call Reports and the FFIEC 101 would implement various changes to the agencies' capital rule that the agencies have finalized or are considering finalizing. In addition, the agencies are proposing a change in the scope of the FFIEC 031 Call Report as well as an instructional revision for the reporting of operating lease liabilities in the Call Reports, both of which would take effect March 31, 2020, and a Call Report instructional revision for home equity lines of credit that convert from revolving to non-revolving status that would take effect March 31, 2021.

DATES: Comments must be submitted on or before December 3, 2019.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the ''Call Report and FFIEC 101 Reporting Revisions,'' will be shared among the agencies.

OCC: You may submit comments, which should refer to ''Call Report and FFIEC 101 Reporting Revisions,'' by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557–0081 and 1557–0239, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''1557–

0081 and 1557–0239'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection 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 ''1557–0081'' or ''1557–0239.'' 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.

Board: You may submit comments, which should refer to ''Call Report and FFIEC 101 Reporting Revisions,'' by any of the following methods:

• *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

• *Email: regs.comments@federalreserve.gov.* Include ''Call Report and FFIEC 101 Reporting Revisions'' in the subject line of the message.

• *Fax:* (202) 452–3819 or (202) 452–3102.

• *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available on the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

FDIC: You may submit comments, which should refer to ''Call Report and FFIEC 101 Reporting Revisions,'' by any of the following methods:

• *Agency Website: https://www.fdic.gov/regulations/laws/federal/.* Follow the instructions for submitting comments on the FDIC's website.

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

• *Email: comments@FDIC.gov.* Include ''Call Report and FFIEC 101 Reporting Revisions'' in the subject line of the message.

• *Mail:* Manuel E. Cabeza, Counsel, Attn: Comments, Room MB–3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

• *Public Inspection:* All comments received will be posted without change to *https://www.fdic.gov/regulations/laws/federal/* including any personal information provided. Paper copies of public comments may be requested from the FDIC Public Information Center, 3501 North Fairfax Drive, Arlington, VA 22226, or by telephone at (877) 275–3342 or (703) 562–2200.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503; by fax to (202) 395–6974; or by email to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the proposed revisions to the information collections discussed in this notice, please contact any of the agency staff whose names appear below. In addition, copies of the report forms for the Call Report and the FFIEC 101 can be obtained at the FFIEC's website (*https://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649–5490, or for persons who are deaf or hearing impaired, TTY, (202) 649–5597.

Board: Nuha Elmaghrabi, Federal Reserve Board Clearance Officer, (202) 452–3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Manuel E. Cabeza, Counsel, (202) 898–3767, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

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I. Affected Reports

All of the proposed changes discussed below affect the Call Reports, while a number of the changes also affect the FFIEC 101. The Board will separately propose to make corresponding revisions to the Consolidated Financial Statements for Holding Companies (FR Y–9C).[1]

A. Call Reports

The agencies propose to extend for three years, with revision, the FFIEC 031, FFIEC 041, and FFIEC 051 Call Reports.

Report Title: Consolidated Reports of Condition and Income (Call Report).

Form Number: FFIEC 031 (Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices), FFIEC 041 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only, and FFIEC 051 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less Than $5 Billion).

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

Type of Review: Revision and extension of currently approved collections.

OCC

OMB Control No.: 1557–0081.

Estimated Number of Respondents: 1,152 national banks and federal savings associations.

Estimated Average Burden per Response: 39.74 burden hours per quarter to file.

Estimated Total Annual Burden: 183,122 burden hours to file.

Board

OMB Control No.: 7100–0036.

Estimated Number of Respondents: 781 state member banks.

Estimated Average Burden per Response: 43.64 burden hours per quarter to file.

Estimated Total Annual Burden: 136,331 burden hours to file.

FDIC

OMB Control No.: 3064–0052.

Estimated Number of Respondents: 3,419 insured state nonmember banks and state savings associations.

Estimated Average Burden per Response: 38.47 burden hours per quarter to file.

Estimated Total Annual Burden: 526,116 burden hours to file.

The estimated average burden hours collectively reflect the estimates for the FFIEC 051, the FFIEC 041, and the FFIEC 031 reports for each agency. When the estimates are calculated by type of report across the agencies, the estimated average burden hours per quarter are 35.38 (FFIEC 051), 49.45 (FFIEC 041), and 95.06 (FFIEC 031). The estimated burden hours for the currently approved reports are 40.27 (FFIEC 051), 53.72 (FFIEC 041), and 95.60 (FFIEC 031), so the revisions proposed in this notice would represent a reduction in estimated average burden hours per quarter of 4.89 (FFIEC 051), 4.27 (FFIEC 041), and 0.54 (FFIEC 031). The change in burden is predominantly due to changes associated with the community bank leverage ratio rule. The reduction in average burden hours is significantly less for the FFIEC 031 than for the FFIEC 041 or the FFIEC 051 because greater percentages of institutions that would be eligible to report under the proposed community bank leverage ratio framework currently file the FFIEC 041 or the FFIEC 051 than the FFIEC 031.[2] The estimated burden per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (*e.g.,* size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices).

Type of Review: Extension and revision of currently approved collections.

Legal Basis and Need for Collections

The Call Report information collections are mandatory: 12 U.S.C. 161 (for national banks), 12 U.S.C. 324 (for state member banks), 12 U.S.C. 1817 (for insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (for federal and state savings associations). At present, except for selected data items and text, these information collections are not given confidential treatment.

Banks and savings associations submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data serve a regulatory or public policy purpose by assisting the agencies in fulfilling their shared missions of ensuring the safety and soundness of financial institutions and the financial system and protecting consumer financial rights, as well as agency-specific missions affecting national and state-chartered institutions, such as conducting monetary policy, ensuring financial stability, and administering federal deposit insurance. Call Reports are the source of the most current statistical data available for identifying areas of focus for on-site and off-site examinations. Among other purposes, the agencies use Call Report data in evaluating institutions' corporate applications, including interstate merger and acquisition applications for which the agencies are required by law to determine whether the resulting institution would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Call Report data also are used to calculate institutions' deposit insurance assessments and national banks' and federal savings associations' semiannual assessment fees.

B. FFIEC 101

The agencies propose to extend for three years, with revision, the FFIEC 101 report.

Report Title: Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework.

Form Number: FFIEC 101.

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

OCC

OMB Control No.: 1557–0239.

Estimated Number of Respondents: 8 national banks and federal savings associations.

Estimated Time per Response: 674 burden hours per quarter to file for banks and federal savings associations.

Estimated Total Annual Burden: 21,568 burden hours to file.

[1] Consolidated Financial Statements for Holding Companies (FR Y–9C), OMB Number 7100–0128.

[2] For estimating burden hours, the agencies assumed 60 percent of eligible institutions would use the framework.

Board

OMB Control No.: 7100–0319.

Estimated Number of Respondents: 1 state member bank; 4 bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only; 9 other bank holding companies and savings and loan holding companies; and 6 intermediate holding companies.

Estimated Time per Response: 674 burden hours per quarter to file for state member banks; 3 burden hours per quarter to file for bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only; 677 burden hours per quarter to file for other bank holding companies and savings and loan holding companies; and 3 burden hours per quarter to file for intermediate holding companies.

Estimated Total Annual Burden: 2,696 burden hours for state member banks to file; 48 burden hours for bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only to file; 24,372 burden hours for other bank holding companies and savings and loan holding companies to file; and 72 burden hours for intermediate holding companies to file.

FDIC

OMB Control No.: 3064–0159.

Estimated Number of Respondents: 1 insured state nonmember bank and state savings association.

Estimated Time per Response: 674 burden hours per quarter to file.

Estimated Total Annual Burden: 2,696 burden hours to file.

Type of Review: Extension and revision of currently approved collections.

Legal Basis and Need for Collections

Each advanced approaches institution [3] is required to report quarterly regulatory capital data on the FFIEC 101. The FFIEC 101 information collections are mandatory for advanced approaches institutions: 12 U.S.C. 161 (national banks), 12 U.S.C. 324 (state member banks), 12 U.S.C. 1844(c) (bank holding companies), 12 U.S.C. 1467a(b) (savings and loan holding companies), 12 U.S.C. 1817 (insured state nonmember commercial and savings banks), 12 U.S.C. 1464 (savings associations), and 12 U.S.C. 1844(c), 3106, and 3108 (intermediate holding companies). Certain data items in this information collection are given confidential treatment under 5 U.S.C. 552(b)(4) and (8).

The agencies use data reported in the FFIEC 101 to assess and monitor the levels and components of each reporting entity's capital requirements and the adequacy of the entity's capital under the Advanced Capital Adequacy Framework; [4] to evaluate the impact of the Advanced Capital Adequacy Framework on individual reporting entities and on an industry-wide basis and its competitive implications; and to supplement on-site examination processes. The reporting schedules also assist advanced approaches institutions in understanding expectations relating to the system development necessary for implementation and validation of the Advanced Capital Adequacy Framework. Submitted data that are released publicly will also provide other interested parties with information about advanced approaches institutions' regulatory capital.

II. Current Actions

A. Simplifications Rule

1. Background

On July 22, 2019, the agencies published a final rule amending their regulatory capital rule [5] to make a number of burden-reducing changes to the capital rule (simplifications rule).[6] In the simplifications rule, the agencies adopted a simpler methodology for non-advanced approaches banking organizations [7] to calculate minority interest limitations and simplified the regulatory capital treatment of mortgage servicing assets (MSAs), temporary difference deferred tax assets (DTAs), and investments in the capital of unconsolidated financial institutions. The simplifications rule had an effective date of April 1, 2020. However, the FDIC and the OCC have recently approved,[8] and the Board is considering, a planned final rule that would permit non-advanced approaches banking organizations to implement the simplifications rule on January 1, 2020. As a result, non-advanced approaches banking organizations would have the option to implement the simplifications rule on the revised effective date of January 1, 2020, or wait until the quarter beginning April 1, 2020.

The agencies propose revisions to Call Report Schedule RC–R, Regulatory Capital, in all three versions of the Call Report to implement the associated changes to the agencies' regulatory capital rule effective as of the March 31, 2020, report date, consistent with the planned final rule that would permit early adoption of the simplifications rule.

In addition, the agencies adopted a number of technical amendments to their regulatory capital rule in the simplifications rule that do not require clearance under the PRA and would become effective October 1, 2019.

2. Proposed Revisions to Call Report Schedule RC–R

The revisions in the simplifications rule would make a number of changes to the calculation of common equity tier 1 (CET1) capital, additional tier 1 capital, and tier 2 capital for non-advanced approaches institutions that do not apply to advanced approaches institutions. Thus, the simplifications rule results in different sets of calculations for these tiers of regulatory capital for non-advanced approaches institutions and advanced approaches institutions. At present, the FFIEC 031 and the FFIEC 041 Call Reports are completed by both non-advanced approaches institutions and advanced approaches institutions while only non-advanced approaches institutions are eligible to file the FFIEC 051 Call Report. To mitigate the complexity of revising existing Schedule RC–R, Part I, Regulatory Capital Components and Ratios, to incorporate the different sets of regulatory capital calculations for non-advanced approaches institutions and advanced approaches institutions, and to reflect the effects of the simplifications rule in both the FFIEC 031 and FFIEC 041 Call Reports, the agencies are proposing to require all advanced approaches institutions to file the FFIEC 031 Call Report effective as of the March 31, 2020, report date.[9] As a result, the agencies would adjust the existing regulatory capital calculations reported on Schedule RC–R, Part I, for the FFIEC 041 Call Report, and also for the FFIEC 051 Call Report, to reflect the

[3] *See* 12 CFR 3.100(b) (OCC); 12 CFR 217.100(b) (Board); 12 CFR 324.100(b) (FDIC).

[4] 12 CFR part 3, subpart E (OCC); 12 CFR part 217, subpart E (Board); 12 CFR part 324, subpart E (FDIC).

[5] 12 CFR part 3 (OCC); 12 CFR part 217 (Board); 12 CFR part 324 (FDIC). While the agencies have codified the capital rule in different parts of title 12 of the Code of Federal Regulations, the internal structure of the sections within each agency's rule are substantially similar.

[6] 84 FR 35234 (July 22, 2019).

[7] Non-advanced approaches banking organizations are institutions that do not meet the criteria in 12 CFR 3.100(b) (OCC); 12 CFR 217.100(b) (Board); or 12 CFR 324.100(b) (FDIC).

[8] *See* FDIC Press Release 80–2019, dated September 17, 2019.

[9] While this proposed change relates to existing advanced approaches institutions, as discussed in Section II.C. below, the agencies also propose to require all Category I, II, and III institutions to file the FFIEC 031 Call Report.

effects of the simplifications rule for non-advanced approaches institutions. For the FFIEC 031 Call Report, which is filed by the fewest institutions, the agencies are proposing to incorporate the two different sets of regulatory capital calculations (one for non-advanced approaches institutions and the other for advanced approaches institutions) in Schedule RC–R, Part I, and, as mentioned above, require all advanced approaches institutions to file this version of the Call Report.

The agencies propose a number of revisions that would simplify the capital calculations on each version of Schedule RC–R, Part I, effective March 31, 2020, and thereby reduce reporting burden. Because both non-advanced approaches institutions and advanced approaches institutions file the FFIEC 031 Call Report, the FFIEC 031 Call Report would include two different sets of calculations (one that incorporates the effects of the simplifications rule and the other that does not) in adjacent columns in the affected portion of Schedule RC–R, Part I. An institution would complete only the column for the set of calculations applicable to that institution. For the March 31, 2020, report date, non-advanced approaches institutions that file the FFIEC 031 Call Report and elect to adopt the simplifications rule on January 1, 2020, would complete the column for the set of calculations that incorporates the effects of the simplifications rule. Non-advanced approaches institutions that elect to wait to adopt the simplifications rule on April 1, 2020, and all advanced approaches institutions would complete the column for the set of calculations that does not reflect the effects of the simplifications rule (*i.e.,* that reflects the capital calculation in effect for all institutions before this revision). Beginning with the June 30, 2020, report date, all non-advanced approaches institutions that file the FFIEC 031 Call Report would complete the column for the set of calculations that incorporates the effects of the simplifications rule; all advanced approaches institutions that file this Call Report would complete the column that does not reflect the effects of the simplifications rule.

Because advanced approaches institutions currently are not permitted to file the FFIEC 051 Call Report and would not be permitted to file the FFIEC 041 Call Report, the FFIEC 041 and FFIEC 051 Call Reports would include a single column for the capital calculation in Schedule RC–R, Part I, that would be revised effective March 31, 2020, to incorporate the effects of the simplifications rule. For the March 31, 2020, report date, non-advanced approaches institutions that file the FFIEC 041 or FFIEC 051 Call Report and elect to adopt the simplifications rule on January 1, 2020, would complete the capital calculation column in Schedule RC–R, Part I, as revised for the simplifications rule. The agencies propose to provide instructions for non-advanced approaches institutions that file the FFIEC 041 or FFIEC 051 Call Report that elect to wait to adopt the simplifications rule on April 1, 2020, on how to complete Schedule RC–R, including the capital calculation column, for the March 31, 2020, report date in accordance with the capital rule in effect before the simplifications rule's revised effective date of January 1, 2020. Beginning with the June 30, 2020, report date, all non-advanced approaches institutions that file the FFIEC 041 or FFIEC 051 Call Report would complete Schedule RC–R as revised for the simplifications rule.

In connection with proposing that all advanced approaches institutions file the FFIEC 031 Call Report, the agencies propose to remove certain items from the FFIEC 041 Call Report that apply only to advanced approaches institutions. Thus, for Schedule RC–R, Part I, in the FFIEC 041 Call Report, the agencies propose to remove items 30.b, 32.b, 34.b, 35.b, 40.b, 41 through 43 (Column B only), 45.a, 45.b, and 46.b. The agencies propose to renumber items 30.a, 32.a, 34.a, 35.a, 40.a, and 46.a as items 30, 32, 34, 35, 40, and 46, respectively. When the FFIEC 051 Call Report was created in 2016 (and implemented as of March 31, 2017), Schedule RC–R, Part I, was revised to remove the items and references applicable only to advanced approaches institutions. Thus, as a result, Schedule RC–R, Part I, as it is proposed to be revised in the FFIEC 041 would be the same as the existing Schedule RC–R, Part I, in the FFIEC 051.

In the simplifications rule, the agencies increased the thresholds for including MSAs, temporary difference DTAs that could not be realized through net operating loss carrybacks (temporary difference DTAs),[10] and investments in the capital of unconsolidated financial institutions for non-advanced approaches institutions. In addition, the agencies revised the capital calculation for minority interests included in the various capital categories for non-advanced approaches institutions and to the calculation of the capital conservation buffer.

The current regulatory capital calculations in Call Report Schedule RC–R, which do not yet reflect the revisions contained in the simplifications rule, require that an institution's capital cannot include MSAs, certain temporary difference DTAs, and significant investments in the common stock of unconsolidated financial institutions in an amount greater than 10 percent of CET1 capital, on an individual basis, and those three data items combined cannot comprise more than 15 percent of CET1 capital. When the reporting of regulatory capital calculations by non-advanced approaches institutions in accordance with the simplifications rule takes effect, this calculation would be revised in Schedule RC–R, Part I, to require that only MSAs or temporary difference DTAs in an amount greater than 25 percent of CET1 capital, on an individual basis, could not be included in a non-advanced approaches institution's capital. The 15 percent aggregate limit would be removed. In addition, the simplifications rule will combine the current three categories of investments in financial institutions (non-significant investments in the capital of unconsolidated financial institutions, significant investments in the capital of unconsolidated financial institutions that are in the form of common stock, and significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock) into a single category, investments in the capital of unconsolidated financial institutions, and will apply a limit of 25 percent of CET1 capital on the amount of these investments that can be included in capital. Any investments in excess of the 25 percent limit would be deducted from capital using the corresponding deduction approach.

Consistent with the current capital rule, an institution must risk weight MSAs, temporary difference DTAs, and investments in the capital of unconsolidated financial institutions that are not deducted. The agencies propose revisions to allow institutions to enter values into the Column K—250% risk weight on Schedule RC–R, Part II, in the FFIEC 051 Call Report, which is currently shaded out, and remove footnote two on the second page of Schedule RC–R, Part II, and the corresponding footnote on subsequent pages of Schedule RC–R, Part II, in all three versions of the Call Reports

[10] The agencies note that An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Public Law 115–97 (originally introduced as the Tax Cuts and Jobs Act), enacted December 22, 2017, eliminated the concept of net operating loss carrybacks for U.S. federal income tax purposes, although the concept may still exist in particular jurisdictions for state or foreign income tax purposes.

effective as of the March 31, 2020, report date to accommodate the simplifications rule revisions to the risk weight for MSAs and temporary difference DTAs. Consistent with the simplifications rule, non-advanced approaches institutions will not be required to differentiate among categories of investments in the capital of unconsolidated financial institutions. The risk weight for such equity exposures generally will be 100 percent, provided the exposures qualify for this risk weight.[11] For non-advanced approaches institutions, the simplifications rule eliminates the exclusion of significant investments in the capital of unconsolidated financial institutions in the form of common stock from being eligible for a 100 percent risk weight.[12] The application of the 100 percent risk weight (i) requires a banking organization to follow an enumerated process for calculating adjusted carrying value and (ii) mandates the equity exposures that must be included in determining whether the threshold has been reached. Equity exposures that do not qualify for a preferential risk weight will generally receive risk weights of either 300 percent or 400 percent, depending on whether the equity exposures are publicly traded.

In order to implement these regulatory capital changes from a regulatory reporting perspective, the agencies propose to make a number of revisions to Schedule RC–R, Part I, for non-advanced approaches institutions effective March 31, 2020. Specifically, in Schedule RC–R, Part I, in the FFIEC 041 and FFIEC 051 Call Reports, the agencies propose to remove item 11 and modify item 13 to reflect the consolidation of all investments in unconsolidated financial institutions into a single category and apply a single 25 percent of CET1 capital limit to these investments. The agencies propose to modify items 14 and 15 to reflect the 25 percent of CET1 capital limit for MSAs and certain temporary difference DTAs, respectively. The agencies also propose to remove item 16, which applies to the aggregate 15 percent limitation that was removed from the capital rule for non-advanced approaches institutions. In the FFIEC 031 Call Report, the agencies propose to create two columns for existing items 11 through 19. Column A would be reported by non-advanced approaches institutions that elect to adopt the simplifications rule on January 1, 2020, in the March 2020 Call Report and by all non-advanced approaches institutions beginning in the June 2020 Call Report using the definitions under the simplifications rule. Column A would not include items 11 or 16, and items 13 through 15 would be designated as items 13.a through 15.a to reflect the new calculation methodology. Column B would be reported by advanced approaches institutions and by non-advanced approaches institutions that elect to wait to adopt the simplifications rule on April 1,2020, in the March 2020 Call Report and only by advanced approaches institutions beginning in the June 2020 Call Report using the existing definitions. Existing items 13 through 15 would be designated as items 13.b through 15.b to reflect continued use of the existing calculation methodology.

The agencies are not proposing any changes to the form to incorporate the minority interest revisions. However, the agencies are proposing to modify the instructions for the existing minority interest items in all versions of the Call Report to reflect the ability of non-advanced approaches institutions to use the revised method under the simplifications rule to calculate minority interest in existing items 4, 22, and 29 (CET1, additional tier 1, and tier 2 minority interest, respectively).

B. Community Bank Leverage Ratio Rule

1. Background

In February 2019, the agencies proposed a rule to provide a simplified alternative measure of capital adequacy, the community bank leverage ratio (CBLR), for qualifying community banking organizations with less than $10 billion in total consolidated assets (CBLR proposed rule),[13] consistent with section 201 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA).[14] In February 2019, the FDIC published a proposed rule to amend the deposit insurance assessment regulations to incorporate the community bank leverage ratio framework (CBLR framework) into the deposit insurance assessment system (CBLR assessments proposed rule).[15] The agencies then requested comment in April 2019 on proposed revisions to the Call Report to implement the CBLR proposed rule and the CBLR assessments proposed rule.[16]

However, the FDIC and the OCC have recently approved,[17] and the Board is considering, a final rule (planned CBLR final rule) that contains significant revisions to the calculation methodology relative to the CBLR proposed rule. Therefore, the agencies are proposing a revised version of community bank leverage ratio reporting in the Call Report to reflect the changes in the planned CBLR final rule, which replaces the previously proposed community bank leverage ratio reporting that had been designed to implement the CBLR proposed rule. In addition, the FDIC has recently approved a final rule regarding the application of the CBLR framework to the deposit insurance assessment system (CBLR assessments final rule).[18] Because of the features of the revised calculation methodology in the planned CBLR final rule described below, the agencies are not proceeding with the previously proposed revisions to Call Report Schedule RC–O, ''Other Data for Deposit Insurance Assessments,'' to implement the CBLR assessments proposed rule[19] and no revisions to Schedule RC–O are being proposed in connection with the CBLR assessments final rule. Certain clarifications would be made to the Schedule RC–O instructions to address the application of the CBLR framework to the FDIC's deposit insurance assessment system in accordance with the CBLR assessments final rule.

Under the planned CBLR final rule, banking organizations that have less than $10 billion in total consolidated assets, meet risk-based qualifying criteria, and have a leverage ratio of greater than 9 percent will be eligible to opt into the CBLR framework. A banking organization that opts into the CBLR framework, maintains a leverage ratio of greater than 9 percent, and meets the other qualifying criteria will not be subject to other risk-based and leverage capital requirements and, in the case of an insured depository

[11] 12 CFR 3.52 and .53 (OCC); 12 CFR 217.52 and .53 (Board); 12 CFR 324.52 and .53 (FDIC). Note that for purposes of calculating the 10 percent nonsignificant equity bucket, the capital rule excludes equity exposures that are assigned a risk weight of zero percent and 20 percent, and community development equity exposures and the effective portion of hedge pairs, both of which are assigned a 100 percent risk weight. In addition, the 10 percent non-significant bucket excludes equity exposures to an investment firm that would not meet the definition of traditional securitization were it not for the application of criterion 8 of the definition of traditional securitization, and has greater than immaterial leverage.

[12] Equity exposures that exceed, in the aggregate, 10 percent of a non-advanced approaches banking organization's total capital would then be assigned a risk weight based upon the approaches available in sections 52 and 53 of the capital rule. 12 CFR 3.52 and .53 (OCC); 12 CFR 217.52 and .53 (Board); 12 CFR 324.52 and .53 (FDIC).

[13] 84 FR 3062 (February 8, 2019).

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

[15] 84 FR 5380 (February 21, 2019).

[16] 84 FR 16560 (April 19, 2019).

[17] *See* FDIC Press Release 80–2019, dated September 17, 2019.

[18] *See* FDIC Press Release 80–2019, dated September 17, 2019.

[19] *See* 84 FR 16565–16566 (April 19, 2019).

institution (IDI), would be considered to have met the well capitalized capital ratio requirements for purposes of the agencies' prompt corrective action framework.

Under the planned CBLR final rule, a bank or savings association (bank) that opts into the CBLR framework (CBLR bank) may opt out of the CBLR framework at any time, without restriction, by reverting to the generally applicable capital requirements in the agencies' capital rule [20] and reporting its regulatory capital information in Call Report Schedule RC–R, ''Regulatory Capital,'' Parts I and II, at the time of opting out.

As described in the planned CBLR final rule, a banking organization that no longer meets the qualifying criteria for the CBLR framework will be required within two consecutive calendar quarters (grace period) either to once again satisfy the qualifying criteria or demonstrate compliance with the generally applicable capital requirements. During the grace period, the bank would continue to be treated as a CBLR bank and would be required to report its leverage ratio and related components in Call Report Schedule RC–R, Part I, in the manner described in this notice.[21] A CBLR bank that ceases to meet the qualifying criteria as a result of a business combination (*e.g.,* a merger) would receive no grace period, and would immediately become subject to the generally applicable capital requirements. Similarly, a CBLR bank that fails to maintain a leverage ratio greater than 8 percent would not be permitted to use the grace period and would immediately become subject to the generally applicable capital requirements.

2. Proposed Revisions to Call Report Schedule RC–R

In this notice, the agencies are proposing reporting revisions to the Call Reports for banks that qualify for and opt into the CBLR framework, consistent with the planned CBLR final rule. The reporting changes to the Call Reports proposed in this notice would take effect in the same quarter as the effective date of the planned final rule adopting the CBLR framework.

The agencies originally proposed to incorporate all the community bank leverage ratio items into a separate version of Schedule RC–R. However, after considering the substantial changes made in the planned CBLR final rule, the agencies now propose to incorporate all the revisions related to the community bank leverage ratio into the existing Schedule RC–R, Part I, for all versions of the Call Report.

As provided in the planned CBLR final rule, the numerator of the community bank leverage ratio will be tier 1 capital, which is currently reported in Schedule RC–R, Part I, item 26. Therefore, the agencies are not proposing any changes related to the numerator of the community bank leverage ratio.

As provided in the planned CBLR final rule, the denominator of the community bank leverage ratio will be average total consolidated assets. Specifically, average total consolidated assets would be calculated in accordance with the existing reporting instructions for Schedule RC–R, Part I, items 36 through 39. The agencies are not proposing any substantive changes related to the denominator of the community bank leverage ratio. However, the agencies are proposing to move existing items 36 through 39 of Schedule RC–R, Part I, and renumber them as items 27 through 30 of Schedule RC–R, Part I, to consolidate all of the community-bank-leverage-ratio-related capital items earlier in Schedule RC–R, Part I.

As provided in the planned CBLR final rule, a CBLR bank will calculate its community bank leverage ratio by dividing tier 1 capital by average total consolidated assets (as adjusted), and the community bank leverage ratio would be reported as a percentage, rounded to four decimal places. Since this calculation is essentially identical to the existing calculation of the tier 1 leverage ratio in Schedule RC–R, Part I, item 44, the agencies are not proposing a separate item for the community bank leverage ratio in Schedule RC–R, Part I. Instead, the agencies propose to move the tier 1 leverage ratio from item 44 of Part I and renumber it as item 31, and rename the item the Leverage Ratio, as this ratio would apply to all institutions (as the community bank leverage ratio for qualifying institutions or the tier 1 leverage ratio for all other institutions).

As provided in the planned CBLR final rule, a CBLR bank will need to satisfy certain qualifying criteria in order to be eligible to opt into the CBLR framework. The proposed items identified below would collect information necessary to ensure that a bank continuously meets the qualifying criteria for using the CBLR framework.

Specifically, a CBLR bank is a bank that is not an advanced approaches institution and meets the following qualifying criteria:

- A leverage ratio of greater than 9 percent;
- Total consolidated assets of less than $10 billion;
- Total trading assets and trading liabilities of 5 percent or less of total consolidated assets; and
- Total off-balance sheet exposures (excluding derivatives other than sold credit derivatives and unconditionally cancelable commitments) of 25 percent or less of total consolidated assets.[22]

Accordingly, the agencies propose collecting the items described below for community bank leverage ratio reporting purposes.

In proposed item 32 of Schedule RC–R, Part I, a CBLR bank would report total assets, as reported in Call Report Schedule RC, item 12.

In proposed item 33, a CBLR bank would report the sum of trading assets from Schedule RC, item 5, and trading liabilities from Schedule RC, item 15, in Column A. The bank would also report that sum divided by total assets from Schedule RC, item 12, and expressed as a percentage in Column B. As provided in the planned CBLR final rule, trading assets and trading liabilities would be added together, not netted, for purposes of this calculation. Also as discussed in the planned CBLR final rule, a bank would not meet the definition of a qualifying community banking organization for purposes of the CBLR framework if the percentage reported in Column B is greater than 5 percent.

In proposed items 34.a through 34.d, a CBLR bank would report information related to commitments, other off-balance sheet exposures, and sold credit derivatives.

[20] 12 CFR part 3 (OCC); 12 CFR part 217 (Board); 12 CFR part 324 (FDIC).

[21] For example, if the electing banking organization no longer meets one of the qualifying criteria as of February 15, and still does not meet the criteria as of the end of that quarter, the grace period for such a banking organization will begin as of the end of the quarter ending March 31. The banking organization may continue to use the community bank leverage ratio framework as of June 30, but will need to comply fully with the generally applicable rule (including the associated reporting requirements) as of September 30, unless the banking organization once again meets all qualifying criteria of the community bank leverage ratio framework, including a leverage ratio of greater than 9 percent, by that date.

[22] Under the planned CBLR final rule, the agencies have reserved the authority to disallow the use of the CBLR framework by a depository institution or depository institution holding company based on the risk profile of the banking organization. This authority is reserved under the general reservation of authority included in the capital rule, in which the CBLR framework would be codified. *See* 12 CFR 3.1(d) (OCC); 12 CFR 217.1(d) (Board); 12 CFR 324.1(d) (FDIC). In addition, for purposes of the capital rule and section 201 of the EGRRCPA, the agencies have reserved the authority to take action under other provisions of law, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law or regulation. *See* 12 CFR 3.1(b) (OCC); 12 CFR 217.1(b) (Board); 12 CFR 324.1(b) (FDIC).

In proposed item 34.a, a CBLR bank would report the unused portion of conditionally cancelable commitments. This amount would be the amount of all unused commitments less the amount of unconditionally cancelable commitments, as discussed in the planned CBLR final rule and defined in the agencies' capital rule.[23] This item would be calculated consistent with the sum of Schedule RC–R, Part II, items 18.a and 18.b, Column A.

In proposed item 34.b, a CBLR bank would report total securities lent and borrowed, which would be the sum of Schedule RC–L, items 6.a and 6.b.

In proposed item 34.c, a CBLR bank would report the sum of certain other off-balance sheet exposures and sold credit derivatives. Specifically, a CBLR bank would report the sum of self-liquidating, trade-related contingent items that arise from the movement of goods; transaction-related contingent items (performance bonds, bid bonds, warranties, and performance standby letters of credit); sold credit protection in the form of guarantees and credit derivatives; credit-enhancing representations and warranties; financial standby letters of credit; forward agreements that are not derivative contracts; and off-balance sheet securitizations. A CBLR bank would not include derivatives that are not sold credit derivatives, such as foreign exchange swaps and interest rate swaps, in proposed item 34.c.

In proposed item 34.d, a CBLR bank would report the sum of proposed items 34.a through 34.c in Column A. The bank would also report that sum divided by total assets from Schedule RC, item 12, and expressed as a percentage in Column B. As discussed in the planned CBLR final rule, a bank would not be eligible to opt into the CBLR framework if this percentage is greater than 25 percent.

In proposed item 35, a CBLR bank would report the total of unconditionally cancellable commitments, which would be calculated consistent with the instructions for existing Schedule RC–R, Part II, item 19. This item is not used specifically to calculate a bank's eligibility for the CBLR framework. However, the agencies are collecting this information to identify any bank using the CBLR framework that may have significant or excessive concentrations in unconditionally cancellable commitments that would warrant the agencies' use of the reservation of authority in their capital rule to direct an otherwise-eligible CBLR bank to report its regulatory capital using the generally applicable capital requirements.[24]

In proposed item 36, a CBLR bank would report the amount of investments in the capital instruments of an unconsolidated financial institution that would qualify as tier 2 capital. Since the CBLR framework does not have a total capital requirement, a CBLR bank is neither required to calculate tier 2 capital nor make any deductions that would be taken from tier 2 capital. Therefore, if a CBLR bank has investments in the capital instruments of an unconsolidated financial institution that would qualify as tier 2 capital of the CBLR bank under the generally applicable capital requirements (tier 2 qualifying instruments), and the CBLR bank's total investments in the capital of unconsolidated financial institutions exceed 25 percent of its CET1 capital, the CBLR bank is not required to deduct the tier 2 qualifying instruments. A CBLR bank is required to make a deduction from CET1 capital or tier 1 capital only if the sum of its investments in the capital of an unconsolidated financial institution is in a form that would qualify as CET1 capital or tier 1 capital instruments of the CBLR bank and the sum exceeds the 25 percent CET1 threshold. The agencies believe it is important to continue collecting information on the amount of investments in these capital instruments as excessive investments similarly could warrant the agencies' use of their reservation of authority.

In proposed item 37, a CBLR bank would be required to report its allocated transfer risk reserve (ATRR), as currently calculated and reported in Schedule RC–R, Part II, item 30. In proposed items 38.a through 38.c, a CBLR bank that has adopted Accounting Standards Update (ASU) No. 2016–13 on credit losses must report the amount of any allowances for credit losses on purchased credit-deteriorated loans and leases held for investment, held-to-maturity debt securities, and other financial assets measured at amortized cost, as currently calculated and reported in Schedule RC–R, Part II, Memorandum items 4.a through 4.c. The amount of the ATRR, if any, is necessary to calculate capital and surplus and corresponding limits in a number of the OCC's regulations, including investment securities limits (12 CFR part 1) and lending limits (12 CFR part 32). After an institution adopts ASU 2016–13, allowances for credit losses on purchased credit-deteriorated assets similarly would affect the calculation of these limits. While these limits apply directly to institutions supervised by the OCC, a number of federal or state laws may apply the OCC's calculation of certain limits to state-chartered institutions supervised by the FDIC or the Board. Therefore, the agencies are proposing to retain this information for all CBLR banks. As CBLR banks would not complete Schedule RC–R, Part II, this information would otherwise not be readily available for the agencies to calculate the relevant regulatory limits for these institutions.[25]

Because a CBLR bank would not be subject to the generally applicable capital requirements, a CBLR bank would not need to complete any of the items in Schedule RC–R, Part I, after proposed item 38, nor would the bank need to complete Schedule RC–R, Part II, Risk-Weighted Assets.

In connection with moving the leverage ratio calculations and inserting items for the CBLR qualifying criteria in Schedule RC–R, Part I, existing items 27 through 35 of Schedule RC–R, Part I, will be renumbered as items 39 through 47. Existing items 40 through 43 will be renumbered as items 48 through 51, while existing items 46 through 48 will be renumbered as items 52 through 54. For advanced approaches institutions filing the FFIEC 031 Call Report, existing items 45.a and 45.b for total leverage exposure and the supplementary leverage ratio, respectively, will be renumbered as items 55.a and 55.b.

A CBLR bank would indicate that it has elected to apply the CBLR framework by completing Schedule RC–R, Part I, items 32 through 38. Institutions not subject to the CBLR framework would be required to report all data items in Schedule RC–R, Part I, except for items 32 through 38.

3. Other Proposed Call Report Revisions Related to the CBLR

While not specifically part of the planned CBLR final rule, the agencies currently collect information in Call Report Schedule RC–C, Part I, ''Loans

[23] *See* definition of ''unconditionally cancellable'' in 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC).

[24] Other factors also may lead the agencies to determine that the risk profile of an otherwise-eligible CBLR bank would warrant the use of the reservation of authority.

[25] Institutions that are not CBLR banks would not complete proposed items 37 and 38.a through 38.c, but would continue to report any ATRR and any allowances for credit losses on purchased credit-deteriorated loans and leases held for investment, held-to-maturity debt securities, and other financial assets measured at amortized cost in Schedule RC–R, Part II.

and Leases,'' Memorandum item 13, from institutions that have a significant amount of construction, land development, and other land loans with interest reserves in relation to their total regulatory capital as reported as of the previous calendar year-end report date. At present, total regulatory capital is defined as total capital reported on Schedule RC–R, Part I, item 35 (FFIEC 051) or item 35.a (FFIEC 031 or FFIEC 041). While CBLR banks would no longer report their total capital in Schedule RC–R, Part I, the agencies believe it is still important to collect this information from CBLR banks that have a significant amount of construction, land development, and other land loans with interest reserves. Therefore, effective March 31, 2021,[26] the agencies propose to revise the reporting threshold for Schedule RC–C, Part I, Memorandum item 13, for all institutions to reference the sum of tier 1 capital as reported in Schedule RC–R, Part I, item 26, plus the allowance for loan and lease losses or the allowance for credit losses on loan and leases, as applicable, as reported in Schedule RC, item 4.c.

C. Proposed Tailoring Rules

1. Background

On December 21, 2018, the agencies published a notice of proposed rulemaking (NPR) proposing to revise the criteria for determining the applicability of requirements under the regulatory capital rule, the liquidity coverage ratio rule, and the proposed net stable funding ratio rule for large U.S. banking organizations (domestic interagency tailoring NPR).[27] The proposal would establish four risk-based categories and apply tailored capital and liquidity requirements for banking organizations subject to each category.

On May 24, 2019, the agencies published an NPR that would revise the criteria for determining the applicable regulatory capital requirements for certain U.S. intermediate holding companies of foreign banking organizations and their depository institution subsidiaries, and the application of standardized liquidity requirements with respect to the U.S. operations of large foreign banking organizations and certain of their depository institution subsidiaries, each according to three of the four risk-based categories proposed for U.S. banking organizations (foreign interagency tailoring NPR).[28] Thus, the proposal is similar to the domestic interagency tailoring NPR. The foreign interagency tailoring NPR also proposed technical amendments to certain provisions of the domestic interagency tailoring NPR.

Under the proposed approach, the most stringent set of standards (Category I) would apply to U.S. global systemically important banks (GSIBs). The second set of standards (Category II) would apply to banking organizations that are very large or have significant international activity. Like Category I, this category would generally include standards that are based on standards that reflect agreements reached by the Basel Committee on Banking Supervision. The third set of standards (Category III) would apply to banking organizations with $250 billion or more in total consolidated assets that do not meet the criteria for Category I or II. The third set of standards would also apply to banking organizations with total consolidated assets of $100 billion or more, but less than $250 billion, that meet or exceed other specified risk-based indicators. The fourth set of standards (Category IV) would apply to banking organizations with total consolidated assets of $100 billion or more that do not meet the thresholds for one of the other categories.

The domestic interagency tailoring and foreign interagency tailoring NPRs also describe the capital and liquidity requirements that would apply for institutions subject to Category I, II, III, or IV capital standards. Based on the proposed capital and liquidity requirements that would apply to institutions subject to Category I, II, III, or IV capital standards in the domestic interagency tailoring and foreign interagency tailoring NPRs, the agencies are proposing to amend certain regulatory report forms to clarify the reporting requirements for those institutions that would be subject to those proposed rules. Specifically, the agencies are proposing changes to Call Report Schedule RC–R, Part I, Regulatory Capital Components and Ratios, and FFIEC 101 Schedule A, Advanced Approaches Regulatory Capital, to provide clarification for institutions subject to Category III capital standards.[29] If modifications are made to the proposed tailoring rules when the rules are adopted in final form, the agencies would modify the Call Report and FFIEC 101 proposals to incorporate such changes. These changes would generally align with the Board's proposed amendments to FR Y–9C, Schedule HC–R, Part I, issued in conjunction with the Board's domestic tailoring and foreign tailoring proposals.[30]

In addition, the agencies are proposing that all institutions subject to Category I, II, or III capital standards would be required to file the FFIEC 031 Call Report. While the agencies proposed to require all advanced approaches institutions to file the FFIEC 031 Call Report in connection with the simplifications rule, the tailoring rules would narrow the scope of institutions calculating risk-weighted assets under the advanced approaches. The agencies expect this scope revision to have little, if any, impact on current institutions, as all institutions with total consolidated assets of $100 billion or more or with foreign offices already are required to file the FFIEC 031, which generally aligns with the standards for Category I, II, and III institutions.[31] Also, modifying the scope of the Call Report in this manner would enable the agencies to streamline Schedule RC–R, Part I, of the FFIEC 041 report by removing data items that apply only to the limited number of current advanced approaches institutions currently eligible to file the FFIEC 041 report and to any future institutions that would, absent this change in scope, be eligible to file the FFIEC 041 report.

2. Proposed Revisions to Call Report Schedule RC–R, Part I

In order to implement the clarifications for institutions subject to Category III capital standards, as discussed above the agencies propose to require all Category III institutions to file the FFIEC 031 Call Report and to revise the caption for Schedule RC–R, Part I, item 45, ''Advanced approaches institutions only: Supplementary leverage ratio information,'' on the FFIEC 031 Call Report. Specifically, the

[26] For report dates during 2020, the reporting threshold for Schedule RC–C, Part I, Memorandum item 13, would be the total capital an institution reported in Schedule RC–R, Part I, as of December 31, 2019, which will predate the initial reporting under the CBLR framework in Schedule RC–R. The first year-end report date under the CBLR framework would be December 31, 2020, which would be the report date to which a CBLR bank would refer in order to determine whether it would need to complete Schedule RC–C, Part I, Memorandum item 13, as of each quarter-end report date during 2021.

[27] 83 FR 66024 (December 21, 2018).

[28] 84 FR 24296 (May 24, 2019).

[29] The agencies do not believe reporting form or instructional clarifications are needed to reflect capital requirements that would apply to institutions subject to Category I, II, or IV capital standards under the domestic interagency tailoring and foreign interagency tailoring NPRs.

[30] *See* 84 FR 22009 (May 15, 2019).

[31] Institutions that are subsidiaries of institutions subject to Category I, II, or III capital standards also are considered Category I, II, or III institutions under the domestic interagency tailoring and foreign interagency tailoring NPRs, and would be treated similarly for this change in reporting scope.

agencies propose to clarify that item 45 (proposed to be renumbered as item 55) applies to ''advanced approaches and Category III institutions'' on the FFIEC 031 report form. Item 45 would be removed from the FFIEC 041 report form. The instructions for Schedule RC–R, Part I, item 45 (proposed to be renumbered as item 55), in the FFIEC 031–FFIEC 041 instruction book also would be revised in the same manner. The general instructions for Schedule RC–R, Part I, in the FFIEC 031–FFIEC 041 instruction book also would be clarified to indicate that Category III institutions are not required to calculate risk-weighted assets according to the advanced approaches rule, but are subject to the supplementary leverage ratio and countercyclical capital buffer.

3. Proposed Revisions to the FFIEC 101

To implement the clarification for institutions subject to Category III capital standards, the agencies propose to revise the instructions for the scope of the FFIEC 101. Specifically, the instructions would be revised to clarify that top-tier Category III bank holding companies, savings and loan holding companies, and insured depository institutions, and all U.S. intermediate holding companies, must complete FFIEC 101 Schedule A, SLR Tables 1 and 2, only.[32] All Category IV institutions would not complete or file any part of the FFIEC 101.

D. Proposed Total Loss Absorbing Capacity Holdings Rule

1. Background

On April 8, 2019, the agencies published an NPR that would address an advanced approaches banking organization's regulatory capital treatment of an investment in unsecured debt instruments issued by foreign or U.S. global systemically important banks (GSIBs) for the purposes of meeting minimum total loss absorbing capacity (TLAC) and, where applicable, long-term debt (LTD) requirements, or liabilities issued by GSIBs that are pari passu or subordinated to such debt instruments (TLAC Holdings NPR).[33] Under the TLAC Holdings NPR, investments by an advanced approaches banking organization in certain unsecured debt instruments generally would be subject to deduction from the advanced approaches banking organization's regulatory capital if such investments exceed certain thresholds. The Board also proposed to require that banking organizations subject to minimum TLAC and LTD requirements under Board regulations publicly disclose their TLAC and LTD issuances in a manner described in the TLAC Holdings NPR.

The agencies are proposing changes to Call Report Schedule RC–R, Part I, Regulatory Capital Components and Ratios, and FFIEC 101 Schedule A, Advanced Approaches Regulatory Capital, to implement the changes proposed to the agencies' capital rule. If modifications are made to the proposed TLAC holdings rule when it is adopted in final form, the agencies would modify the Call Report and FFIEC 101 proposals to incorporate such changes.

2. Proposed Revisions to Call Report Schedule RC–R, Part I

Under the TLAC Holdings NPR, advanced approaches banking organizations would report the total amount of deductions related to investments in own CET1, additional tier 1, and tier 2 capital instruments; investments in own covered debt instruments, if applicable; reciprocal cross holdings; non-significant investments in the capital and covered debt instruments of unconsolidated financial institutions that exceed certain thresholds; certain investments in excluded covered debt instruments, as applicable; and significant investments in the capital and covered debt instruments of unconsolidated financial institutions. Any deductions related to covered debt instruments and excluded covered debt instruments (together, TLAC debt holdings) would be applied at the level of tier 2 capital under the agencies' existing regulatory capital rule. Any required deduction would be made using the ''corresponding deduction approach,'' by which an advanced approaches banking organization would deduct TLAC debt holdings first from tier 2 capital and, if it had insufficient tier 2 capital to make the full requisite deduction, deduct the remaining amount from additional tier 1 capital and then, if necessary, from CET1 capital.

In order to implement these proposed changes, the agencies propose to make a number of revisions to the instructions for Schedule RC–R, Part I, that would be applicable to advanced approaches banking organizations and would be included in the FFIEC 031–FFIEC 041 instruction book. Specifically, the agencies propose to revise the instructions for items 11, 17, 24, and 33 (proposed to be renumbered as item 45) to effectuate the deductions from regulatory capital for advanced approaches banking organizations related to investments in covered debt instruments and excluded covered debt instruments. These changes would generally align with the Board's proposed amendments to FR Y–9C, Schedule HC–R, Part I, issued in conjunction with the TLAC Holdings NPR.[34]

3. Proposed Revisions to Call Report Schedule RC–R, Part II

The agencies also are proposing to revise the instructions for Schedule RC–R, Part II, that would be applicable to advanced approaches banking organizations and would be included in the FFIEC 031–FFIEC 041 instruction book. Specifically, the agencies propose to revise the instructions for items 2.a, 2.b, 7, and 8 to incorporate investments in covered debt instruments and excluded debt instruments, as applicable, by advanced approaches banking organizations in their calculation of risk-weighted assets. These changes would generally align with the Board's proposed amendments to FR Y–9C, Schedule HC–R, Part II, issued in conjunction with the TLAC Holdings NPR.

4. Proposed Revisions to FFIEC 101 Schedule A

i. Deductions From Regulatory Capital

The agencies propose to make a number of revisions to the instructions for FFIEC 101 Schedule A and add a new data item to this schedule. Specifically, the agencies propose to revise the instructions for existing items 52 through 54 and add a new data item to effectuate any deductions from regulatory capital for advanced approaches banking organizations for investments in excluded covered debt instruments, as described in Section II.D.2. above. Existing item 56, ''Other deductions from tier 2 capital,'' would be renumbered and recaptioned as item 56.b, ''All other deductions from tier 2 capital.'' The new item would be inserted as item 56.a, ''Investments in excluded covered debt instruments,'' which would be applicable only to global systemically important bank holding companies (GSIBs) and subsidiaries of GSIBs.

ii. LTD and TLAC Amounts, Ratios, and Buffer

In conjunction with the issuance of the TLAC Holdings NPR, the Board also proposed revisions to the FR Y–9C,

[32] Any Category III banking organization that is a consolidated subsidiary of a top-tier Category III bank holding company, savings and loan holding company, or insured depository institution would not complete or file any part of the FFIEC 101. Those subsidiary banking organizations would report SLR data on Schedule RC–R of the Call Report.

[33] 84 FR 13814 (April 8, 2019).

[34] *See* 84 FR 13823–13824 (April 8, 2019).

Schedule HC–R, Part I, that would collect information from U.S. GSIBs and the intermediate holding companies of foreign GSIBs. Specifically, the proposed items would collect information on these holding companies' LTD and TLAC amounts, LTD and TLAC ratios, and TLAC buffer.

Since the minimum LTD and TLAC requirements and TLAC buffer are only applied at the holding company-level, the agencies are not proposing to amend the FFIEC 101 to include this information. Collecting this information in the FFIEC 101 would be a duplicative reporting requirement and would only be applicable to a subset of FFIEC 101 filers. However, the agencies are interested in public feedback on this issue, especially if commenters believe including these items would enhance or simplify public disclosure.

E. Proposed Revisions to the Supplementary Leverage Ratio for Certain Central Bank Deposits of Custodial Banks

1. Background

On April 30, 2019, the agencies published an NPR that would implement section 402 of the EGRRCPA (section 402). Section 402 directs the agencies to amend the capital rule [35] to exclude from the SLR certain central bank deposits of custodial banks. Section 402 defines a custodial bank as any depository institution holding company predominantly engaged in custody, safekeeping, and asset servicing activities, including any IDI subsidiary of such a holding company.[36]

Under the proposed rulemaking, a depository institution holding company would be considered predominantly engaged in custody, safekeeping, and asset servicing activities if the U.S. top-tier depository institution holding company in the organization has a ratio of assets under custody-to-total assets of at least 30:1. The proposal would define such a depository institution holding company, together with any subsidiary depository institution, as a ''custodial banking organization.'' [37] Under the proposal, a custodial banking organization would exclude deposits placed at a ''qualifying central bank'' from the denominator of the SLR. For purposes of the proposal, a qualifying central bank would mean a Federal Reserve Bank, the European Central Bank, or a central bank of a member country of the Organisation for Economic Co-operation and Development (OECD) [38] if the country's sovereign exposures qualify for a zero percent risk weight under section 32 of the capital rule and the sovereign debt of such member country is not in default or has not been in default during the previous five years. The amount of central bank deposits that could be excluded from the denominator of the SLR would be limited by the amount of deposit liabilities on the consolidated balance sheet of the custodial banking organization that are linked to fiduciary or custody and safekeeping accounts.

The agencies are proposing changes to the instructions for Call Report Schedule RC–R and FFIEC 101 Schedule A, that would implement the proposed changes to the agencies' capital rule.[39] If modifications are made to the proposed custodial bank rule when it is adopted in final form, the agencies would modify the Call Report and FFIEC 101 proposals to incorporate such changes.

2. Proposed Revisions to Call Report Schedule RC–R, Part I

As described in Section II.E.1. above, revisions have been proposed to the calculation of the total leverage exposure, which is the denominator of the SLR. Currently, the instructions for Schedule RC–R, Part I, item 45.a, ''Total leverage exposure,'' reference section 10(c)(4) of the agencies' capital rule. However, the proposed revisions to implement section 402 would allow an organization that qualifies as a ''custodial banking organization'' to exclude deposits placed at a ''qualifying central bank'' from the total leverage exposure, limited to the amount of deposit liabilities on the consolidated balance sheet of the custodial banking organization that are linked to fiduciary or custody and safekeeping accounts. Therefore, if the rule is implemented as proposed, the capital rule would be modified through the incorporation of section 402. Accordingly, the agencies would make corresponding modifications to the instructions for the calculation of the total leverage exposure for institutions that qualify as a ''custodial banking organization'' and the reporting of this exposure in Schedule RC–R, Part I, item 45.a (which would become item 54.a, as proposed above).

3. Proposed Revisions to FFIEC 101 Schedule A

Similar to its effect on the Call Report, the agencies' proposal to implement section 402, as discussed in section II.E.1. above, would also revise the total leverage exposure calculation that would be reported on the FFIEC 101 Schedule A. Currently, there are two calculations for the total leverage exposure in Schedule A, one is contained in SLR Table 1 and the other is in SLR Table 2. The agencies invite comment on the addition of a new data item to both tables in FFIEC 101 Schedule A for the qualifying central bank deduction. The new reporting item would be placed between existing data items 1.7 and 1.8 in SLR Table 1, with the instructions for the total leverage exposure expected to include the new reporting item in the total calculation. Similarly, for SLR Table 2, the new reporting item would be placed between data items 2.2 and 2.3 and the total leverage exposure would be modified to include the new reporting item in the total calculation.

F. Proposed Standardized Approach for Counterparty Credit Risk on Derivative Contracts

1. Background

On December 17, 2018, the agencies published an NPR to implement a new approach for calculating the exposure amount of derivative contracts under the capital rule: the standardized approach for counterparty credit risk (SA–CCR) (SA–CCR proposal).[40]

The SA–CCR proposal would replace the current exposure methodology (CEM) with SA–CCR in the capital rule for advanced approaches institutions. Under the advanced approaches, an advanced approaches institution would have to choose either SA–CCR or the internal models methodology to calculate the exposure amount of its noncleared and cleared derivative contracts and use SA–CCR to determine the risk-weighted asset amount of its default fund contributions. In addition, an advanced approaches institution would be required to use SA–CCR (instead of CEM) to calculate the

[35] *See* 12 CFR part 3 (OCC); 12 CFR part 217 (Board); 12 CFR part 324 (FDIC).

[36] *See generally* Public Law 115–174, sec. 402.

[37] For purposes of this proposed rulemaking, the OCC's capital rule would be revised to include a definition of ''custody bank,'' defined as a national bank or Federal savings association that is a subsidiary of a depository institution holding company that is a custodial banking organization under 12 CFR 217.2. Similarly, the FDIC's capital rule would be revised to include a definition of ''custody bank,'' defined as an FDIC-supervised institution that is a subsidiary of a depository institution holding company that is a custodial banking organization under 12 CFR 217.2.

[38] The OECD is an intergovernmental organization founded in 1961 to stimulate economic progress and global trade. A list of OECD member countries is available on the OECD's website, *www.oecd.org.*

[39] In connection with the NPR to implement section 402 of the EGRRCPA, the Board will separately propose to make corresponding revisions to the Consolidated Financial Statements for Holding Companies (FR Y–9C).

[40] 83 FR 64660 (December 17, 2018).

exposure amount of its noncleared and cleared derivative contracts and to determine the risk-weighted asset amount of its default fund contributions under the standardized approach, as well as to determine the exposure amount of its derivative contracts for purposes of the SLR.

Under the SA–CCR proposal, a non-advanced approaches institution would be able to use either CEM or SA–CCR to calculate the exposure amount of its noncleared and cleared derivative contracts and to determine the risk-weighted asset amount of its default fund contributions under the standardized approach. A Category III banking organization would also use SA–CCR for calculating its SLR if it chooses to use SA–CCR to calculate its derivative and default fund exposures.

The agencies propose to revise the instructions for Call Report Schedule RC–R, Part II, as well as to SLR Table 2 in FFIEC 101 Schedule A, to implement the proposed changes to the calculation of the exposure amount of derivative contracts under the agencies' capital rule. If modifications are made to the SA–CCR proposal when it is adopted in final form, the agencies would modify the Call Report and FFIEC 101 proposals to incorporate such changes.

2. Proposed Revisions to Call Report Schedule RC–R, Part II

A banking organization must report the notional amount and regulatory capital exposure amount of its derivatives exposures in Schedule RC–R, Part II. The agencies propose to revise the instructions for Schedule RC–R, Part II, consistent with the SA–CCR proposal. Generally, the proposed revisions to the reporting of derivatives elements in Schedule RC–R, Part II, are driven by the treatment of cleared derivatives' variation margin (settled-to-market versus collateralized-to-market), netting provisions impacting the calculations of notional and exposure amounts, and attributions of derivatives to cleared versus noncleared derivatives. The General Instructions for Schedule RC–R, Part II, and the instructions for Schedule RC–R, Part II, items 20, 21, and Memorandum items 1 through 3 would be revised.

3. Proposed Revisions to FFIEC 101 Schedule A, SLR Table 2

An advanced approaches institution must report the exposure amount of its derivatives in SLR Table 2 of FFIEC 101 Schedule A. The agencies propose to revise the instructions for SLR Table 2 consistent with the SA–CCR proposal. In particular, institutions that are required to use SA–CCR for the purpose of the SLR would apply the SA–CCR-based exposure amount without consideration of the various collateral items currently listed in the instructions for SLR Table 2. Institutions that continue to use the current exposure method would use the current instructions to complete SLR Table 2.

G. High Volatility Commercial Real Estate (HVCRE) Land Development Proposal

1. Background

On September 28, 2018, the agencies published an HVCRE NPR to revise the HVCRE exposure definition in section 2 of the capital rule [41] to conform to the statutory definition of an HVCRE ADC loan.[42] Consistent with section 214 of the EGRRCPA, the agencies proposed in the HVCRE NPR to exclude credit facilities that finance the acquisition, development, or construction of one- to four-family residential properties from the definition of HVCRE exposure.

Section 214 became effective upon enactment of the EGRRCPA. Accordingly, on July 6, 2018, the agencies issued a statement (interagency statement), advising institutions that, when determining which loans should be subject to a heightened risk weight, they may choose to continue to apply the current regulatory definition of HVCRE exposure, or they may choose to apply the heightened risk weight only to those loans they reasonably believe meet the definition of ''HVCRE ADC loan'' set forth in section 214 of the EGRRCPA.[43] Until the agencies take further action, institutions are advised to reference the interagency statement for purposes of the HVCRE exposure definition and regulatory reporting.

On July 23, 2019, the agencies published the HVCRE Land Development NPR,[44] which would expand upon the HVCRE NPR to revise the definition of HVCRE exposure in the capital rule by adding a new paragraph that provides that the exclusion for one- to four-family residential properties would not include credit facilities that solely finance land development activities, such as the laying of sewers, water pipes, and similar improvements to land, without any construction of one- to four-family residential structures. In order for a loan to be eligible for this exclusion, the credit facility would be required to include financing for construction of one- to four-family residential structures. This proposed revision to the capital rule would generally align with the instructions for item 1.a.(2) of Call Report Schedule RC–C, Part I, and FR Y–9C, Schedule HC–C.

Allowing institutions to apply a consistent definition of one- to four-family residential property and land development in this manner would simplify reporting requirements, reduce burden, and promote uniform application of the capital rule.

2. Proposed Revisions to Call Report Schedule RC–R, Part II

If the agencies adopt a final rule under section 214 of the EGRRCPA, such final rule would supersede the July 6, 2018, interagency statement and institutions would be required to apply the HVCRE definition in that rule. Therefore, the agencies are proposing conforming revisions to the instructions for Schedule RC–R, Part II, items 4.b and 5.b, in all versions of the Call Report. No revisions to the Call Report forms would be necessary.

3. Proposed Revisions to FFIEC 101 Schedule G

The changes to the HVCRE definition discussed above would also affect the instructions for Schedule G—Wholesale Exposure. Therefore, the agencies are proposing conforming revisions to the FFIEC 101 instructions to align with the new HVCRE definition in the final rule implementing section 214.

H. Operating Lease Liabilities

In February 2016, the Financial Accounting Standards Board (FASB) issued ASU No. 2016–02, ''Leases,'' which added Topic 842, Leases, to the Accounting Standards Codification (ASC). Once ASU 2016–02 is effective for an institution, the ASU's accounting requirements, as amended by certain subsequent ASUs, supersede ASC Topic 840, Leases.

The most significant change that ASC Topic 842 makes to the previous lease accounting requirements is to lessee accounting. Under the lease accounting standards in ASC Topic 840, lessees recognize lease assets and lease liabilities on the balance sheet for capital leases, but do not recognize operating leases on the balance sheet. The lessee accounting model under Topic 842 retains the distinction between operating leases and capital leases, which the new standard labels

[41] 12 CFR part 3 (OCC); 12 CFR part 217 (Board); and 12 CFR part 324 (FDIC).

[42] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); and 12 CFR 324.2 (FDIC).

[43] Board, FDIC, and OCC, *Interagency statement regarding the impact of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180706a1.pdf.*

[44] 84 FR 35344 (July 23, 2019).

finance leases. However, the new standard requires lessees to record a right-of-use (ROU) asset and a lease liability on the balance sheet for operating leases. (For finance leases, a lessee's lease asset also is designated an ROU asset.) In general, the new standard permits a lessee to make an accounting policy election to exempt leases with a term of one year or less at their commencement date from on-balance sheet recognition.

For institutions that are public business entities, as defined under U.S. generally accepted accounting principles (GAAP), ASU 2016–02 is effective for fiscal years beginning after December 15, 2018, including interim reporting periods within those fiscal years. For institutions that are not public business entities, at present, the new standard is effective for fiscal years beginning after December 15, 2019, and interim reporting periods within fiscal years beginning after December 15, 2020.[45] Early application of the new standard is permitted for all institutions.

The Call Report Supplemental Instructions for March 2019[46] stated that a lessee should report lease liabilities for operating leases and finance leases, including lease liabilities recorded upon adoption of the ASU, in Schedule RC–M, items 5.b, ''Other borrowings,'' and 10.b, ''Amount of 'Other borrowings' that are secured,'' which is consistent with the current Call Report instructions for reporting a lessee's obligations under capital leases under ASC Topic 840. In response to this instructional guidance, the agencies received questions from institutions concerning the reporting of a bank lessee's lease liabilities for operating leases. These institutions indicated that reporting operating lease liabilities as other liabilities instead of other borrowings would better align the reporting of the single noninterest expense item for operating leases in the income statement (which is the presentation required by ASC Topic 842) with their balance sheet classification and would be consistent with how these institutions report operating lease liabilities internally.

The agencies have considered the views expressed by these institutions and propose to require that operating lease liabilities be reported on the Call Report balance sheet in Schedule RC, item 20, ''Other liabilities.'' In Schedule RC–G, Other Liabilities, operating lease liabilities would be reported in item 4, ''All other liabilities.'' In subitems of Schedule RC–G, item 4, institutions must itemize and describe any components of this item in amounts greater than $100,000 that exceed 25 percent of the amount reported in item 4. Because of the expected prevalence of operating lease liabilities, the agencies also propose to add a new subitem with the preprinted caption ''Operating lease liabilities'' to item 4 to facilitate the reporting of these liabilities when their amount exceeds the reporting threshold for itemizing and describing components of ''All other liabilities.''

As described in the Call Report Supplemental Instructions for June 2019, while the agencies are in the process of proposing this instructional revision, the agencies are permitting institutions to report the lease liability for operating leases in either Schedule RC–G, item 4, ''All other liabilities,'' or Schedule RC–M, item 5.b, ''Other borrowings.''[47] If an institution chooses the latter reporting treatment, the amount of operating lease liabilities reported in Schedule RC–M, item 5.b, should also be reported in Schedule RC–M, item 10.b, ''Amount of 'Other borrowings' that are secured,'' and this amount should not be reported in Schedule RC–O, item 7, as ''Unsecured 'Other borrowings'.'' An institution may choose to amend the reporting of operating lease liabilities in its Call Report for March 31, 2019, consistent with this instructional guidance.

I. Reporting Home Equity Lines of Credit That Convert From Revolving to Non-Revolving Status

Institutions report the amount outstanding under revolving, open-end lines of credit secured by 1–4 family residential properties (commonly known as home equity lines of credit or HELOCs) in item 1.c.(1) of Schedule RC–C, Part I, Loans and Leases. The amounts of closed-end loans secured by 1–4 family residential properties are reported in Schedule RC–C, Part I, item 1.c.(2)(a) or (b), depending on whether the loan is a first or a junior lien.[48]

A HELOC is a line of credit secured by a lien on a 1–4 family residential property that generally provides a draw period followed by a repayment period. During the draw period, a borrower has revolving access to unused amounts under a specified line of credit. During the repayment period, the borrower can no longer draw on the line of credit, and the outstanding principal is either due immediately in a balloon payment or repaid over the remaining loan term through monthly payments. Because the Call Report instructions do not address the reporting treatment for a home equity line of credit when it reaches its end-of-draw period and converts from revolving to nonrevolving status, the agencies have found diversity in how these credits are reported in Schedule RC–C, Part I, items 1.c.(1), 1.c.(2)(a), and 1.c.(2)(b), and in other Call Report items that use the definitions of these three loan categories.

In September 2015, to address this absence of instructional guidance and promote consistency in reporting, the agencies proposed to clarify the instructions for reporting loans secured by 1–4 family residential properties by specifying that after a revolving open-end line of credit has converted to non-revolving closed-end status, the loan should be reported as closed-end in Schedule RC–C, Part I, item 1.c.(2)(a) or (b), as appropriate.[49] As discussed in a subsequent notice,[50] the agencies received a number of comments that raised concerns with the proposal. In particular, some commenters stated that reclassifying HELOCs after the draw period could raise operational challenges for institutions' loan systems that would require additional time to implement. Based on the feedback received, the agencies did not proceed with their proposed instructional clarification at that time.

The agencies continue to believe that it is important to collect accurate data on loans secured by 1–4 family residential properties in the Call Report. Consistent classification of HELOCs based on the status of the draw period is particularly important for the agencies' safety and soundness monitoring. Due to the structure of HELOCs discussed above, borrowers generally are not required to make

[45] On August 15, 2019, the FASB issued a proposal that would amend the effective date of ASC Topic 842 for institutions that are not public business entities. As proposed, ASC Topic 842 would be effective for such institutions for fiscal years beginning after December 15, 2020, and interim reporting periods within fiscal years beginning after December 15, 2021. The FASB would retain the existing effective date for ASC Topic 842 for public business entities. Early adoption would continue to be allowed.

[46] *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_FFIEC051_suppinst_201903.pdf.*

[47] *See* the Call Report Supplemental Instructions for June 2019, *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_FFIEC051_suppinst_201906.pdf.*

[48] Institutions report additional information on open-end and closed-end loans secured by 1–4 family residential properties in certain other Call Report schedules in accordance with the loan category definitions in Schedule RC–C, Part I, items 1.c.(1), 1.c.(2)(a), and 1.c.(2)(b).

[49] *See* 80 FR 56539 (September 18, 2015).

[50] *See* 81 FR 45357 (July 13, 2016).

principal repayments during the draw period, which may create a financial shock for borrowers when they must make a balloon payment or begin regular monthly repayments after the draw period. With some institutions reporting HELOCs past the draw period as revolving, this increases the amounts outstanding, charge-offs, recoveries, past dues, and nonaccruals reported in the open-end category relative to the amounts reported by institutions that treat HELOCs past the draw period as closed-end, which makes the data less useful for agency comparisons and safety and soundness monitoring. In addition, in ASU No. 2019–04,[51] the FASB amended ASC Subtopic 326–20 on credit losses to require that, when presenting credit quality disclosures in notes to financial statements prepared in accordance with U.S. GAAP, an entity must separately disclose line-of-credit arrangements that are converted to term loans from line-of-credit arrangements that remain in revolving status. After further review, the agencies have determined that there would be little or no impact to the regulatory capital calculations, FDIC deposit insurance assessments, or other regulatory reporting requirements as a result of this clarification, which were other concerns previously raised by commenters.

Therefore, the agencies are re-proposing to clarify the Call Report instructions for Schedule RC–C, Part I, items 1.c.(1), 1.c.(2)(a), and 1.c.(2)(b), to state that revolving open-end lines of credit that have converted to non-revolving closed-end status should be reported as closed-end loans. The effect of this clarification would extend to the instructions for the following data items that reference the Schedule RC–C, Part I, loan category definitions for open-end and closed-end loans secured by 1–4 family residential properties:

- Schedule RI–B, Part I, items 1.c.(1), 1.c.(2)(a), and 1.c.(2)(b);
- Schedule RC–C, Part I, Memorandum items 2.a.(1) through (6) and 2.b.(1) through (6);
- Schedule RC–M, items 13.a.(1)(c)(1), 13.a.(1)(c)(2)(a), and 13.a.(1)(c)(2)(b) on the FFIEC 031 and FFIEC 041;
- Schedule RC–N, items 1.c.(1), 1.c.(2)(a), and 1.c.(2)(b);
- Schedule RC–N, items 12.a.(3)(a), 12.a.(3)(b)(1), and 12.a.(3)(b)(2) on the FFIEC 031 and FFIEC 041;
- Schedule RC–O, Memorandum items 18.b, 18.c, and 18.d on the FFIEC 031 and FFIEC 041;
- Schedule RC–S, Memorandum items 2.a, 2.b, and 2.c on the FFIEC 031 and FFIEC 041; and
- Schedule SU, items 6 and 6.a on the FFIEC 051.

This instructional clarification would not apply to the reporting of asset-backed securities collateralized by HELOCs in Schedule RC–B, Memorandum item 5.b, on the FFIEC 031 and FFIEC 041 and Schedule RC–D, Memorandum item 5.b on the FFIEC 031 and securitizations of closed-end 1–4 family residential loans and home equity lines in Schedule RC–S, columns A and B, on the FFIEC 031, and columns A and G on the FFIEC 041.

To address prior comments regarding the time needed for any systems changes, the agencies propose that compliance with the clarified instructions would not be required until the March 31, 2021, report date. Institutions not currently reporting in accordance with the clarified instructions would be permitted, but not required, to report in accordance with the clarified instructions before that date.

III. Timing

The agencies propose to make the capital-related reporting changes in this notice effective the same quarters as the effective dates of the various currently final or potential final capital rules discussed in this notice. The agencies also propose that the changes in the scope of the FFIEC 031 Call Report and in the reporting of operating lease liabilities would be effective March 31, 2020, and the changes in the reporting of construction, land development, and other land loans with interest reserves and home equity lines of credit would be effective March 31, 2021. The agencies invite comment on any difficulties that institutions would expect to encounter in implementing the systems changes necessary to accommodate the proposed revisions to the Call Reports and the FFIEC 101 report or the minimum time required to make systems changes to implement these changes.

The specific wording of the captions for the new or revised Call Report data items discussed in this proposal and the numbering of these data items should be regarded as preliminary.

IV. Request for Comment

Public comment is requested on all aspects of this joint notice. Comment is specifically invited on:

(a) As an alternative to the approach proposed for reporting in Schedule RC–R, Part I, in the FFIEC 041 and FFIEC 051 Call Reports for March 31, 2020, by non-advanced approaches institutions that choose not to early adopt the simplifications rule (discussed in Section II.A.1. above), which would have the agencies provide instructions on how such institutions should complete this schedule as of that report date, whether the agencies should instead provide separate columns in Schedule RC–R, Part I, in the FFIEC 041 and FFIEC 051 Call Reports for the March 31, 2020, report date that would enable institutions to report in either the column for the simplifications rule or the column for the current capital rule for that report date? This alternative approach would be similar to the proposed two-column approach in Schedule RC–R, Part I, for the FFIEC 031 Call Report, but the two columns would be included in the FFIEC 041 and FFIEC 051 Call Reports only for the March 31, 2020, report date and the second column would be removed from these two reports effective June 30, 2020, when the simplifications rule would apply to all non-advanced approaches institutions.

(b) For advanced approaches banking organizations, whether the agencies should include items related to LTD and TLAC amounts, ratios, and the TLAC buffer in the FFIEC 101. Please describe the benefits and drawbacks of including these items in the FFIEC 101.

(c) For the reporting of derivatives data in Call Report Schedules RC–D, RC–F, RC–G, RC–L (or SU on the 051), and RC–R, Part II, the degree to which the agencies should align the reporting approaches applicable to these schedules. In particular, please describe how the agencies can ensure data consistency while reducing the burden of reporting the fair values, notional amounts, and exposure amounts of derivatives for settled-to-market and collateralized-to-market derivatives in Schedules RC–D, RC–F, RC–G, RC–L (or SU on the 051), and RC–R, Part II, as applicable. Please address whether the agencies should adopt a consistent classification of derivatives by asset class (*e.g.,* interest rate, energy, and volatility derivative contracts) and by product type (*e.g.,* cleared swap, futures contract, exchange-traded option).

(d) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(e) The accuracy of the agencies' estimates of the burden of the

[51] ASU No. 2019–04, ''Codification Improvements to Topic 326, Financial Instruments—Credit Losses, Topic 815, Derivatives and Hedging, and Topic 825, Financial Instruments,'' issued in April 2019.

information collections as they are proposed to be revised, including the validity of the methodology and assumptions used;

(f) Ways to enhance the quality, utility, and clarity of the information to be collected;

(g) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(h) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments submitted in response to this joint notice will be shared among the agencies.

Dated: October 1, 2019.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System, September 30, 2019.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 30, 2019.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–21659 Filed 10–3–19; 8:45 am]

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

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons, aircraft, and vessel that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons, aircraft, and this vessel are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; or Assistant Director for Regulatory Affairs, tel.: 202–622–4855.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On September 30, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and the following aircraft and vessel subject to U.S. jurisdiction are blocked under the relevant sanctions authorities listed below.

Individuals

1. ASLANOV, Dzheykhun Nasimi Ogly (a.k.a. ASLANOV, Jay; a.k.a. ASLANOV, Jayhoon), Russia; DOB 01 Jan 1990; POB Sumgait, Azerbaijan; nationality Russia; Gender Male; Passport 629512112 (Russia); National ID No. 2504139886 (individual) [CYBER2] [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of Executive Order 13848 of September 12, 2018, ''Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election,'' (E.O. 13848) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

2. BURCHIK, Mikhail Leonidovich (a.k.a. ABRAMOV, Mikhail), Russia; DOB 07 Jun 1986; Gender Male (individual) [CYBER2] [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

3. KUZMIN, Denis Igorevich, Russia; DOB 18 Dec 1990; Gender Male (individual) [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

4. NESTEROV, Igor Vladimirovich, Russia; DOB 07 Feb 1985; citizen Russia; Gender Male (individual) [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

5. PODKOPAEV, Vadim Vladimirovich (a.k.a. PODKOPAYEV, Vadim), Russia; DOB 01 May 1985; Gender Male (individual) [CYBER2] [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

6. PRIGOZHIN, Yevgeniy Viktorovich (a.k.a. PRIGOZHIN, Evgeny), Russia; DOB 01 Jun 1961; Gender Male (individual) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

7. VENKOV, Vladimir Dmitriyevich (a.k.a. VENKOV, Vladimir), Russia; DOB 28 May 1990; Gender Male (individual) [CYBER2] [ELECTION–EO13848] (Linked To: INTERNET RESEARCH AGENCY LLC).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted,

sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 2(a)(iii) of E.O. 13848 for having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13848.

Entities

1. AUTOLEX TRANSPORT LTD., Alpha Centre, Providence Office, Number 22, Mahe, Seychelles [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 1(a)(iii)(B) of Executive Order 13694 of April 1, 2015, ''Blocking Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities,'' as amended by Executive Order 13757 of December 28, 2016, ''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,'' (E.O. 13694, as amended) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

Also designated pursuant to section 1(a)(ii)(D)(2) of Executive Order 13661 of March 16, 2014, ''Blocking Property of Additional Persons Contributing to the Situation in Ukraine,'' (E.O. 13661) for having materially assisted sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13661.

2. BERATEX GROUP LIMITED (a.k.a. BERATEX GROUP LTD.), Suite 1, Sound and Vision House, Francis Rachel Street, Victoria, Mahe, Seychelles [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 1(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

Also designated pursuant to section 1(a)(ii)(D)(2) of E.O. 13661 for having materially assisted sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13661.

3. LINBURG INDUSTRIES LTD., Alpha Centre, Providence Office, Number 22, Mahe, Seychelles; Blanicka 590/3, Vinohrady, Prague 120 000, Czech Republic; Registration Number 191335 (Seychelles) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 2(a)(ii) of E.O. 13848 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13848.

Also designated pursuant to section 1(a)(iii)(B) of E.O. 13694, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

Also designated pursuant to section 1(a)(ii)(D)(2) of E.O. 13661 for having materially assisted sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, YEVGENIY VIKTOROVICH PRIGOZHIN, a person whose property and interests in property are blocked pursuant to E.O. 13661.

4. INTERNET RESEARCH AGENCY LLC (a.k.a. AZIMUT LLC; a.k.a. GLAVSET LLC; a.k.a. GLAVSET, OOO; a.k.a. LAKHTA INTERNET RESEARCH; a.k.a. MEDIASINTEZ LLC; a.k.a. MEDIASINTEZ, OOO; a.k.a. MIXINFO LLC; a.k.a. NOVINFO LLC; a.k.a. NOVINFO, OOO), 55 Savushkina Street, St. Petersburg, Russia; d. 4 korp. 3 litera A pom. 9–N, ofis 238, ul. Optikov, St. Petersburg, Russia; d. 4 litera B pom. 22–N, ul. Starobelskaya, St. Petersburg, Russia; d. 79 litera A. pom 1–N, ul. Planernaya, St. Petersburg, Russia; 4 Optikov Street, Building 3, St. Petersburg, Russia [CYBER2] [ELECTION–EO13848].

Designated pursuant to section 2(a)(i) of E.O. 13848 for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

Aircraft

1. M–SAAN; Aircraft Manufacture Date Sep 2007; Aircraft Mode S Transponder Code 424B32; Aircraft Model EMB135; Aircraft Operator Autolex Transport LTD.; Nationality of Registration Man, Isle of; Aircraft Serial Identification 14501008 (aircraft) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: AUTOLEX TRANSPORT LTD.).

Identified pursuant to E.O. 13848 for being property in which AUTOLEX TRANSPORT LTD., a person whose property and interests in property are blocked pursuant to E.O. 13848, has an interest.

Also identified pursuant to E.O. 13694, as amended, for being property in which AUTOLEX TRANSPORT LTD., a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended, has an interest.

Also identified pursuant to E.O. 13661, for being property in which AUTOLEX TRANSPORT LTD., a person whose property and interests in property are blocked pursuant to E.O. 13661, has an interest.

2. RA–02791 (f.k.a. M–VITO); Aircraft Manufacture Date 01 Dec 2000; Aircraft Mode S Transponder Code 140AE7; Aircraft Model Hawker 800XP; Aircraft Operator Beratex Group Limited; Nationality of Registration Russia; Aircraft Serial Identification 258512 (aircraft) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: BERATEX GROUP LIMITED).

Identified pursuant to E.O. 13848 for being property in which BERATEX GROUP LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13848, has an interest.

Also identified pursuant to E.O. 13694, as amended, for being property in which BERATEX GROUP LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended, has an interest.

Also identified pursuant to E.O. 13661, for being property in which BERATEX GROUP LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13661, has an interest.

3. VP–CSP; Aircraft Manufacture Date Sep 1991; Aircraft Mode S Transponder Code 400065; Aircraft Model BAE 125 Series 800B; Aircraft Operator Linburg Industries LTD.; Nationality of Registration Cayman Islands; Aircraft Serial Identification 258210 (aircraft) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: LINBURG INDUSTRIES LTD.).

Identified pursuant to E.O. 13848 for being property in which LINBURG INDUSTRIES LTD., a person whose property and interests in property are blocked pursuant to E.O. 13848, has an interest.

Also identified pursuant to E.O. 13694, as amended, for being property in which LINBURG INDUSTRIES LTD., a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended, has an interest.

Also identified pursuant to E.O. 13661, for being property in which LINBURG INDUSTRIES LTD., a person whose property and interests in property are blocked pursuant to E.O. 13661, has an interest.

Vessel

1. ST. VITAMIN Pleasure Craft St. Vincent and the Grenadines flag (Beratex Group Limited); MMSI 375311000 (vessel) [UKRAINE–EO13661] [CYBER2] [ELECTION–EO13848] (Linked To: BERATEX GROUP LIMITED).

Identified pursuant to E.O. 13848 for being property in which BERATEX GROUP

LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13848, has an interest.

Also identified pursuant to E.O. 13694, as amended, for being property in which BERATEX GROUP LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13694, as amended, has an interest.

Also identified pursuant to E.O. 13661, for being property in which BERATEX GROUP LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13661, has an interest.

On September 30, 2019, OFAC updated the Specially Designated Nationals and Blocked Persons List entry for the following person, whose property and interests in property subject to U.S. jurisdiction continue to be blocked.

Individual

1. CHEN, Mei Hsiang (Chinese Traditional: 陳美香) (a.k.a. CHEN, Mei-Hsiang), Taiwan; DOB 06 May 1961; nationality Taiwan; Gender Female; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Passport 314009735; National ID No. Q221029421 (individual) [DPRK4].

Dated: September 30, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–21606 Filed 10–3–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Rental and Utility Assistance for Certain Low-Income Veteran Families

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Supportive Services for Veteran Families (SSVF) Program has enabled grantees to augment available housing options for homeless Veterans in high-rent burden communities by increasing the rental assistance for up to 2 years before recertification. This notice will establish locations where the SSVF grantees can place Veterans in housing with this rental subsidy.

DATES: SSVF grantees can place Veterans in housing with the rental subsidy described in title 38 Code of Federal Regulations (CFR) section 62.34(a)(8) effective October 1, 2019.

FOR FURTHER INFORMATION CONTACT: John Kuhn, Homeless Program Office, Supportive Services for Veteran Families Program Office, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8596. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on August 28, 2019, the Department of Veterans Affairs published a final rule, which revised its regulations that govern the SSVF Program, which are authorized under section 2044 of title 38 United States Code (U.S.C.). 84 FR 45074. This rule, which amended 38 CFR 62.34(a)(6) and (8), extends the ability of SSVF grantees to provide rental assistance in certain areas where the limited availability of affordable housing makes it difficult to reduce a community's population of homeless Veterans.

Through the provision of these subsidies, the pool of available housing can be expanded as program participants have access to a broader rental market. Section 62.34(a)(8) states that extremely low-income Veteran families and very low-income Veteran families who meet the criteria of § 62.11 may be eligible to receive a rental subsidy for a 2-year period without recertification. Section 62.34(a)(8) further states that the applicable counties will be published annually in the **Federal Register**. This notice provides the eligible counties for Fiscal Year 2020.

Locations: This rental subsidy will be available in the District of Columbia and the following counties:

California: Los Angeles, San Francisco, Alameda, San Diego, Santa Clara, and Contra Costa
Washington: King
Hawaii: Honolulu
Illinois: Cook
New York: New York, Bronx, Queens, Kings, and Richmond

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on September 30, 2019, for publication.

Dated: September 30, 2019.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2019–21607 Filed 10–3–19; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity Under OMB Review: per Diem to States for Care of Eligible Veterans in State Homes

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before November 4, 2019.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–NEW'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Office of Quality, performance and Risk (OQPR), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov* Please refer to ''OMB Control No. 2900–NEW'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: per Diem to States for Care of Eligible Veterans in State Homes (VA Forms 10–0143, 10–0143A, 10–0144, 10–0144A, 10–0460, and 10–3567)

OMB Control Number: 2900–NEW.

Type of Review: Reinstatement of previously approved collection as a new collection.

Abstract: This collection of forms was part of a previously approved collection under OMB Control Number 2900–0160. However, it has been determined that these six forms will be separated from the other three forms in 2900–0160, and renewal is requested under a new OMB Control Number.

Title 38 CFR part 51 State Veterans Homes (SVH) regulations published in the **Federal Register** as final rule on November 28, 2018 (RIN 2900–A088) require the VA to ensure per diem payments are limited to facilities providing high quality care. These six forms are presented to and completed by SVH management and then assessed and utilized by VA SVH Representatives designated by the Medical Center Director of VA of jurisdiction during the annual VA survey process at each SVH across the U.S. as a regulatory action. This collection of forms falls under the auspices of Geriatrics and Extended Care in VA Central Office (10NC4). As per VHA Directive 1145.01, this collection of forms is part of the annual VA survey process. The legal requirements that necessitate this collection of information are found specifically at 38 CFR parts 51.31, 51.43, and 51.210 for all three levels of care; nursing home, domiciliary, and adult day health care.

The information required at time of the VA survey includes the application and justification for medications for a basic rate Veteran; records and reports that SVH management must maintain regarding activities of residents or participants; information relating to whether the SVH meets standards concerning residents' rights and responsibilities prior to admission or enrollment, during admission or enrollment, and upon discharge; the records and reports which SVH management and SVH health care professionals must maintain regarding residents or participants and employees; various types of documents pertaining to the management of the SVH; pharmaceutical records; and staffing documentation.

a. VA Form 10–0143—38 CFR 51.210(c)(9)—is used for the annual certification pursuant to the Drug-Free Workplace Act of 1988.

b. VA Form 10–0143A—38 CFR 51.210(c)(8)—is used for annual certification from the responsible State Agency showing compliance with Section 504 of the Rehabilitation Act of 1973 (Public Law 93–112).

c. VA Form 10–0144—38 CFR 51.210(c)(10)—is used for annual certification regarding lobbying, in compliance with Public Law 101–121.

d. VA Form 10–0144A—38 CFR 51.210(c)(11)—is used for annual certification of compliance with Title VI of the Civil Rights Act of 1964, as incorporated in Title 38 CFR 18.1–18.3.

e. VA Form 10–0460—38 CFR 51.43—As a condition for receiving drugs or medicine under this section or under § 17.96 of this chapter, the State must submit to the VA medical center of jurisdiction a completed VA Form 10–0460 with the corresponding prescription(s) for each eligible Veteran.

f. VA Form 10–3567—38 CFR 51.31—is completed by SVH management during the annual VA survey and used to record and then assess the following: operating beds versus recognized beds, total FTEE authorized and vacancies, as well as resident census.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 35453 on July 23, 2019, pages 35453 and 35454.

VA Form 10–0143

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 156.

VA Form 10–0143A

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 156.

VA Form 10–0144

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 156.

VA Form 10–0144A

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 13 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 156.

VA Form 10–0460

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 5500 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 11,000.

VA Form 10–3567

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 78 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 156.

By direction of the Secretary.

Danny S. Green,

Interim VA Clearance Officer, Office of Quality, performance and Risk (OQPR), Department of Veterans Affairs.

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Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 292 and 375

Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978; Proposed Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 292 and 375

[Docket Nos. RM19–15–000 and AD16–16–000]

Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking, the Federal Energy Regulatory Commission proposes to revise its regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 in light of changes in the energy industry since 1978.

DATES: Comments are due December 3, 2019.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Lawrence R. Greenfield (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6415, *lawrence.greenfield@ferc.gov.*

Helen Shepherd (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6176, *helen.shepherd@ferc.gov.*

Thomas Dautel (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6196, *thomas.dautel@ferc.gov.*

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1. In this notice of proposed rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) proposes to revise its regulations (PURPA Regulations) [1] implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) [2] in light of changes in the energy industry since 1978.

2. PURPA was enacted in 1978 as part of a package of legislative proposals intended to reduce the country's dependence on oil and natural gas, which at the time were in short supply and subject to dramatic price increases. PURPA sets forth a framework to encourage the development of alternative generation resources that do not rely on fossil fuels and cogeneration facilities that make more efficient use of the heat produced from the fossil fuels that were then commonly used in the production of electricity. The Commission issued the PURPA Regulations to implement PURPA in 1980.

3. Circumstances have changed considerably since the Commission implemented its PURPA Regulations in 1980. For one thing, advances in technology and the discovery of significant new natural gas reserves have resulted in plentiful supplies of relatively inexpensive natural gas. As a result, there no longer is the same need to provide incentives to address shortages of natural gas. Moreover, unlike in 1980, when the electric industry was made up principally of vertically integrated utilities that were reluctant to purchase power from independent generators, today the electric industry provides open access transmission and there are vibrant wholesale electric markets in much of the country where independent generators can sell their power at competitive prices. These markets have supported the addition of significant amounts of new independently-owned generation resources, including renewable resources. In addition, there are a number of federal and state programs that provide further incentives for the development of alternative resources, such as renewable resources. Consequently, the majority of renewable resources in operation today do not rely on PURPA.

4. Congress not only directed the Commission to establish rules to implement PURPA, but also directed that the Commission revise those rules ''from time to time thereafter[.]'' [3] The Commission now is proposing to revise its PURPA Regulations to rebalance the benefits and obligations of the Commission's PURPA Regulations in light of the changes in circumstances since the PURPA Regulations were promulgated in 1980. As explained more fully herein, the Commission proposes to grant state regulatory authorities that oversee regulated electric utilities and nonregulated electric utilities (collectively, for ease of reference, referred to as states) the flexibility in key respects to incorporate competitive market pricing in the rates paid by electric utilities to qualifying small power production facilities and qualifying cogeneration facilities under PURPA (collectively, QFs). These proposed changes constitute a package of reforms the Commission believes will continue to encourage QFs while at the same time addressing concerns that have been raised regarding the Commission's current PURPA Regulations.

5. *First,* the Commission proposes to grant states the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations (LEO) [4] vary in accordance with changes in the purchasing electric utility's as-available avoided costs at the time the energy is delivered. Under this proposal, if a state exercises this flexibility, a QF would no longer have the ability to elect to have its energy rate be fixed for the term of the contract or LEO.[5]

6. *Second,* the Commission proposes to grant states additional flexibility to allow QFs to have a fixed energy rate, but to provide that such state-authorized fixed energy rate can be based on projected energy prices during the term of a QF's contract based on the anticipated dates of delivery.

7. *Third,* the Commission proposes to grant states the flexibility to set ''as-available'' QF energy rates: (1) For QFs selling to electric utilities located in organized electric markets defined in 18 CFR 292.309(e), (f), or (g),[6] at the locational marginal price (LMP); and (2) for QFs selling to electric utilities located outside of organized electric markets defined in 18 CFR 292.309(e), (f), or (g), at competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and specified heat rates. Further, states would have the flexibility to set energy and capacity rates pursuant to a competitive solicitation process conducted pursuant to transparent and non-discriminatory procedures. In each case, the Commission's proposal would entail granting the states options to employ additional approaches in setting QF rates beyond those commonly employed today. Under the Commission's proposal, the states would have the flexibility to choose to adopt one or more of these options or to continue setting QF rates under the existing standards currently set out in the PURPA Regulations.

8. *Fourth,* the Commission proposes to provide that an electric utility's obligation to purchase from QFs may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program.

9. *Fifth,* the Commission proposes to modify its current ''one-mile rule'' for determining whether generation facilities should be considered to be part of a single facility for purposes of determining qualification as a qualifying small power production facility. Specifically, the Commission proposes to allow electric utilities, state regulatory authorities, and other interested parties to show that facilities between one and ten miles apart (*i.e.,* more than one mile apart and less than ten miles apart) actually are a single facility (with distances one mile or less still irrebuttably a single facility, and distances ten miles or more irrebuttably separate and different facilities). The Commission also proposes to allow an entity seeking QF status to provide further information in its certification (whether a self-certification or a Commission certification) to preemptively defend against subsequent

[1] 18 CFR part 292. In connection with the proposed revisions to the PURPA Regulations, the Commission also proposes to revise its delegation of authority to Commission staff in 18 CFR part 375.

[2] 16 U.S.C. 796(17)–(18), 824a–3.

[3] 16 U.S.C. 824a–3(a).

[4] The Commission has held that a LEO can take effect before a contract is executed and may not necessarily be incorporated into a contract. *JD Wind 1, LLC,* 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied,* 130 FERC ¶ 61,127 (2010) (''[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.''). For ease of reference, however, references herein to a contract also are intended to refer to a LEO that is not incorporated into a contract.

[5] Moreover, any state—whether located in regions where energy prices are competitively based or whether located in regions where they are not—would be permitted to require that the fixed energy rate established at the time of the contract include provisions, established at the time the contract is established, providing for revisions to the energy rate at regular intervals, consistent with, for example, a purchasing electric utility's integrated resource plan, to reflect updated avoided cost calculations.

[6] These are the markets operated by Midcontinent Independent System Operator, Inc.; PJM Interconnection, L.L.C.; ISO New England Inc.; New York Independent System Operator, Inc.; Electric Reliability Council of Texas; California Independent System Operator, Inc.; and Southwest Power Pool, Inc.

challenges by identifying factors affirmatively demonstrating that its facility is indeed a separate facility at a separate site from other facilities. The Commission further proposes to add a definition of the term ''electrical generating equipment'' to the PURPA Regulations and to clarify how the distance between facilities is to be calculated.

10. *Sixth,* the Commission proposes to revise its regulations implementing PURPA section 210(m), which provide for the termination of an electric utility's obligation to purchase from a QF with nondiscriminatory access to certain markets. Currently, there is a rebuttable presumption that QFs with a net capacity at or below 20 MW do not have nondiscriminatory access to such markets. The Commission proposes to reduce the rebuttable presumption for small power production facilities (but not cogeneration facilities) from 20 MW to 1 MW.

11. *Seventh,* the Commission proposes to clarify that a QF must demonstrate commercial viability and financial commitment to construct its facility pursuant to objective and reasonable state-determined criteria before the QF is entitled to a contract or LEO.

12. *Finally,* the Commission proposes to allow a party to protest a self-certification or self-recertification of a facility without being required to file a separate petition for declaratory order and to pay the associated filing fee.

13. The Commission believes these proposed changes will enable the Commission to continue to fulfill its statutory obligations under sections 201 and 210 of PURPA, as explained in more detail in the relevant sections below. In particular, consideration of transparent, competitive market prices in appropriate circumstances would help to identify an electric utility's avoided costs in a simpler, more transparent, and more predictable manner that would, in conjunction with the Commission's other existing and proposed PURPA Regulations, act to encourage QFs. Allowing energy prices, but not capacity prices, to vary in QF contracts would protect consumers without materially affecting QF financing and, indeed, likely would make it easier for QFs to obtain longer-term contracts that support financing.[7] Further, the proposed revisions to the PURPA Regulations relating to the one-mile rule and PURPA section 210(m) would better implement the Commission's understanding of Congress' intent in enacting those provisions in light of current circumstances.

14. The Commission seeks comment on these proposed reforms 60 days from the date of publication of this NOPR in the **Federal Register**.

I. Background

A. Circumstances Underlying the Passage of PURPA in 1978 and the Commission's Promulgation of Its PURPA Regulations in 1980

15. PURPA was part of a legislative package Congress enacted in 1978 to address the energy crisis then facing the country.[8] As the Supreme Court explained in *FERC* v. *Mississippi,* in passing PURPA Congress was aware that domestic oil production had lagged behind demand, and the country had become increasingly dependent on foreign oil—which could jeopardize the country's economy and undermine its independence.[9] Roughly a third of the nation's electricity was generated using oil and natural gas,[10] and Congress concluded that increased reliance on cogeneration and small power production could significantly contribute to conserving this energy.[11] The Fuel Use Act, another part of that legislative package with the same ultimate goal in mind, similarly required federal agencies to ''carry out programs designed to *prohibit or discourage the use of natural gas and petroleum* as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy *and conserve natural gas and petroleum.*'' [12] In short, as recognized by the Supreme Court, Congress passed PURPA to address the consequences of shortages of oil and natural gas (and electric utilities' decreasing efficiency in their generating capacities), which adversely impacted rates to customers and the economy as a whole.[13]

16. Congress enacted PURPA section 210 in 1978 to address the energy crisis by encouraging the development of QFs and thereby reducing the country's demand for traditional fossil fuels.[14] To accomplish this, section 210(a) directed that the Commission ''prescribe, and from time to time thereafter revise, such rules as [the Commission] determines necessary to encourage cogeneration and small power production,'' [15] including rules requiring electric utilities to offer to sell electricity to, and purchase electricity from, QFs. Section 210(f) required each state regulatory authority and nonregulated electric utility to implement the Commission's rules.

17. In 1980, the Commission issued Order Nos. 69 and 70, which promulgated the required rules that, with minor exceptions, remain in effect today.[16] The Commission explained that, at the time of the passage of PURPA, QFs faced three major obstacles: (1) Electric utilities were not required to purchase their electric output or to make purchases at an appropriate rate; (2) electric utilities sometimes charged discriminatorily high rates for backup services; and (3) QFs ran the risk of being considered public utilities themselves and thus being subject to state and federal regulation as utilities.[17] Further, at that time, there was no open access transmission and essentially no competition in electric wholesale markets. Electric utilities were vertically-integrated and held dominant

[7] As explained below, some states have established limited contract durations as a way of limiting long-term price risk from fixed energy rate purchases from QFs. The Commission considers that, by addressing the concern that has led to the imposition of short-term contracts, the changes proposed herein will provide opportunities for longer-term contracts, which will encourage the development of QFs.

[8] *See* Public Law 95–617, 92 Stat. 3117. In addition to PURPA, the package included: the Energy Tax Act of 1978, Public Law 95–618, 92 Stat. 3174; the National Energy Conservation Policy Act, Public Law 95–619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Public Law 95–620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Public Law 95–621, 92 Stat. 3351.

[9] *FERC* v. *Miss.,* 456 U.S. 742, 756 (1982).

[10] *Id.* at 745.

[11] *Id.* at 757.

[12] 42 U.S.C. 8301(b)(7) (emphasis added).

[13] *FERC* v. *Miss.,* 456 U.S. at 745–46.

[14] *Id.* at 750.

[15] 16 U.S.C. 824a–3(a).

[16] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 (cross-referenced 10 FERC ¶ 61,150), *order on reh'g,* Order No. 69–A, FERC Stats. & Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983) (*API*); *Small Power Production and Cogeneration Facilities—Qualifying Status,* Order No. 70, FERC Stats. & Regs. ¶ 30,134 (cross-referenced at 10 FERC ¶ 61,230), *orders on reh'g,* Order No. 70–A, FERC Stats. & Regs. ¶ 30,159 (cross-referenced at 11 FERC ¶ 61,119) *and* FERC Stats. & Regs. ¶ 30,160 (cross-referenced at 11 FERC ¶ 61,166), *order on reh'g,* Order No. 70–B, FERC Stats. & Regs. ¶ 30,176 (cross-referenced at 12 FERC ¶ 61,128), *order on reh'g,* FERC Stats. & Regs. ¶ 30,192 (1980) (cross-referenced at 12 FERC ¶ 61,306), *amending regulations,* Order No. 70–D, FERC Stats. & Regs. ¶ 30,234 (cross-referenced at 14 FERC ¶ 61,076), *amending regulations,* Order No. 70–E, FERC Stats. & Regs. ¶ 30,274 (1981) (cross-referenced at 15 FERC ¶ 61,281).

[17] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,863.

market positions. As a result of their control over transmission access, it was virtually impossible for third parties—whether independent power producers or other electric utilities—to compete with them to make sales of electricity.

18. Given the Congressional mandate described above, the Commission determined in Order No. 69 to set rates for sales by QFs equal to the purchasing electric utilities' avoided costs.[18] The Commission also directed that electric utilities provide backup electric energy to QFs on a non-discriminatory basis and at just and reasonable rates,[19] and that utilities interconnect with QFs.[20] Pursuant to section 210(e) of PURPA,[21] the Commission further provided exemptions from many provisions of the Federal Power Act (FPA) and state laws governing utility rates and financial organization.[22]

B. Changes in Circumstances Subsequent to the Commission's Promulgation of Its PURPA Regulations in 1980

19. In the past 40 years, there have been three important changes in the circumstances that prompted Congress to pass PURPA in 1978. First, the situation with respect to the availability of natural gas has changed completely. The Commission recently outlined the sweeping changes that have taken place in the natural gas industry, and the resulting greater availability of natural gas.[23] As the Commission explained, over the last decade, the United States has seen an unprecedented change in the dynamics of the natural gas market and the relevant supply and demand. Led by advancements in production technologies, primarily in accessing shale reserves, natural gas supplies have increased dramatically. Domestic natural gas production, which appeared to peak in the early 1970s at 21.7 Tcf per year, has recently increased from 18.1 Tcf in 2005 to 30.4 Tcf in 2018.[24] The U.S. Energy Information Administration's (EIA) Annual Energy Outlook 2019 forecasts continued supply growth over the next 25 years, increasing to nearly 40 Tcf by 2035 and 43 Tcf by 2050.[25] In short, there no longer are shortages of natural gas supply.

20. Second, since 1978, the outlook for the development of alternatives to natural gas and oil-fired resources, such as renewable resources, has changed equally dramatically. The once-nascent renewables industry has grown and matured over the past 40 years, and has only accelerated subsequent to the 2005 amendment of PURPA. Renewable resources likewise benefit from the availability of federal tax credits[26] and from state-mandated renewable portfolio standards (RPS) that require electric utilities to procure electric energy from renewable resources.[27] The cost of renewable facilities, including solar, also has dropped substantially,[28] to the point that the levelized cost of electricity (LCOE) from solar facilities is now or is shortly expected to approach the LCOE from traditional electric generation.[29] Similarly, a recent report from Lawrence Berkeley National Lab finds that wind power purchase agreements are being executed at around $0.02/kWh, which compares favorably to projected future fuel costs for natural gas-fired generation.[30]

21. According to EIA, in the first 5 months of 2019, renewable resources (including hydro) provided a significant share (approximately 20 percent) of the net electricity generated in the United States.[31] The Commission's monthly Energy Infrastructure Update Report shows that, as of July of 2019, the installed nameplate capacity of renewable resources, again including hydro, represented approximately 22 percent of the entire available installed capacity in the United States.[32]

22. Furthermore, EIA projects that approximately 65 percent of capacity additions in 2019 will come from renewable resources.[33] Although almost 100 percent of all renewable resources in 1995 were QFs, since 2005 QFs have made up only 10 to 20 percent of all renewable resource capacity in service in the United States. Consequently, today most renewable resources are not relying on PURPA in order to develop and operate. This decreasing reliance on PURPA suggests that some generation capacity that might otherwise qualify as and be built as small power productions under PURPA is being built, through wholesale market constructs that have developed since the Commission first implemented PURPA.

23. Another development pursued by regions (such as the Regional Greenhouse Gas Initiative) or states (like California and New York) has been state-initiated efforts to promote carbon reduction and through RPS programs require electric utilities to supply a specified percentage of their customers' loads from renewable resources or through the establishment of

[18] 18 CFR 292.304(a)(2); *see API,* 461 U.S. at 412–18.

[19] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,887–90; *see also* 18 CFR 292.305.

[20] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,874; *see also* 18 CFR 292.303(c).

[21] 16 U.S.C. 824a–3(e).

[22] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,864; *accord id.* at 30,863, 30,894–96; *see also* 18 CFR 292.601–.602.

[23] *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018).

[24] EIA, Monthly Energy Review, Aug. 27, 2019 (in table 4.1 see column labeled ''Natural Gas Production (Dry)'' on the Annual tab of the xls version) *https://www.eia.gov/totalenergy/data/monthly/.*

[25] EIA, Annual Energy Outlook 2018, at tbl.13 (Jan. 24, 2019) (in table see row labeled ''Dry Gas Production'' under the reference case) (Annual Energy Outlook 2019), *https://www.eia.gov/outlooks/aeo/data/browser/#/?id=13-AEO2019&cases=ref2018&sourcekey=0.*

[26] Although Congress has reauthorized the federal production tax credit, the federal production tax credit is still currently scheduled to phase out over the next several years. *See* U.S. Dep't of Energy, *Renewable Energy Production Tax Credit, https://www.energy.gov/savings/renewable-electricity-production-tax-credit-ptc* (''Wind facilities commencing construction by December 31, 2019, and all other qualifying facilities commencing construction by January 1, 2018 can qualify for this credit. The value of the credit for wind steps down in 2017, 2018 and 2019. . . . For all other technologies, the credit is not available for systems whose construction commenced after December 31, 2017.'').

[27] As of February 1, 2019, 29 states, Washington, DC, and three territories had adopted mandatory renewable portfolio standards, while eight states and one territory had set renewable energy goals. *See* National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals, http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.*

[28] According to the EIA, the ''overnight'' (interest excluded) capital costs for utility-scale onshore wind and fixed tilt photovoltaic systems decreased by approximately 25 percent and 67 percent respectively, just during the period from 2013 to 2017. *See* EIA, *Updated Capital Cost Estimates for Utility Scale Electricity Generating Plants, https://www.eia.gov/analysis/studies/powerplants/capitalcost/.*

[29] EIA, *Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook 2019* (Feb. 2019), *https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf.* However, EIA cautions against directly comparing the costs of dispatchable and nondispatchable generation: ''Because load must be continuously balanced, generating units with the capability to vary output to follow demand (dispatchable technologies) generally have more value to a system than less flexible units (nondispatchable technologies) such as those using intermittent resources to operate. The LCOE values for dispatchable and non-dispatchable technologies are listed separately in the tables because comparing them must be done carefully. *See* EIA, *Cost and Performance Characteristics of New Generating Technologies, Annual Energy Outlook 2019* (Jan. 2019), *https://www.eia.gov/outlooks/aeo/assumptions/pdf/table_8.2.pdf.*

[30] *See* Lawrence Berkeley National Lab, *Wind Technologies Market Report, https://emp.lbl.gov/wind-technologies-market-report/.*

[31] *See* EIA, *August 2019 Monthly Energy Review* at Figure 7.2a, *https://www.eia.gov/totalenergy/data/monthly.*

[32] Office of Energy Projects, *Energy Infrastructure Update For July2019* at 4 (July 2019), *https://www.ferc.gov/legal/staff-reports/2019/july-energy-infrastructure.pdf.*

[33] EIA, Today in Energy, *New electric generating capacity in 2019 will come from renewables and natural gas* (Jan. 10, 2019), *https://www.eia.gov/todayinenergy/detail.php?id=37952* (Form EIA–860M, Preliminary Monthly Electric Generator Inventory).

requirements to purchase renewable energy certificates (RECs). Presently, 29 states and the District of Columbia have mandatory RPS programs.[34] This trend has further influenced increasing investment in renewables in the United States.

24. Unlike renewable generation, cogeneration is a technology that is imbedded in an industrial process.[35] Record evidence suggests that cogeneration has not achieved recent increases in penetration similar to renewable generation, and also remains more dependent on PURPA. For example, from 2008—2017, over 67 percent of industrial cogeneration additions obtained QF status.[36] However, energy produced by cogeneration in 2008 equaled 304.5 TWh, decreasing to 293.9 TWh in 2018.[37] Furthermore, this trend of decreasing cogeneration output goes back even further; for example in 2005 cogeneration output equaled 321.6 TWh.[38]

25. Third, the introduction of QFs as competing sources of electricity to the incumbent electric utilities has led to the development of significant non-QF independent power production. Development of independent power production, in turn, has been a major factor in the establishment of vibrant competitive markets in much of the United States. Pursuant to the Energy Policy Act of 1992, the Commission, through Order No. 888 and related orders, has overseen the development of competition and competitive wholesale electricity markets.[39] In addition, regional transmission organizations (RTO) and independent system operators (ISO) serve two-thirds of electricity consumers in the United States.[40] This development has transformed the electric industry in the intervening years and has significantly reduced the barriers to entry that faced QFs when PURPA was enacted.

26. Congress recognized the important effect of the development of these organized competitive markets when it enacted, as part of the Energy Policy Act of 2005, PURPA section 210(m). Among other things, section 210(m) permits electric utilities to request termination of their obligation to purchase electricity from QFs having access to RTO/ISO markets (or markets of comparable competitive quality).[41] In so doing, we interpret Congress as recognizing that the development of competition in the electric industry created conditions that sufficiently encouraged the development of cogeneration and small power production facilities, at least in the RTO/ISO markets and in markets of comparable competitive quality.

27. Since PURPA was amended in 2005, competition and competitive markets have spread even further, and have spurred additional development of independently-owned generation both inside and outside of the RTO/ISO markets. For example, EIA data shows that net generation of energy by non-utility owned renewable resources[42] in the United States escalated from 51.7 TWh in 2005 when EPAct 2005 was passed, to 340 TWh in 2018.[43] This also has included significant growth in non-utility renewable resources in states outside of RTOs. For example, net generation by non-utility renewable resources in the region defined by EIA as the Mountain State region[44] increased from 3.6 TWh in 2005 to 19.5 TWh in 2012, and to 42.5 TWh in 2018.[45] Pacific Northwest (Oregon and Washington) net non-utility generation from renewable resources increased from 1.5 TWh in 2005, to 8.7 TWh in 2012, and to 10.6 TWh in 2018.[46] In the Southeast region of the country, non-utility renewable resources saw a lesser increase from 2.6 TWh in 2005 to 2.7 TWh in 2012, but expanded to 6.5 TWh in 2018.[47]

C. Need for Revisions to the Commission's PURPA Regulations in Light of Changed Circumstances

28. In 2016, the Commission conducted a technical conference in Docket No. AD16–16–000 (Technical Conference) to address issues involving the implementation of PURPA. The Technical Conference covered such issues as: (1) Various methods for calculating avoided cost; (2) the obligation to purchase pursuant to a LEO; (3) application of the one-mile rule; and (4) the rebuttable presumption the Commission has adopted under PURPA section 210(m) that QFs 20 MW and below do not have nondiscriminatory access to competitive organized wholesale markets.[48] In addition to the oral presentations made at the Technical Conference, the Commission received numerous written comments on these and other subjects regarding the need to revise the PURPA Regulations. The Commission has found these oral presentations and comments to be helpful, and the revisions proposed in this NOPR were informed by the record of the Technical Conference, which the Commission is incorporating into this proceeding.

29. Consistent with the direction from Congress that the Commission revise its PURPA Regulations ''from time to time''[49] and considering the changes in the energy industry described above, the Commission preliminarily finds, based on the data described in the preceding section and the comments received at the Technical Conference, that the Commission's PURPA Regulations should be modernized. First, currently there is an increased supply of natural gas resulting from advanced production techniques that have opened up large new natural gas reserves. Second, vertically integrated utilities no longer dominate the wholesale electric markets throughout the United States as they did

[34] Galen Barbose, Lawrence Berkeley National Laboratory, *U.S. Renewable Portfolio Standards 2018 Annual Status Report* at 6 (Nov. 2018), *http://eta-publications.lbl.gov/sites/default/files/2018_annual_rps_summary_report.pdf.*

[35] *See* American Forest & Paper Association and Electricity Consumers Resource Council Supplemental Comments, Docket No. AD16–16–000, at 5 (Nov. 30, 2018).

[36] *Id.*

[37] This data was taken from EIA's Electricity Data Browser, *www.eia.gov/electricity/data/browser* (the total of net generation by independent power producers cogeneration, commercial cogeneration, and industrial cogeneration).

[38] *Id.*

[39] *See 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 75 FERC ¶ 61,080, *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 at 30,176, (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 (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); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 119 FERC ¶ 61,295, *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).

[40] ISO/RTO Council, *The Role of ISOs and RTOs, https://isorto.org.*

[41] 16 U.S.C. 824a–3(m).

[42] The EIA renewable resources data discussed herein is based on the EIA ''other renewables'' category of generation resources, which consists of wind, utility scale solar, geothermal, and biomass resources.

[43] This data was taken from EIA's Electricity Data Browser, *www.eia.gov/electricity/data/browser* (select net generation, other renewables, independent power producers).

[44] Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

[45] This data was taken from EIA's Electricity Data Browser, *www.eia.gov/electricity/data/browser.*

[46] *Id.*

[47] Florida, Georgia, Alabama, and Mississippi.

[48] Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (May 9, 2016).

[49] 16 U.S.C. 824a–3(a).

in the past, and the participation of independently owned generation no longer is the exception but is the rule in much of the country. Consequently, electric prices increasingly are established based on competitive factors in many regions. Third, significant renewable resources have been developed outside of PURPA based on other programs that specifically target renewable resources, as well as on the falling costs of such resources.

30. In addition, there is evidence suggesting that the Commission's rationale for allowing a QF to fix its avoided cost rate for the term of its contract, *i.e.,* that any overestimations and underestimations in avoided cost rates during the term of the contract would ''balance out'' over time,[50] may no longer be valid. This evidence suggests, instead, that overestimations of avoided cost have not been balanced by underestimations.[51] This trend may persist with the continuing general decline in the cost of electricity due to technological innovations, changes in the fuel mix, and conservation.[52] Further, testimony at the Technical Conference and data regarding the development of independently-owned generation resources suggest that it is not necessary for energy rates to be fixed in order to obtain financing.[53]

31. Consequently, the Commission is proposing revisions to its PURPA Regulations to rebalance the approach adopted in the 1980s. Because some of the small power producer generation technologies originally encouraged by PURPA are now being developed independent of PURPA, it appears appropriate to provide states flexibility to rely on the market tools that are available today to set QF rates. The Commission is proposing to allow states flexibility to ensure that the rates for energy sold by QFs to electric utilities more accurately reflect PURPA's requirement that the rates for purchases of energy from QFs not exceed ''the cost to the electric utility of the electric energy which, but for the purchase from such [QF], such utility would generate or purchase from another source'' at the time of delivery.[54] The Commission preliminarily finds that using a competitive price will continue to encourage the development of QFs and more closely adhere to PURPA's requirement that rates for purchases of energy from QFs not only be capped at avoided cost, but also be just and reasonable to the purchasing electric utility's electric consumers and in the public interest.[55] Given the targeted nature of the reforms proposed here, and the existing benefits to QFs that the Commission does not propose to amend and that were directly responsive to the barriers to QFs that PURPA sought to reduce,[56] the approach adopted here also maintains PURPA's protections against discrimination.[57]

The Commission believes that the revisions proposed here represent a reasonable package of benefits and obligations that would bring the Commission's implementation of PURPA into the modern era while at the same time continuing to satisfy PURPA's statutory mandates.

II. Discussion

A. QF Rates

32. The Commission proposes to revise its PURPA Regulations to permit states to incorporate competitive market forces in setting QF rates. First, the Commission proposes to allow states to exercise their discretion to set the energy component of the rate a purchasing electric utility pays for a QF's power based on market prices rather than on the purchasing electric utility's administratively-determined avoided cost rate. Thus, the Commission proposes to revise its PURPA Regulations with regard to energy rates to state that:

- States have the flexibility to require that ''as-available'' QF energy rates paid by electric utilities located in RTO/ISO markets be based on the market's locational marginal price (LMP) or similar energy price derived by the market, in effect at the time the energy is delivered.
- States have the flexibility to require that ''as-available'' QF energy rates paid by electric utilities located outside of RTO/ISO markets be based on competitive prices determined by: (1) Liquid market hub energy prices; or (2) formula rates based on observed natural gas prices and a specified heat rate.
- States have the flexibility to require that energy rates under QF contracts and LEOs be based on as-available energy rates determined at the time of delivery rather than being fixed for the term of the contract or LEO.
- States in RTO/ISO markets have the flexibility to instead implement an alternative approach of requiring that the fixed energy rate be calculated based on estimates of the present value of the stream of revenue flows of future LMPs or other acceptable as-available energy rates at the time of delivery.

33. Second, the Commission proposes to amend its regulations to make clear that States have the flexibility to require that energy and/or capacity rates be determined through a competitive solicitation process, such as an RFP. However, the Commission does not otherwise propose to change how the PURPA Regulations require the capacity component of a QF's rates to be determined.[58]

34. Although the Commission is proposing to modify how the states are permitted to calculate avoided costs, it is not terminating the requirement that the states continue to calculate, and to set QF rates at, such avoided costs.

35. The Commission has long emphasized that states have ''great latitude in determining the manner of implementation of the Commission's rules, provided that the manner chosen is reasonably designed to implement the requirements of Subpart C [which includes the pricing rules of § 292.304].'' [59] The modifications proposed here are intended to be consistent with this approach. The Commission intends that the states will continue to have ''great latitude'' in determining how to apply the revised rules, provided that such application is reasonably designed to implement any new rate provisions that may be adopted, as well as the other already-existing provisions of the PURPA Regulations.

1. Background

36. PURPA requires that the Commission promulgate rules, to be

[50] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[51] *See infra* note 101.

[52] *See e.g.,* EEI Supplemental Comments, Docket No. AD16–16–000, attach. A at 2–3 (June 25, 2018) (EEI Supplemental Comments).

[53] This evidence is discussed in detail below in Section II.A.5.b.

[54] 16 U.S.C. 824a–3(b), (d).

[55] 16 U.S.C. 824a–3(b)(1).

[56] *See, e.g., supra* notes 19–20, 22 (citing *inter alia* 18 CFR 292.303(c) (electric utility's obligation to interconnect), 292.305 (electric utility's obligation to provide backup power to QFs), 292.601–02 (QF exemption from public utility regulations in FPA and Public Utility Holding Company Act)).

[57] 16 U.S.C. 824a–3(b)(2).

[58] An electric utility is not required to pay for QF capacity that the state has determined is not needed. *See Hydrodynamics Inc.,* 146 FERC ¶ 61,193, at P 35 (2014) (*Hydrodynamics*) (referencing *City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, at 62,061 (2001) (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.''); *Entergy Servs., Inc.,* 137 FERC ¶ 61,199, at P 56 (2011).

[59] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,891–92. The Commission explained that ''[s]uch latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements.'' *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304, at 61,646 (1983).

implemented by the states,[60] establishing the rates electric utilities pay for purchases of QF energy. Under PURPA, such rates must: (1) Be just and reasonable to the electric consumers of the electric utility and in the public interest; (2) not discriminate against qualifying cogenerators or qualifying small power producers;[61] and (3) not exceed ''the incremental cost to the electric utility of alternative electric energy,''[62] which is ''the cost to the electric utility of the electric energy which, *but for* the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.''[63] The ''incremental cost to the electric utility of alternative electric energy'' referred to in prong (3) above, which sets out a statutory upper bound on a QF rate, has been consistently referred to by the Commission and industry by the short-hand phrase ''avoided cost,''[64] although the term ''avoided cost'' itself does not appear in PURPA.

37. In addition, the PURPA Regulations currently provide a QF two options for how to sell its power to an electric utility. The QF may sell as much of its energy as it chooses when the energy becomes available, with the rate for the sale calculated at the time of delivery (the so-called ''as-available'' rate).[65] Alternatively, the QF may choose to sell pursuant to a contract over a specified term.[66]

38. If the QF chooses to sell under the second option, the PURPA Regulations then provide the QF the further option of receiving, in terms of pricing, either: (1) The purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred;[67] or (2) the purchasing electric utility's avoided cost calculated at the time of delivery.[68]

39. In implementing the PURPA Regulations, the Commission recognized that a contract with avoided costs calculated at the time a LEO is incurred could exceed the electric utility's avoided costs at the time of delivery in the future, thereby seemingly violating PURPA's requirement that QFs not be paid more than an electric utility's avoided costs. But the Commission believed that the fixed avoided cost rate might also turn out to be lower than the electric utility's avoided costs over the course of the contract and that, ''in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.''[69] The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire life of the contract was that fixing the rate provides ''certainty with regard to return on investment in new technologies.''[70]

40. The record developed in the Commission's technical conference docket, Docket No. AD16–16–000, where the Commission began its reconsideration of the PURPA Regulations, indicates that allowing QFs to fix their avoided cost rates at the time a LEO is incurred has resulted in overpayments as energy prices generally have declined over the years, leaving the fixed energy portion of the QF rate well above the purchasing electric utility's actual avoided energy costs at the time of delivery.[71] Some commenters have recommended that the Commission allow states to ''price generation [energy] from QFs at market prices, and to update those prices regularly so that the prices for qualifying facilities are not burdensome on customer rates'' and ''clarify that states can set avoided costs through [requests for proposal (RFPs)] or other forms of competitive solicitations,'' and that the Commission limit as-available avoided cost energy rates in a LEO to no higher than avoided cost rates at the time of delivery.[72]

41. Over the years subsequent to the issuance of the PURPA Regulations in 1980, the Commission has taken significant steps to implement changes to its rules and regulations to encourage the development of competitive wholesale electricity markets. After approving the first market-based rate tariff in 1989,[73] sales of electricity at market-based rates proliferated. This ultimately led to the issuance of Order No. 697[74] in 2007, which established uniform regulations governing market-based rate sales. In addition, RTOs and ISOs with organized electric markets were established in the 2000s, and today serve two-thirds of electricity consumers in the United States.[75]

42. These developments have largely transformed the electric industry from one where rates were once based on administratively-determined cost of service ratemaking to one where rates now often are based on competitive market forces. This change has led the Commission to likewise consider whether to allow states to rely on competitive forces, rather than administrative determinations, to set as-available avoided cost energy rates.

2. LMP as a Permissible Rate for Certain As-Available QF Energy Sales

43. The Commission proposes to revise the PURPA Regulations in 18 CFR 292.304 to add subsections (b)(6) and (e)(1). In combination, these subsections would permit a state the flexibility to set the as-available energy rate paid to a QF by an electric utility located in an RTO/ISO at LMPs calculated at the time of delivery.

44. RTOs and ISOs generally use LMP to set day-ahead and real-time energy prices through competitive auctions that optimally dispatch resources to balance

[60] Nonregulated electric utilities implement the requirements of PURPA with respect to themselves. An electric utility that is ''nonregulated'' is any electric utility other than a ''state regulated electric utility.'' 16 U.S.C. 2602(9). The term ''state regulated electric utility,'' in contrast, means any electric utility with respect to which a state regulatory authority has ratemaking authority. 16 U.S.C. 2602(18). The term ''state regulatory authority,'' as relevant here, means a state agency which has ratemaking authority with respect to the sale of electric energy by an electric utility. 16 U.S.C. 2602(17).

[61] 16 U.S.C. 824a–3(b)(1)–(2).

[62] 16 U.S.C. 824a–3(b).

[63] 16 U.S.C. 824a–3(d) (emphasis added).

[64] *See* 18 CFR 292.101(b)(6) (defining avoided costs in relation to the statutory terms); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865 (''This definition is derived from the concept of ''the incremental cost to the electric utility of alternative electric energy'' set forth in section 210(d) of PURPA. It includes both the fixed and the running costs on an electric utility system which can be avoided by obtaining energy or capacity from qualifying facilities.'').

[65] 18 CFR 292.304(d)(1).

[66] 18 CFR 292.304(d)(2)(a)–(b); *see also FLS Energy, Inc.,* 157 FERC ¶ 61,211, at P 21 (2016) (*FLS*) (citing 18 CFR 292.304(d)).

[67] 18 CFR 292.304(d)(2)(ii). Rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery. 18 CFR 292.304(b)(5).

[68] 18 CFR 292.304(d)(2)(i).

[69] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880. *See also* 18 CFR 292.304(b)(5) (''In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.''); *Entergy Servs., Inc.,* 137 FERC ¶ 61,199 at P 56 (''Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost.'').

[70] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[71] EEI Supplemental Comments, attach. A at 2–3 (June 25, 2018).

[72] *Id.* at 4.

[73] *See Citizens Power and Light Corp.,* 48 FERC ¶ 61,210 (1989).

[74] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 119 FERC ¶ 61,295, *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).

[75] ISO/RTO Council, *The Role of ISOs and RTOs, https://isorto.org.*

supply and demand, while taking into account actual system conditions including congestion on the transmission system. As described in the Commission Energy Primer written by Commission staff, ''[t]he RTO markets calculate a LMP at each location on the power grid. . . All sellers receive the LMP for their location and all buyers pay the market clearing price for their location.'' [76] While the various RTOs and ISOs may calculate LMP somewhat differently, the Commission has recognized that LMPs ''reflect the true marginal cost of production, taking into account all physical system constraints, and these prices would fully compensate all resources for the variable cost of providing service.'' [77] Prices in such an LMP-based rate structure ''are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time.'' [78]

45. The Commission therefore preliminarily finds that LMP is an accurate measure of avoided costs. Unlike, for example, average system-wide cost measures of avoided cost used by many states, LMP could provide an accurate measure of the varying actual avoided costs for each receipt point on an electric utility's system where the utility receives power from QFs. LMP is the per MWh cost of obtaining incremental supplies at each point. Further, these prices are not rigid, long-lasting prices as tends to be the case currently for administratively-determined avoided costs, but prices that are calculated daily (for the day-ahead markets) and/or every five minutes (for real-time markets) and vary to reflect changing system conditions (*e.g.,* they tend to rise as demand increases and the system operator dispatches increasingly expensive supplies to meet that higher demand). The Commission also notes that Congress, through enactment of section 210(m) of PURPA, appears to recognize that RTO/ISO LMP pricing provides sufficient encouragement for QFs.

46. Consequently the Commission believes it is appropriate to consider giving states the flexibility to employ LMP pricing for QF energy rates. Specifically, the Commission proposes to make clear in the PURPA Regulations that a state may use LMP as a rate for as-available QF energy sales to electric utilities located in an RTO/ISO market.[79]

47. The Commission requests comment on whether the real-time prices established in the California Independent System Operator, Inc. (CAISO)-administered Energy Imbalance Market (EIM) [80] are similar for these purposes to the LMP in RTOs/ISOs. In this regard, the Commission requests comment on whether there are any reasons why prices developed in the EIM similarly ''reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid,'' [81] as the Commission has found to be the case with LMP rates.[82]

48. In addition to continuing to set QF energy rates at avoided costs, using LMPs for as-available energy pricing brings many other benefits. LMPs, in contrast to the administrative pricing methodologies used to set as-available QF rates by many states, could promote the more efficient use of the transmission grid, promote the use of the lowest-cost generation, and provide for transparent price signals.[83]

49. Furthermore, when Congress added PURPA § 210(m) as part of EPAct 2005, Congress provided for the Commission to terminate electric utilities' obligation to make new purchases from QFs that have nondiscriminatory access to the RTO/ISO markets and markets of comparable competitive quality. The Commission interprets this amendment as representing an acknowledgement by Congress that access to these markets provides sufficient encouragement to QFs.

50. The Commission understands that some states already use LMP to establish avoided cost energy rates under our PURPA Regulations.[84] The Commission thus proposes also to clarify that, while a state in the past may have been able to conclude that LMP was an appropriate measure of the energy component of avoided costs,[85] a state would be able to adopt LMP as a per se appropriate measure of the as-available energy component of avoided costs.[86]

3. Use of Other Competitive Prices as a Permissible Rate for Certain As-Available QF Energy Sales

51. The Commission proposes to revise the PURPA Regulations in 18 CFR 292.304 to add a subsection (b)(7) which, in combination with new subsection (e)(1), would permit a state to set the as-available energy rate paid to a QF by electric utilities located outside of RTO/ISO markets at a

[76] Federal Energy Regulatory Commission, *Energy Primer, A Handbook of Market Basics,* at 60 (Nov. 2015), *available at https://www.ferc.gov/market-oversight/guide/energy-primer.pdf.*

[77] *Offer Caps in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 831, 157 FERC ¶ 61,115, at P 7(2016), *order on reh'g and clarification,* Order No. 831–A, 161 FERC ¶ 61,156 (2017).

[78] *Sacramento Mun. Util. Dist.* v. *FERC,* 616 F.3d 520, 524 (D.C. Cir. 2010) (*SMUD*); *see also FERC* v. *Elec. Power Supply Ass'n,* 136 S.Ct. 760, 768–69 (2016) (describing how LMP is typically calculated).

[79] Although not regulated by the Commission, the Commission proposes to include in this definition of LMP the LMP established in the market governed by the Electric Reliability Council of Texas.

[80] By seeking comment regarding the CAISO EIM prices, the Commission does not mean to imply that real-time energy prices established by CAISO within its balancing authority area do not already satisfy the requirement for setting as-available QF rates.

[81] *SMUD,* 616 F.3d at 524.

[82] Use of real time prices in the EIM was addressed at the Technical Conference, but only in the context of whether that market could satisfy the requirements for termination of the mandatory purchase obligation under PURPA section 210(m)(1)(C). *See* Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (May 9, 2016). The Commission here requests comments on whether it would be appropriate to use the EIM price to develop an as-available energy rate.

[83] *See, e.g., Cal. Indep. Sys. Operator Corp.,* 105 FERC ¶ 61,140, at PP 48–50 (2003). *Cf. Price Formation in Energy and Ancillary Servs. Markets Operated by Regional Transmission Organizations and Indep. Sys. Operators,* 153 FERC ¶ 61,221, at P 2 (2015).

[84] S*ee Exelon Wind 1, LLC,* 140 FERC ¶ 61,152, at P 11 (2012), *reconsideration denied,* 155 FERC ¶ 61,066 (2016) (recognizing that the Texas Public Utility Commission has permitted Southwestern Public Service Company to set avoided costs at LMP); Xcel Energy Services Inc., Request for Reconsideration, Docket No. EL12–80–001, at 13 & n.23 (Sept. 27, 2012) (stating that Maryland, New Jersey, North Carolina, Virginia, Connecticut, New Hampshire, Kentucky, and Michigan have set avoided costs at LMP).

[85] *See* 18 CFR 292.304(e).

[86] We recognize that this proposal could be seen as a departure from the Commission's statement in *Exelon Wind 1, LLC,* 140 FERC ¶ 61,152, at P 52 (2012), *reconsideration denied,* 155 FERC ¶ 61,066 (2016) (''The problem with the methodology proposed by [Southwestern Public Service Company] and adopted by the Texas Commission is that it is based on the price that a QF would have been paid had it sold its energy directly in the [Energy Imbalance Service] Market, instead of using a methodology of calculating what the costs to the utility would have been for self-supplied, or purchased, energy 'but for' the presence of the QF or QFs in the markets, as required by the Commission's regulations.''). The Commission has already found that this statement was overtaken by events, namely Southwest Power Pool, Inc.'s evolution from an energy imbalance service market into an Integrated Marketplace, with day-ahead and real-time energy and operating reserve markets and the Texas Commission's approving a separate request from Southwestern Public Service Company to substitute LMP for Locational Imbalance Prices in calculating avoided costs. *Exelon Wind 1, LLC,* 155 FERC ¶ 61,066 at P 11. The Commission acknowledges that, if adopted in a final rule, the reasoning in this NOPR supports the departure from our precedent. *See Cal. Pub. Utils. Comm'n* v. *FERC,* 879 F.3d 966, 977 (9th Cir. 2018) (''When an agency changes policy, the requirement that it provide a reasoned explanation for its action demands, at a minimum, that the agency 'display awareness that it *is* changing position.'''') (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

competitive price (Competitive Price) calculated at the time of delivery. Competitive Prices would be defined as: (1) Energy rates established at liquid market hubs; or (2) energy rates determined pursuant to formulas based on natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. In each case, the state would need to find that the Competitive Price reasonably represents a competitive market price for the purchasing electric utility, consistent with Congress's directive that QF rates not exceed ''the incremental cost to the electric utility of alternative electric energy.'' [87] Other conditions also would have to be satisfied, as explained below.

a. Background

52. The Commission recognizes that competitive bilateral energy markets have arisen outside of the RTO/ISO energy markets. Particularly in the western United States, price hubs such as the Mid-Columbia (Mid-C) and Palo Verde hubs are liquid markets with prices the Commission has recognized as representing competitive market prices at those hubs.[88] Further, the price of electricity generated by efficient combined-cycle natural gas generation facilities would appear to represent a reasonable measure of a competitive energy price.[89]

53. For the same reasons described above that LMPs represent an appropriate energy rate for QFs purchasing from electric utilities located in RTO/ISO markets, the Commission proposes to find that Competitive Prices can represent appropriate rates for QFs selling to electric utilities located outside of RTO/ISO markets. Like LMP, liquid market hubs would rely on competition to derive an avoided cost price at particular points and times. From a price determination perspective, liquid market hub prices differ from LMP mainly in that they measure price at only one or a few points, whereas RTOs/ISOs derive unique LMPs for all receipt and delivery points on a specific area of the system. However, depending on how far away a particular purchasing electric utility or selling QF may be from the liquid market hub in question, the Commission believes that it may be appropriate to allow the states to set as-available energy rates based on Market Hub prices.

54. Natural gas indices coupled with the heat rate of an efficient natural gas combined-cycle generating facility may also be a reasonably accurate measure of avoided cost, at least in those markets where natural gas commonly is the marginal fuel. In such markets, we would expect that new supplies of energy would need to be offered at a price equal to or less than the incremental cost of using these efficient gas units in order to economically displace them. Thus, using natural gas indices and the heat rate of a combined-cycle unit to establish avoided cost also relies on competitive market forces, in this case competitive forces in natural gas markets for the fuel used by natural gas combined cycle) facilities the purchasing electric utility would generate itself or purchase from another source but for the sale from the QF.[90]

b. Commission Proposal

55. The Commission proposes in sections 292.304(b)(7) and (e)(1) to give states the flexibility to set QF energy rates for sales to electric utilities located outside of RTO/ISO markets based on Competitive Prices, *i.e.,* prices determined at liquid market hubs (Market Hub Prices), or prices determined by a formula based on natural gas price indices and a specified proxy heat rate for an efficient natural gas combined-cycle generating facility (Combined Cycle Prices).

i. Market Hub Prices

56. The Commission proposes to define Market Hub Prices as prices determined at a liquid market hub to which the purchasing electric utility has reasonable access. States electing to set QF energy rates using a Market Hub Price also would identify the particular market hub used to set the price. Such determination would require the state to find that the prices at such hub are competitive prices that actually relate to the costs an electric utility would avoid but for the purchase from the QF.

57. The following represents examples of factors the Commission believes a state reasonably could consider in making this determination: (1) Whether the hub is sufficiently liquid that prices at the hub represent a competitive price; [91] (2) whether the prices developed at the hub are sufficiently transparent; (3) whether the electric utility has the ability to deliver power from such hub to its load, even if its load is not directly connected to the hub; [92] and (4) whether the hub represents an appropriate market to derive an energy price for the electric utility's purchases from the relevant QFs given the electric utility's physical proximity to the hub. The above factors are not intended to be exhaustive and states reasonably could consider other factors in identifying a relevant liquid trading hub for setting QF energy rates. The Commission seeks comment on additional factors or standards for consideration by the states in determining whether liquid trading hubs could be used to set an electric utility's as-available energy avoided cost rate.

58. The Commission also understands that, in order for prices at market hubs to represent a purchasing electric utility's avoided costs, the market hub price may need to be subject to adjustments to account for transmission costs the electric utility would incur before such prices could serve as a factor in determining appropriate QF rates.[93] In addition, the Commission understands that market prices in a region may be determined based on a formula that incorporates prices at more than one market hub located in the region. The Commission seeks comment on whether under this proposal a state should be permitted to set QF rates at energy prices in a region that are based on a formula that includes adjustments to the market hub price or that incorporates prices at more than one market hub located in the region, when such prices represent standard pricing practice in the region where the purchasing electric utility is located.

ii. Combined Cycle Prices

59. In regions where there are no RTOs/ISO or market hubs, a competitive

[87] 16 U.S.C. 824a–3(b).

[88] *See Price Discovery in Natural Gas and Electric Markets,* 109 FERC ¶ 61,184, at P 66 (2004) (approving the use of published prices at market hubs with sufficient liquidity to set prices charged in tariffs); *El Paso Electric Co.,* 148 FERC ¶ 61, 051, at P 7 (2014) (approving the use of the Palo Verde price to set imbalance charges); *Idaho Power Co.,* 121 FERC ¶ 61,181 at P 27 (2007) (approving use of Mid-Columbia prices to set energy imbalance charge); *PacifiCorp,* 95 FERC ¶ 61,463, at 61,463 (2001) (approving setting energy imbalance rate at average of four market hub prices); *Pinnacle West Energy Corp.,* 92 FERC ¶ 61,248, at 61,791 (2000) (accepting the use of the Palo Verde price to set prices for affiliate transactions because the Palo Verde Index is a recognized market hub with competitive prices).

[89] *See, e.g., ISO New England Inc.,* 131 FERC ¶ 61,147, at P 5 (2010) (calculating the competitive price cap for imports into ISO New England equal to a published fuel price times a proxy heat rate).

[90] *See* 16 U.S.C. 824a–3(d).

[91] In considering whether a hub is sufficiently liquid, states could, for example, consider such factors as those identified by the Commission in *Price Discovery in Natural Gas and Electric Markets,* 109 FERC ¶ 61,184 at P 66.

[92] This factor might not apply if the purchase of energy avoided by the electric utility is from a resource whose energy is priced based on the hub price even though the purchasing electric utility does not have the ability to deliver energy from the hub itself to its load.

[93] Other adjustments also may be necessary in other situations in order for the adjusted hub price to reasonably reflect the purchasing electric utility's avoided cost.

price for energy may be established as the price of energy generated from an efficient natural gas combined cycle generating facility. The Commission proposes to allow states to set QF as-available energy rates at Combined Cycle Prices, defined as a formula rate established by the state using published natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. The state would need to determine that the resulting Combined Cycle Price represents an appropriate approximation of the purchasing electric utility's avoided costs. This determination would involve consideration of such factors as, for example: (1) Whether the cost of energy from an efficient natural gas combined cycle generating facility represents a reasonable approximation of a competitive price in the purchasing electric utility's region; (2) whether natural gas priced in accordance with particular proposed natural gas price indices would be available in the relevant market; (3) whether there should be an adjustment to the natural gas price to appropriately reflect the cost of transporting natural gas to the relevant market; and (4) whether the proxy heat rate used in the formula should be updated regularly to reflect improvements in generation technology. Again, the above factors are not exhaustive and states would have flexibility to apply other factors that also might be appropriate for consideration.

iii. Other Approaches to Competitive Pricing for Certain As-Available QF Energy Sales

60. The Commission observes that electric utilities may purchase energy at market-oriented prices other than those that would qualify under the standards identified above.

The two options presented above are not intended to supersede the states' existing ability to set as-available energy rates based on an electric utility's avoided costs. The states would continue to be free, under the Commission's existing PURPA Regulations, to determine that competitive energy prices included in an electric utility's power purchase agreement represent the electric utility's avoided cost of energy and to set avoided cost energy rates for that utility based on its contract rate. Nothing proposed here would prevent a state from establishing an avoided cost rate based on such a contract, provided that all the necessary conditions for determining avoided costs apply.[94]

4. Permitting the Energy Rate Component of a Contract To Be Fixed at the Time of the LEO Using Forecasted Values of the Estimated Stream of Market Revenues

61. Frequently, price forecasts are available for LMPs in RTOs/ISOs, for liquid market hubs located outside of RTOs/ISOs, and for natural gas pricing hubs. Such forecasts could be used to allow QFs to request a fixed energy rate component calculated at the time a LEO is incurred. The Commission therefore proposes to add a new option in § 292.304(d)(1)(iii) permitting fixed energy rates to be based on forecasted estimates of the stream of revenue flows during the term of the contract. In other words, states could rely on market estimates of forecasted energy prices at the times of delivery over the anticipated life of the contract—such estimates are commonly referred to as a forward price curve—to develop a fixed energy rate component for that contract when such estimates reflect the purchasing electric utility's avoided costs.

62. The fixed energy rate component of the contract could be a single energy rate, based on the amortized present value of the forecast energy prices, or it could be a series of specified energy rates that are different in future years (or other periods).[95] Under this proposal, the QF would be able to establish, at the time the LEO is incurred, the applicable energy rate(s) for the entire term of a contract when the contract is signed; however, the energy rate in the contract could be different from year-to-year (or some other period) and nevertheless comply with the current § 292.304(d)(1)(ii) requirement that the energy rate be fixed for the term of the contract.[96]

5. Providing for Variable Energy Rates in QF Contracts

a. Background

63. As explained above, if a QF chooses to sell energy and/or capacity pursuant to a contract, the PURPA Regulations provide the QF the option of receiving the purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred.[97] The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.[98] The Commission stated that its regulations pertaining to LEOs ''are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided costs with the need for qualifying facilities to be able to enter contractual commitments based, by necessity, on estimates of future avoided costs.'' [99] Further, the Commission agreed with the ''need for certainty with regard to return on investment in new technologies.'' [100]

64. The provision that QFs be permitted to fix their rates for the entire term of a contract or other LEO has proved to be one of the most controversial aspects of the Commission's PURPA Regulations. Some commenters at the Technical Conference submitted data indicating that energy prices generally have declined over the years, leaving the fixed energy portion of the QF rate, even when levelized, well above market prices that likely would represent the purchasing electric utility's actual avoided energy costs at the time of delivery.[101] Based on this concern, some

[94] Further, as explained in more detail below, energy and/or capacity rates for QFs could be established through a competitive solicitation process, such as an RFP.

[95] As explained above, the PURPA Regulations already require that the fixed energy rate would need to account for the operating characteristics of the QF, including the QF's ability to deliver energy during peak periods and the utility's ability to dispatch energy from the QF. *See* 18 CFR 292.304(e)(2).

[96] This is permissible under the Commission's existing PURPA Regulations. *See Windham Solar LLC,* 157 FERC ¶ 61,134, at PP 5–6 (2016) (*Windham Solar*) (''[A]lthough state regulatory authorities cannot preclude a QF . . . from obtaining a legally enforceable obligation with a forecasted avoided cost rate, we remind the parties that the Commission's regulations allow state regulatory authorities to consider a number of factors in establishing an avoided cost rate. These factors which include, among others, the availability of capacity, the QF's dispatchability, the QF's reliability, and the value of the QF's energy and capacity, allow state regulatory authorities to establish lower avoided cost rates for purchases from intermittent QFs than for purchases from firm QFs.'' (citing 18 CFR 292.304(e)–(f)) (footnote omitted).

[97] 18 CFR 292.304(d)(2)(ii). Rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery. 18 CFR 292.304(b)(5).

[98] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies'').

[99] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[100] *Id.*

[101] *See* Alliant Energy Comments, Docket No. AD16–16–000, at 5 (Nov. 7, 2016) (''Current market-based wind prices in the Iowa region of MISO are approximately 25% lower than the PURPA contract obligation prices [Interstate Power and Light Company] is forced to pay for the same wind power for long-term contracts entered into as of June 2016. As a result, PURPA-mandated wind power purchases associated with *just one project* could cost Alliant Energy's Iowa customers an

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commenters recommended that the Commission allow states to ''price generation [energy] from QFs at market prices, and to update those prices regularly so that the prices for qualifying facilities are not burdensome on customer rates'' and that the Commission should limit avoided cost energy rates in a LEO to no higher than avoided cost rates at the time of delivery.[102] QFs, in turn argued that elimination of the option to fix QF rates for the term of a contract would threaten a QF's ability to obtain financing.[103]

65. Further, it is clear that the desire to limit the effect of fixed QF contract rates has directly led to PURPA implementation issues that affect QF financing in other respects, particularly with respect to the length of QF contracts.[104] For example, a commissioner of the Idaho Public Service Commission (Idaho Commission) testified at the Technical Conference that the Idaho Commission's decision to limit QF contracts to a two-year term was based on the Idaho Commission's concern that longer contract terms at fixed rates would lead to payments above avoided costs.[105] Similarly, Southern Company testified that the fixed payment requirement is ''resulting in . . . typically shorter contract term lengths.'' [106] Golden Spread Electric Cooperative recommended that if the fixed cost requirement is not eliminated, the Commission permit shorter contract terms, ''as short as one-year or three years at most.'' [107]

66. The Commission proposes to revise § 292.304(d) of the PURPA Regulations to permit a state to limit a QF's option to elect to fix at the outset of a LEO the energy rate for the entire length of its contract, and instead allow the state to require QF energy rates to vary during the term of the contract. However, under the proposed revisions to § 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* costs calculated and fixed at the time the LEO is incurred. Only the contractual *energy* rate could be required by a state to vary.

67. To the extent that a QF is not entitled to capacity payments because a purchasing electric utility is not avoiding any capacity as a consequence of entering into a contract with a QF, the QF's contract could be limited by a state under the proposed rule to variable energy payments. However, in that event, the only costs being avoided by the purchasing electric utility would be the incremental costs of purchasing or producing energy at the time the energy is delivered.[108] Further, the state would retain the ability to require that the QF's energy rate be fixed at the time the LEO is incurred.

68. In Order No. 69, the Commission allowed avoided costs to be calculated and fixed at the time a LEO is first incurred because the Commission believed that any overestimations or underestimations ''will balance out.'' [109] The Commission now finds compelling the record evidence, discussed in section II.A.5.a. above, that overestimations have not been adequately balanced by underestimations in past years. Further, this trend may persist into the future with the continuing general decline in the cost of both wind and solar generation.[110] Consequently, the Commission believes that it may be necessary to allow states to provide for a variable energy rate in order to reflect more accurately the purchasing electric utility's avoided costs and therefore satisfy the statutory requirement that QF rates not exceed the utility's avoided cost and ''be just and reasonable to the electric consumers of the electric utility and in the public interest.'' [111]

69. The Commission recognizes that the current PURPA Regulations allowing a QF to fix its rates for the term of a contract were based on the recognition that fixed rates are beneficial for obtaining financing for QF projects. QF developers continue to assert today that they require fixed rates to finance new projects. However, the Commission does not view the proposed modification to the PURPA Regulations as materially affecting the ability of QFs to obtain financing. This is the case for a number of reasons.

70. First, the Commission's proposed modifications would allow a state to set a variable energy rate, but not a variable avoided capacity rate at the time of a LEO. The Commission understands that fixed energy rates are not generally required in the electric industry in order for electric generation facilities to be financed. For example, RTO/ISO capacity markets provide only for fixed capacity payments, leaving capacity owners to sell their energy into the organized electric markets at LMPs that vary based on market conditions at the time the energy is delivered.[112] These fixed capacity and variable energy payments have been sufficient to permit the financing of significant amounts of

incremental $17.54 million above market wind prices over the next 10 years.'') (emphasis in original); EEI Supplemental Comments, Docket No. AD16–16–000, attach. A at 3–4 (June 25, 2018) (EEI Supplemental Comments) (''On August 1, 2014, a 10-year fixed price contract at the Mid-Columbia wholesale power market trading hub was priced at $45.87/MWh. On June 30, 2016, the same contract was priced as $30.22/MWh, a decline of 34% in less than two years. However, over the next 10 years, PacifiCorp has a legal obligation to purchase 51.9 million MWhs under its PURPA contract obligations at an average price of $59.87/MWh. The average forward price curve for the Mid-Columbia trading hub during the same period is $30.22/MWh, or 50% below the average PURPA contract price that PacifiCorp will pay. The additional price required under long-term fixed contracts will cost PacifiCorp's customers $1.5 billion above current forward market prices over the next 10 years.''); Comm'r Kristine Raper, Idaho Commission Comments, Docket No. AD16–16–000, at 3–4 (June 29, 2016) (''Idaho Power demonstrated that the average cost for PURPA power since 2001 has exceed the Mid-Columbia (Mid-C) Index Price and is projected to continue to exceed the Mid-C price through 2032. Likewise, PacifiCorp's levelized avoided cost rates for 15-year contract terms in Wyoming shows a decrease of approximately 50% from 2011 through 2015 (from approximately $60 per megawatt-hour to less than $30 per megawatt-hour).'').

[102] EEI Supplemental Comments, attach. A at 4; *see also* Southern Company Comments, Docket No. AD16–16–000, at 7 (June 29, 2016) (''the avoided energy cost payment to the QF should be based on actual avoided energy cost at the time the QF delivers energy'').

[103] *See* Technical Conference Tr. at 26:22–25, 27:1–3 (Solar Energy Industries Association) (''The Power Purchase Agreement is the single most important contract of the development and financing of an energy project that's not owned by a utility. Without the long-term commitment to buy the output of that agreement at a fixed price, there is no predictable stream of revenue. Without a predictable stream of revenues, there is no financing. Without any financing, there is no project.'').

[104] *See* Natural Resources Defense Council Comments, Docket No. AD16–16–000, at 4 (June 30, 2016).

[105] *See* Technical Conference Tr. at 142–43 (Idaho Commission) (''No matter the starting point, allowing QFs to fix their avoided cost rates for long terms results in rates which will eventually exceed and overestimate avoided cost rates into the future. The longer the term, the greater the disparity. . . . [The Idaho Commission] recently reduced PURPA contract lengths to two years in order to correct the disparity. We didn't reduce contract lengths to kill PURPA. We did it to allow periodic adjustment of avoided cost rates.'').

[106] *Id.* at 202 (Southern Company).

[107] Golden Spread Electric Cooperative Comments, Docket No. AD16–16–000, at 10 (June 29, 2016).

[108] *See, e.g., City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

[109] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[110] *See* EIA, Today in Energy, *Average U.S. construction costs for solar and wind continued to fall in 2016* (Aug. 8, 2018), *available at https://www.eia.gov/todayinenergy/detail.php?id=36813* (''Based on 2016 EIA data for newly constructed utility-scale electric generators (those with a capacity greater than one megawatt) in the United States, annual capacity-weighted average construction costs for solar photovoltaic systems and onshore wind turbines declined . . . .'').

[111] 16 U.S.C. 824a–3(b)(1).

[112] *See, e.g., ISO New England Inc.,* 147 FERC ¶ 61,172, at P 2 (2014) (resources receiving capacity awards must offer into energy market).

new capacity in the RTOs and ISOs.[113] Testimony presented at the Technical Conference similarly showed that non-QF independent power projects located outside of RTOs enter into contracts with fixed capacity and variable energy prices.[114] Other comments at the Technical Conference suggested that a fixed capacity charge likewise would be adequate for financing a QF project.[115]

71. In addition to the fact that the Commission is not changing the requirement that QF capacity rates be fixed, the Commission anticipates that some may prefer basing variable QF contract energy rates on transparent competitive market prices over the term of the contract. Such rates are based on observable and foreseeable market forces, and thus the electric industry has developed forecasts for these competitive markets that are commonly accepted by the Commission and the industry as reasonable estimates of future prices.[116] Such estimates may provide some support for financing purposes.

72. Further, there are financial products available, such as contracts for differences, which allow generation owners to hedge their exposure to fluctuating energy prices.[117] Such financial products can provide additional comfort to lenders regarding the level of energy rate revenues that a QF can expect from the energy it delivers, in addition to the fixed capacity payments the QF is entitled to receive under its contract.

73. Moreover, although it may have been true at the time the Commission promulgated its PURPA Regulations in 1980 that QFs needed to fix their energy rate for the term of their contract in order to obtain financing of their facilities, there is evidence that this no longer is true. This evidence comes in the form of data, described below, showing that independent generators that have not qualified as QFs under PURPA (including renewable resources that could qualify as QFs but have not sought QF status) have been able to obtain financing for new facilities. That owners of such facilities, which do not have recourse to the avoided cost provisions of PURPA, have been able to obtain financing for new projects is highly relevant to the question of whether the existing PURPA avoided cost provisions—including the requirement to enter into contracts with fixed energy rates—are necessary for QFs to obtain financing.

74. For example, EIA data shows that, since 2005, QFs have made up only 10 to 20 percent of all renewable resource capacity in service in the United States, demonstrating that most renewable resources no longer need to rely on PURPA avoided cost rates to sell their output economically.[118] EIA data also shows that net generation of energy by non-utility owned renewable resources [119] in the United States escalated from 51.7 TWh in 2005 when EPAct 2005 was passed, to 340 TWh in 2018.[120] While much of this growth was in states located in RTOs/ISOs, there also was significant growth of non-utility renewable generation in other states. For example, net generation by non-utility renewable resources in the region defined by EIA as the Mountain State region [121] increased from 3.6 TWh in 2005 to 19.5 TWh in 2012, and to 42.5 TWh in 2018.[122] Pacific Northwest (Oregon and Washington) net non-utility generation from renewable resources increased from 1.5 TWh in 2005, to 8.7 TWh in 2012, and to 10.6 TWh in 2018.[123]

75. EIA data on independently-owned natural gas-fired generation capacity tells a similar story. Natural gas-fired capacity without the requisite cogeneration technology cannot qualify as qualifying small power production or cogeneration, and thus most of this capacity will not be within the scope of the PURPA avoided cost rate provisions. EIA data shows that, in 2018, 44.4 percent of all energy produced by natural gas-fired generation in the United States was generated by independently-owned capacity.[124] The total amount of energy produced in 2018 by independently-owned natural gas-fired generation was 651 TWh, an increase of 13.7 percent from 2017.[125] Again, the percentage of independently-owned natural gas generation outside of RTOs/ISOs was lower than in RTOs/ISOs, but still was significant. In the Mountain states region, 21.4 percent of the energy produced by natural gas-fired generation 2018 was produced by independently-owned capacity, and in Oregon and Washington 45.4 percent of natural gas-fired energy was produced by independently-owned capacity.[126] It thus is apparent that independent owners of non-QF generation have been, and continue to be, able to obtain financing for their facilities.

76. The Commission does not suggest that this evidence supports the conclusion that substantial non-QF capacity is being financed and constructed without any form of fixed revenue to support financing. Rather, the evidence demonstrates that the existing PURPA avoided cost rate provisions are not necessary for some independent power generators to put in place contractual arrangements, including fixed revenue streams, that are sufficient to obtain financing. QFs, which have the advantage of mandatory purchase requirements, should be better positioned than non-QFs to negotiate the necessary contractual arrangements for financing. Moreover, QFs are as equally well positioned as non-QF independent generators to take

[113] *See, e.g.,* Monitoring Analytics, LLC., *Third Quarter, 2018 State of the Market Report for PJM, January through September,* at 249, Table 5–6 (Nov. 8, 2018) (over 23,000 MW of new capacity constructed in PJM Interconnection, L.L.C. since 2007–2008; including over 16,000 MW of new capacity added in the last four years), *available at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2018/2018q3-som-pjm.pdf.*

[114] *See* Technical Conference Tr. at 167–69 (Southern Company) (''So if we enter into a bilateral contract with an independent power producer for combustion turbine or combined cycle capacity, we don't fix the energy price. The capacity payment is a fixed payment. That's their fixed [stream]. The energy price is typically indexed to the price of natural gas.''); *see also id.* at 178 (American Forest & Paper Association) (''Now, you sign a long-term IPP contract. That contract [has] got a variable energy cost in it.'').

[115] *See* Solar Energy Industries Association Comments, Docket No. AD16–16–000, at 3 (June 29, 2016) (''Developers need rates for such sales of *energy and/or capacity* to be fixed'') (emphasis added).

[116] *See generally ITC Great Plains, LLC,* 126 FERC ¶ 61,223, at P 43 (2009) (study evaluating benefits of transmission project based on price forecasts ''provides a reasonable basis to conclude that ITC Great Plains' projects will reduce the cost to serve load by reducing congestion through facilitating integration and delivery of low-cost wind energy in the [Southwest Power Pool, Inc.] region and providing greater transfer capability'').

[117] *See, e.g., Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 841, 162 FERC ¶ 61,127, at P 299 (2018) (noting that ''market participants that purchase energy from the RTO/ISO markets . . . may enter into bilateral financial transactions to hedge the purchase of that energy'').

[118] *See* EIA, Today in Energy, *North Carolina has More PURPA-Qualifying Solar Facilities than any other State,* figure entitled *PURPA qualifying facilities (1980–2015) percent of total renewable capacity* (Aug. 23, 2015), *available at https://eia.gov/todayinenergy/detail.php?id=27632.*

[119] The EIA renewable resources data discussed herein is based on the EIA ''other renewables'' category of generation resources, which consists of wind, utility scale solar, geothermal, and biomass resources.

[120] This data was taken from EIA's Electricity Data Browser, *available at www.eia.gov/electricity/data/browser.*

[121] Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

[122] This data was taken from EIA's Electricity Data Browser, *available at www.eia.gov/electricity/data/browser.*

[123] *Id.*

[124] EIA, *Electric Power Monthly with Data for December 2018,* at Table 1.7.B, *available at https://www.eia.gov/electricity/monthly/current_month/epm.pdf.*

[125] *Id.*

[126] *Id.*

advantage of federal and state incentives designed to encourage the construction of renewable resources.

77. Finally, as described above, states and utilities have responded to the requirement that QF contract rates be fixed for the term of a contract by shortening the terms of those contracts and taking other steps that some argue make it more difficult for a QF to obtain a financeable contract. Representatives of QFs explained that short contract terms make financing difficult, and they cited the Idaho Commission's decision to limit contracts to a two-year term as being especially harmful.[127] Because the decisions to impose short contract terms were based largely on the current requirement that QFs be able to fix their rates, particularly energy rates, for the term of their contracts, allowing states to require contractual energy rates to vary could result in longer QF contracts, and perhaps other more favorable treatment, that would improve the financeability of QF projects.

78. Although the Commission believes that the above evidence supports the conclusion that a fixed capacity rate and a variable energy rate should be adequate to support financing for QFs, the Commission solicits further information from interested entities on the ability of QFs to obtain financing based on contracts with a fixed capacity rate and a variable energy rate. In particular, the Commission solicits information on any independently owned projects (QF and non-QF) that required a fixed energy rate in addition to a fixed capacity rate to obtain financing and on independently owned projects (QF and non-QF) that were able to obtain financing without a fixed energy rate.

b. Implementation of the Commission's Proposal

79. The proposal described above is not mandatory. The Commission proposes to give the states the flexibility to continue to allow QFs to fix their contract energy rates as of the date of their LEO. The Commission's proposal here gives states the additional flexibility to consider imposing some measure of variability to QF contract energy rates when a state determines that it is necessary to do so to comply with the statutory requirement that QF rates not exceed the utility's avoided costs.

80. Further, the Commission understands that one standard form of QF contract rate currently employed by a number of utilities is a one-part rate, applicable to each MWh of energy delivered by the QF, which is calculated to reflect both avoided capacity costs and avoided energy costs. Such contracts also typically impose a must purchase obligation on the purchasing utility. The Commission's proposed rule is not intended to prevent states from implementing such an approach to setting QF contract rates in the future. However, as explained above, the Commission is not modifying the requirement in the PURPA Regulations that QFs have the option of fixing their contract capacity rates as of the date of the LEO.

81. Consequently, the Commission proposes that, to the extent that a state determines to establish a one-part QF contract rate that recovers both avoided capacity and avoided energy costs, the rate must continue to be subject to the QF's option to select a fixed rate for the term of the contract, as provided in § 304(d)(2)(ii). Any requirement to impose a variable energy QF contract rate would need to be accomplished through a multi-part rate that includes separate avoided capacity cost rates and avoided energy cost rates.[128]

6. Consideration of Competitive Solicitations To Determine Avoided Costs

82. The Commission proposes to revise the PURPA Regulations in 18 CFR 292.304 to add subsection (b)(8). In combination with new subsection (e)(1), this subsection would permit a state the flexibility to set avoided energy and/or capacity rates using competitive solicitations (*i.e.,* RFPs), conducted pursuant to appropriate procedures.

83. The Commission recognizes that one way to enable the industry to move towards more competitive QF pricing is to allow states to establish QF avoided cost rates through an RFP process. Such an approach has been suggested on a number of occasions, including in the National Association of Regulatory Utility Commissioners' (NARUC) supplemental comments submitted in Docket No. AD16–16–000, where NARUC proposed that

> energy and capacity needs . . . would be filled by conducting competitive solicitations for energy and capacity. These competitive solicitations, or request for proposals (RFPs), would be open to all QFs and would be overseen by State commissions or administered independently of any individual market participant to mitigate anti-competitive behavior of the buyer.[129]

84. The Commission previously has explored this issue. In 1988, the Commission issued a Notice of Proposed Rulemaking proposing to adopt regulations that would allow bidding procedures to be used in establishing rates for purchases from QFs.[130] That rulemaking proceeding, along with several related proceedings, ultimately was withdrawn as overtaken by events in the industry.[131]

85. Since then, the Commission held in a 2014 order addressing the specific facts of the RFP at issue that an electric utility's obligation to purchase power from a QF under a LEO could not be curtailed based on a failure of the QF to win an only occasionally-held RFP.[132] In a separate proceeding involving a different RFP, the Commission declined to initiate an enforcement action where the state RFP was an alternative to a PURPA program.[133]

86. Given this precedent, the Commission proposes to amend its regulations to clarify that a state could establish QF avoided cost rates through an appropriate RFP process. Consistent with its general approach of giving states flexibility in the manner in which they determine avoided costs, the Commission does not propose in this NOPR to prescribe detailed criteria governing the use of RFPs as tools to determine rates to be paid to QFs, as well as to determine other contract terms. States arguably may be in the best position to consider their particular local circumstances, including questions of need, resulting economic impacts, amounts to be purchased through auctions, and related issues.

[127] *See* Technical Conference Tr. at 70 (Solar Energy Industries Association); 73 (California Cogeneration Council).

[128] If, however, the QF contract rate is appropriately based solely on avoided energy costs with no avoided capacity cost component, then that rate could be implemented on a variable basis in accordance with the requirements of these proposed rules.

[129] NARUC Supplemental Comments, Docket No. AD16–16–000, at 2 (July 20, 2018).

[130] *Regulations Governing Bidding Programs,* FERC Stats. & Regs. ¶ 32,455 (1988) (cross-referenced at 42 FERC ¶ 61,323) (*Bidding NOPR*); *see also Administrative Determination of Full Avoided Costs,* FERC Stats. & Regs. ¶ 32,457 (1988) (cross-referenced at 42 FERC ¶ 61,324) (*ADFAC NOPR*).

[131] *See Regulations Governing Bidding Programs,* 64 FERC ¶ 61,364 at 63,491–92 (1993) (terminating *Bidding NOPR* proceeding); *see also Administrative Determination of Full Avoided Costs,* 84 FERC ¶ 61,265 (1998) (terminating *ADFAC NOPR* proceeding).

[132] *See, e.g., Hydrodynamics,* 146 FERC ¶ 61,193 at PP 31–35. RFP processes have been used more recently in a number of states, including Georgia, North Carolina, and Colorado. Georgia's RFP process is described at Ga. Comp. R. & Regs. 515–3–4.04(3) (2018). North Carolina's RFP process is described at 4 N.C. Admin. Code 11.R8–71 (2018). Colorado's RFP process is described at *SPower Development Co.* v. *Colorado Pub. Utils. Comm'n,* 2018 WL 1014142 (D. Colo. Feb. 22, 2018).

[133] *Winding Creek Solar LLC,* 151 FERC ¶ 61,103, *reconsideration denied,* 153 FERC ¶ 61,027 (2015). *But see Winding Creek Solar LLC* v. *Peterman,* 932 F.3d 861 (9th Cir. 2019).

87. Nevertheless, in considering what constitutes proper design and administration of an RFP, it is appropriate for the Commission to establish certain minimum criteria governing the process by which RFPs are to be conducted in order for an RFP to be used to set QF rates. In that regard, the Commission has addressed competitive solicitations in prior orders in a number of contexts that provide potential guidance to states and others. For example, the Commission's policy for the establishment of negotiated rates for merchant transmission projects,[134] the Bidding NOPR, and the *Hydrodynamics* case [135] all suggest factors that could be considered in establishing an appropriate RFP that is conducted in a transparent and non-discriminatory manner. These factors include, among others: (a) An open and transparent process; (b) solicitations should be open to all sources to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; [136] (c) solicitations conducted at regular intervals; (d) oversight by an independent administrator; and (e) certification as fulfilling the above criteria by the state regulatory authority or nonregulated electric utility. The Commission proposes that a state may use an RFP to set avoided energy and capacity rates provided that such competitive solicitation process is conducted pursuant to procedures ensuring the solicitation is conducted in a transparent and non-discriminatory manner. Such an RFP must be conducted in a process that includes, but is not limited to, the factors identified above which are set forth in proposed § 292.304(b)(8) of the Commission's Regulations.

88. In addition, the Commission seeks comment on whether it should provide further guidance on whether, and under what circumstances, an RFP can be used as a utility's exclusive vehicle for acquiring QF capacity.[137]

B. Relief From Purchase Obligation in Competitive Retail Markets

89. Section 292.303(a) of the PURPA Regulations requires electric utilities generally to purchase ''any energy and capacity which is made available from a qualifying facility.'' [138] The Commission proposes to modify this regulation to provide electric utilities relief from this purchase obligation to the extent their supply obligations are reduced by a state's retail choice program.

1. Background

90. Historically, electric utilities were responsible for serving all of the load within their franchised service territories. Since the 1990s, however, some states have restructured their electricity markets to incorporate retail choice, which allows retail electric customers to choose alternative electricity suppliers and not purchase from their local electric utility. This type of restructuring may have decreased electric utilities' obligations to serve load, *i.e.,* they no longer are required to serve load that otherwise would be their native load. However, electric utilities were still generally required to continue to serve as the Provider of Last Resort (POLR) and serve customers that were not obtaining electricity from competitive electric retail suppliers. Electricity for POLR load often is procured through a competitive solicitation process with contracts of one year or less. This allows customers to leave POLR service and enter into contracts with competitive electricity suppliers while protecting electric utilities from having to honor long-term contracts for a shifting customer base.

2. Commission Proposal

91. It is reasonable for electric utilities' PURPA capacity purchase obligations to be reduced to the extent retail choice reduces their supply obligations. To the extent POLR supplies are obtained through solicitations having a particular contract term such as one year, the length of the utility's PURPA purchase contract should match the term of the POLR supply solicitation contracts in order to more accurately reflect the utility's avoided costs.

92. The Commission proposes to add regulatory text at the end of § 292.303(a) of the PURPA Regulations to provide that the purchase obligation may be reduced to the extent the purchasing electric utility's supply obligation has been reduced by a state retail choice program. The Commission proposes, through this change, to provide that state regulatory authorities and nonregulated electric utilities have flexibility to respond to the possibility that, over time, a utility's POLR supply obligation may decrease (or increase). The Commission intends that this proposal would apply prospectively from the effective date of the final rule and would not disturb contracts in effect at the time the utility's supply obligation is reduced.

C. Evaluation of Whether QFs Are Separate Facilities

93. The PURPA Regulations and Commission precedent establish an irrebuttable presumption that affiliated small power production facilities using the same energy resource, but which are more than one mile apart from each other, are located at separate sites and thus are separate facilities. This irrebuttable presumption therefore renders such facilities eligible for the benefits of PURPA if each facility, individually, has a maximum power production capacity of 80 MW or less.[139] Section 292.204(a)(2)(ii) of the PURPA Regulations states that to measure one mile, ''the distance between facilities shall be measured from the electrical generating equipment of a facility,'' [140] but the PURPA Regulations do not define what constitutes electrical generating equipment or explain how to measure the distance between facilities.

94. As discussed below, the Commission proposes to amend §§ 292.204(a) and 292.207 of the PURPA Regulations to allow entities challenging a QF certification to show that affiliated small power production facilities more than one mile apart and less than ten miles apart, are actually part of a single facility, and not separate facilities; the presumption, in other words, would be a *rebuttable* presumption for facilities over one mile apart and less than ten miles apart. The Commission also proposes amending § 292.202 to include a definition of ''electrical generating equipment'' and § 292.204(a)(2)(ii) to

[134] *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects,* 142 FERC ¶ 61,038 (2013).

[135] *See Hydrodynamics,* 146 FERC ¶ 61,193 at P 32 n.70 (citing *Bidding NOPR,* FERC Stats. & Regs. ¶ 32,455 at 32,030–42). The Commission notes that, while QFs not awarded a contract pursuant to an RFP would retain their existing PURPA right to sell energy as available to the electric utility, if the state has concluded that such QF puts tendered after an RFP was held are ''not needed,'' the capacity rate may be zero because an electric utility is not required to pay a capacity rate for such puts if they are not needed. *See Hydrodynamics,* 146 FERC ¶ 61,193 at P 35 (referencing *City of Ketchikan, Alaska,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'')).

[136] *See* 18 CFR 292.304(e); *Windham Solar LLC,* 157 FERC ¶ 61,134 at PP 5–6.

[137] Even if an RFP were used as an exclusive vehicle for an electric utility to obtain QF capacity, QFs that do not receive an award in the RFP would be entitled to sell energy to the electric utility at its as-available avoided energy cost rate.

[138] 18 CFR 292.303(a).

[139] *N. Laramie Range Alliance,* 139 FERC ¶ 61,190, at PP 22–24 (2012) (*Northern Laramie*). *See* 18 CFR 292.204(a)(1).

[140] 18 CFR 292.204(a)(2)(ii).

specify how to measure the distance between facilities that have multiple separate sets of ''electrical generating equipment'' such as is often the case with wind farms and solar facilities.

1. Background and Need for Reform

a. Ability To Rebut Presumption of Separate Sites

95. PURPA defines a small power production facility as ''a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) *has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 MW.*'' [141] The 80 MW limit on the size of a facility that can qualify as a small power production facility requires a definition of what it means to be ''located at the same site,'' to determine whether a QF satisfies the 80 MW limit.

96. Currently, § 292.204(a) of the PURPA Regulations provides that small power production facilities are considered to be at the same site if they are located within one mile of each other, use the same energy resource, and are owned by the same person(s) or its affiliates.[142] This regulatory provision is commonly referred to as ''the one-mile rule'' and is used to calculate the size of a facility and to distinguish what is a separate facility. The Commission has stated that the one-mile rule is an irrebuttable presumption—facilities within one mile are ''at the same site'' and facilities more than a mile apart from each other are not.[143]

97. In recent years, arguments have been raised that some QF developers of small power production facilities are circumventing the one-mile rule, and thereby circumventing PURPA, by strategically siting small power production facilities that use the same energy resource—primarily wind farms made up of multiple individual wind turbines—slightly more than one mile apart in order to qualify as separate small power production facilities that are protected by the irrebuttable presumption that facilities more than a mile apart are separate QFs.[144]

b. Electrical Generating Equipment

98. Section 292.204(a)(2)(ii) of the PURPA regulations states that, to measure one mile, ''the distance between facilities shall be measured from the *electrical generating equipment* of a facility.'' [145] The Commission has suggested in orders what is *not* considered ''electrical generating equipment,'' [146] but has never defined or elaborated on what equipment meets the definition of ''electrical generating equipment.'' For example, wind farms are typically comprised of multiple wind turbines spread over some geographic area; however, each wind turbine could be considered ''electrical generating equipment.''

99. Similarly, solar facilities can be spread over some geographic area (albeit likely not as large a footprint as a wind farm), potentially creating confusion as to whether the one mile is measured from the edge of the panels at one facility to the edge of the panel at the next facility, or from the center point of each solar array. Additionally, the Commission has not specified how to measure the distance between facilities that have multiple separate sets of ''electrical generating equipment.''

2. Proposed Changes to Subpart B—Qualifying Cogeneration and Small Power Production Facilities

a. Rebuttable Presumption of Separate Facilities

100. The Commission proposes to allow entities challenging a QF certification to rebut the presumption that affiliated facilities located more than one mile apart are considered to be separate QFs. The Commission proposes that this change would be effective as of the date of a final rule, which means that such challenges could only be made to QF certifications and recertifications that are submitted after the effective date of the final rule in this proceeding.

101. The Commission proposes that an entity can seek to rebut the presumption only for those facilities that are located more than one mile apart and less than ten miles apart. The Commission believes that, just as there are some facilities that may be so close that it is reasonable to irrebuttably treat them as a single facility (those a mile or less apart), so there are some facilities that are sufficiently far apart that it is reasonable to treat them as irrebuttably separate facilities. That latter distance, the Commission believes, is ten miles or more apart. Thus, if two affiliated facilities are one mile or less apart they are currently and will continue to be irrebuttably presumed to be a single facility at a single site. If affiliated facilities are ten miles or more apart, they will be irrebuttably presumed to be separate facilities at separate sites.

102. If affiliated facilities are between one and ten miles apart (*i.e.,* more than one mile apart and less than ten miles apart) there will still be a presumption, but it will be a *rebuttable* presumption, that they are separate facilities at separate sites. Purchasing electric utilities and others thus would be able to file a protest attempting to rebut the presumption for facilities more than one mile apart and less than ten miles apart, and argue that they should be treated as a single facility. The Commission may also act *sua sponte.* The Commission proposes, as explained below, that self-certifications will remain effective after a protest has been filed, until such time as the Commission issues an order revoking the certification.

103. The Commission proposes allowing an entity seeking QF status to provide further information in its certification (both self-certification and Commission certification), to preemptively defend against rebuttal by asserting factors that affirmatively show that two facilities are indeed separate facilities at separate sites.[147] Anyone challenging the QF certification would be allowed to assert factors to show that the facilities are actually part of the same, single facility.

104. The Commission proposes limiting protests challenging QF status by requiring any entity filing a protest to specify facts that make a prima facie demonstration that the facility described in the self-certification, self-recertification, or Commission certification does not satisfy the requirements for QF status. General allegations or unsupported assertions would not be a basis for denial of certification. The Commission further

[141] 16 U.S.C. 796(17)(A) (emphasis added).

[142] 18 CFR 292.204(a). Hydroelectric facilities have slightly different rules, which reference water from the same impoundment.

[143] *Northern Laramie,* 139 FERC ¶ 61,190 at PP 22–24.

[144] *See, e.g.,* EEI Comments, Docket No. AD16–16–000, at 5 (Nov. 7, 2016); National Rural Electric Cooperative Association Comments, Docket No. AD16–16–000, at 7 (Nov. 7, 2016); Southern Company Comments, Docket No. AD16–16–000, at 9–10 (Nov. 7, 2016); NARUC Supplemental Comments, Docket No. AD16–16–000, at 3 (Nov. 7, 2016).

[145] 18 CFR 292.204(a)(2)(ii) (emphasis added).

[146] In Order No. 70, the Commission stated: ''The comments noted that some facilities may include equipment for gathering energy to be used in the facility which may extend up to a number of miles from the generating facility. The Commission believes that the one-mile limit should be measured from the generating facilities.'' Order No. 70, FERC Stats. & Regs. ¶ 30,134 at 30,943.

[147] While a QF with a net power production capacity of 1 MW or less is not required to formally certify its QF status (either through Commission certification or self-certification), if the QF's status is later challenged the QF would be able to respond by affirmatively demonstrating that its facilities are not located at the same site as other affiliated facilities and thus that the QF does not exceed the 80 MW size limitation.

proposes limiting protests to QF status by requiring that once the Commission has affirmatively certified an applicant's QF status through either a Commission certification proceeding or in response to protests challenging QF status, any later protest to a QF's existing certification asserting that facilities further than one mile apart are part of a single QF must demonstrate changed circumstances that call into question the continued validity of the earlier certification.

105. The Commission proposes that physical and ownership factors may be asserted to rebut or defend against rebuttal. Noting that no single factor would be dispositive, the Commission proposes the factors listed below:

(1) Physical characteristics including such common characteristics as: Infrastructure, property ownership, interconnection agreements, control facilities, access and easements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, property leases, and connections to the electrical grid; and (2) ownership/other characteristics, including such characteristics as whether the facilities in question are: Owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated facility in the same location, placed into service within 12 months of an affiliated project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts. The Commission solicits comments on whether the Commission should rely on some or any of these factors, or other factors, or whether the various factors should be considered together and weighed.

106. Finally, for its PURPA Regulations, the Commission generally relies on the definition of an ''affiliate'' provided in its regulations at § 35.36(a)(9). The Commission will continue to rely on this definition and notes that subsection (iii) of the Commission's regulation provides that the Commission may determine, after appropriate notice and opportunity for hearing, that a person stands in such relation to a specified company that there is likely to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.[148] The Commission intends, when applying its rules on separate facilities, to consider this provision of its regulations, when entities otherwise would not be deemed affiliates under the other provisions of the definition, to determine whether a person nevertheless should be treated as an affiliate. In doing so, the Commission could take into consideration many of the same factors that would reasonably be considered in evaluating whether facilities located over one and less than ten miles apart are a single facility or separate facilities.

107. The Commission believes that this change, together with the proposed definition of ''electrical generating equipment'' and revision to the FERC Form No. 556 discussed below, would more closely align with Congress's requirement that QFs seeking to certify as small power production facilities are in fact below the statutory limit for such facilities.[149]

b. Electrical Generating Equipment

108. The Commission proposes defining ''electrical generating equipment'' to refer to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels and/or inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility. The Commission expects that each wind turbine on a wind farm and each solar panel in a solar facility would be considered ''electrical generating equipment'' because each wind turbine and each solar panel is independently capable of producing electric energy. We seek comments on this approach, and on what—if not individual wind turbines and solar panels—should be considered ''electrical generating equipment'' for wind and solar plants.

109. The Commission also proposes specifying how to measure the distance between facilities that have multiple separate sets of ''electrical generating equipment'' such as wind farms and solar facilities. In this NOPR, the Commission proposes measuring the distance between the nearest ''electrical generating equipment'' of any two facilities such that, for the facilities to be considered irrebuttably separate, all such equipment of one QF must be at least ten miles away from all such equipment of another QF. We believe this is the appropriate way to measure the distance between affiliated sets of ''electrical generating equipment'' because this reflects the distance between the components directly tied to producing electric energy.

110. The Commission seeks comment on this approach, and whether alternative approaches would be more appropriate. For example, some parties have suggested in QF certification proceedings that the Commission could use the geographic center of the plant footprint or a weighted average of the locations of the individual pieces of ''electrical generating equipment.''[150] The Commission is concerned these approaches may be easily gamed, but seeks comment on whether they may be constructed in a way that would prevent gaming, and whether such formulations would be preferable to the approach proposed above.

3. Corresponding Changes to the FERC Form No. 556

111. If the changes to the evaluation of whether QFs are separate facilities are implemented as proposed above, the Commission proposes corresponding changes to the FERC Form No. 556. Currently, item 8a of Form No. 556 requires that the applicant identify any facilities with electrical generating equipment within one mile of the instant facility's electrical generating equipment, as shown below in Figure 1.

[148] 18 CFR 35.36(a)(9)(iii).

[149] *See* 16 U.S.C. 796(17)(A)(ii) (defining small power production facility as *inter alia* ''a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—. . . has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.'').

[150] *See Beaver Creek Wind II, LLC,* 160 FERC ¶ 61,052, at P 9 (2017).

Figure 1: Item 8a of the current Form No. 556

8a Identify any facilities with electrical generating equipment located within 1 mile of the electrical generating equipment of the instant facility, and for which any of the entities identified in lines 5a or 5b, or their affiliates, holds at least a 5 percent equity interest.

Check here if no such facilities exist. ☐

	Facility location (city or county, state)	Root docket # (if any)	Common owner(s)	Maximum net power production capacity
1)		QF -		kW
2)		QF -		kW
3)		QF -		kW

☐ Check here and continue in the Miscellaneous section starting on page 19 if additional space is needed

112. The Commission proposes adding a new item 8b,[151] which would be similar to the current item 8a, except that it would cover affiliated facilities whose nearest electrical generating equipment is *greater than 1 mile and less than 10 miles* from the electrical generating equipment of the instant facility.

113. The Commission proposes that the instructions for the new item 8b would also allow applicants with facilities identified under item 8b (*i.e.,* facilities more than one mile apart and less than ten miles apart) to, if they choose, explain (in the Miscellaneous section starting on page 19 of the form) why the facilities identified under item 8b should be considered separate facilities, considering the relevant physical and ownership factors. We further propose to provide reference, in the instructions to the new item 8b, to the paragraphs of the final rule under this rulemaking which discuss the relevant physical and ownership factors that may be asserted to defend against rebuttal.

114. The Commission seeks comment on whether item 8a (existing) should be revised and item 8b (as newly proposed) written to require that the applicant specify the distance from the instant facility to each affiliated facility listed. We also seek comment on whether items 8a and (new) 8b should require the applicant to document (in the Miscellaneous section on page 19 of the Form No. 556) how the distances reported were calculated. Specifically, we seek comment on whether the applicant should be required to identify the particular electrical generating equipment and associated geographic coordinates used in calculating the distance(s) between the facility(ies).

115. The Commission notes that item 8a currently requires applicants to list all affiliated ''facilities.'' Under this requirement, an applicant would have to list all affiliated QFs and affiliated *non*-QFs. We request comment on whether such a requirement is more burdensome than necessary. It is not clear that requiring the listing of affiliated *non*-QFs is necessary in monitoring for compliance with the relevant QF regulations, which are concerned only with the distance between affiliated *QFs.* Particularly under the newly proposed item 8b, where applicants would list facilities located more than one mile apart but less than ten miles apart, many more facilities are likely to be listed than are currently listed in the existing item 8a. As such, we seek comment on whether we should revise item 8a (existing) and write item 8b (as newly proposed) to require that applicants list only affiliated *QFs,* or whether there is reason to continue to require all affiliated facilities to be listed.

116. The Commission also seeks comment on whether item 3c (geographic coordinates) and the Geographic Coordinates instructions on page 4 of the current Form No. 556 should be modified such that reporting of geographic coordinates should be required for *all* applications, rather than only for applications where there is no facility street address (as is now the case). We believe such information may provide more transparency in approximate distances between facilities, and that such transparency may be useful for both the public and Commission staff in monitoring compliance with the Commission's QF regulations.

117. We note, as we did in Order No. 732,[152] and as we do in the general form instructions on page 4 of the Form No. 556, that such coordinates can be obtained through certain free online map services (with links and instructions available through the Commission's QF website); GPS devices (including smartphones, which are now nearly ubiquitous); Google Earth; property surveys; various engineering or construction drawings; property deeds; or municipal or county maps showing property lines. We also note that the Commission has a link on its QF web page (*www.ferc.gov/QF*) which provides assistance with determining geographic coordinates of facilities. As such, we believe that the burden that would be created by requiring every QF to provide geographic coordinates would be limited. Even so, we seek comment on whether the value of the information to the public and the Commission would outweigh the limited burden.

D. PURPA Section 210(m) Rebuttable Presumption of Nondiscriminatory Access to Markets

118. In accordance with PURPA section 210(m), the PURPA Regulations permit an electric utility to file an application with the Commission requesting relief from the requirement to enter into new contracts or obligations to purchase electric energy from a QF if the Commission finds that a QF has nondiscriminatory access to certain markets. As relevant here, the PURPA Regulations establish a rebuttable presumption that QFs with a net power production capacity at or below 20 MW lack nondiscriminatory access to such markets. The Commission now proposes

[151] Subsequent items in that section of the form would be retained, but re-numbered and moved down accordingly.

[152] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility,* Order No. 732, 130 FERC ¶ 61,214, at P 100 (2010).

to revise the PURPA Regulations to reduce the capacity level at which this presumption attaches for small power production facilities, but not cogeneration facilities, from 20 MW to 1 MW.[153]

1. Background

119. In 2005, Congress amended PURPA section 210 to add section 210(m), which was intended to reflect the fact that organized electric markets have been created in RTOs/ISOs that provide alternative markets for sales by QFs. Section 210(m) provides for termination of the requirement that an electric utility enter into a new obligation or contract to purchase from a QF if the QF, in fact, has nondiscriminatory access to certain defined types of markets.[154]

120. In Order No. 688, the Commission identified certain specified markets as qualifying for section 210(m) relief from the PURPA mandatory purchase obligation, provided that QFs, in fact, have nondiscriminatory access to such markets.[155] Because section 210(m) requires the Commission to make a final determination on applications to terminate the requirement to enter into new obligations or contracts to purchase from QFs within 90 days of the application, the Commission established certain rebuttable presumptions to make the processing of the applications possible given this 90-day action requirement.

121. As relevant here, one of those rebuttable presumptions, contained in § 292.309(d)(1) of the PURPA Regulations,[156] is that a QF with a net power production capacity at or below 20 MW does *not* have nondiscriminatory access to markets. In creating this rebuttable presumption, the Commission found persuasive arguments that some QFs may, in practice, not have nondiscriminatory access to markets in light of their small size.

122. The Commission noted that there was agreement among commenters representing both QFs and utilities that small size could affect a QF's ability to access markets.[157] The Commission explained that smaller QFs often are interconnected at the distribution level and that QFs interconnected at the distribution level may, in practice, lack the same level of access to markets as those connected to transmission lines.[158] The Commission also explained that smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery rates, and administrative burdens to obtaining access to distant buyers.

123. The Commission found that such difficulties supported a rebuttable presumption that smaller QFs have ''substantially less ability to access wholesale markets than do larger QFs.'' [159] The Commission further explained that it set this rebuttable presumption at 20 MW, rather than at a much smaller size of one or two MW, to reflect its understanding of ''the general nature of QFs' interconnection practices and the relative capabilities of small entities'' to participate in markets.[160] The Commission acknowledged that ''[t]here is no perfect bright line that can be drawn,'' but stated that it ''reasonably exercised [its] discretion in adopting a 20 MW or below demarcation for purposes of determining which QFs are unlikely to have nondiscriminatory access to markets.'' [161]

124. Order No. 688 placed the burden of proof on the electric utility to demonstrate that a smaller QF has nondiscriminatory access to energy markets.[162] The Commission, in Order No. 688, did not specify what evidence a utility could set forth to rebut the presumption, but noted that ''relevant evidence may include the extent to which the QF has been participating in the market or is owned by, or is an affiliate of, a[n] entity that has been participating in the relevant market.'' [163]

125. The Commission in Order No. 688 stated that ''[t]here is nothing in section 210(m) of PURPA to suggest that Congress intended to ensure a QF's commercial viability. Nor does the statute require the Commission to find that the 'economic and technical equivalent to mandatory purchase is available through a competitive market' before it terminates the requirement that an electric utility enters into a new contract or obligation to purchase electric energy from QFs.'' [164]

2. Commission Proposal

126. In 2006, when Order No. 688 was issued, the organized electric markets had been in existence for only a few years and were not well understood by all market participants. Now, twelve years later, the markets are more mature, and the mechanics of participation in such markets are improved and better understood. Consequently, the Commission believes that small power production facilities below 20 MW should be able to participate in such markets under most circumstances. The Commission therefore proposes to revise § 292.309(d) of the PURPA Regulations to reduce the net power production capacity level at which the presumption of nondiscriminatory access to a market attaches for small power production facilities, but not cogeneration facilities, from 20 MW to 1 MW.

127. The Commission believes that, in light of the maturation of organized electric markets, such a reduction is consistent with Congress's intent to relieve electric utilities of their obligation to purchase when a QF has nondiscriminatory access to competitive markets. Under current market conditions, it is fair to expect that small power production facilities above 1 MW can acquire the administrative and technical expertise necessary to obtain nondiscriminatory access to a market.

128. The Commission, in establishing the presumption that QFs whose net power production capacity was 20 MW or below lacked nondiscriminatory access to markets defined in sections 210(m)(1)(A)–(C) of PURPA, acknowledged that ''there is no unique and distinct megawatt size that uniquely determines if a generator is small.'' [165] In using 20 MW to separate the presumption that large QFs had nondiscriminatory access and small QFs lacked such access, the Commission recognized: (1) Order No. 671's exemption for QFs that are 20 MW or smaller from sections 205 and 206 of the FPA; and (2) Order Nos. 2006 and 2006–

[153] The Commission also proposes to revise the PURPA Regulations to replace ''Midwest Independent Transmission System Operator, Inc. (Midwest ISO)'' and ''ISO New England, Inc.'' in 18 CFR 292.309(e), with ''Midcontinent Independent System Operator, Inc. (MISO)'' and ''ISO New England Inc.,'' respectively.

[154] *See* 16 U.S.C. 824a–3(m).

[155] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at PP 9–12 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008).

[156] 18 CFR 292.309(d)(1).

[157] *E.g.,* Order No. 688, 117 FERC ¶ 61,078 at PP 72–73; Order No. 688–A, 119 FERC ¶ 61,305 at P 103.

[158] Order No. 688–A, 119 FERC ¶ 61,305 at PP 94–103.

[159] *Id.* P 96.

[160] *Id.* P 101.

[161] *Id.* P 95.

[162] 18 CFR 292.310(d)(2) (to the extent an electric utility seeks relief from the purchase obligation with respect to a QF 20 MW or smaller, the electric utility bears burden to prove the QF has nondiscriminatory access to the wholesale markets).

[163] Order No. 688, 117 FERC ¶ 61,078 at P 78. In saying this, however, the Commission did not intend to suggest that these two facts alone would necessarily be a basis for granting relief from PURPA's mandatory purchase obligation. *PPL Elec. Utils. Corp.,* 145 FERC ¶ 61,053, at P 23 & n.25 (2013), *order denying reh'g,* 148 FERC ¶ 61,207 (2014).

[164] Order No. 688, 117 FERC ¶ 61,078 at P 37.

[165] Order No. 688–A, 119 FERC ¶ 61,305 at P 97.

A's setting 20 MW as the demarcation for different interconnection standards between small and large generators.[166] While the Commission has not (and does not here) propose to revise the exemptions for QFs from sections 205 and 206 of the FPA, the Commission has taken steps to ease both interconnection and market access for generation resources with small capacities since it first implemented section 210(m) of PURPA.

129. For example, the Commission has required public utilities to provide a Fast-Track interconnection process for some interconnection customers whose capacity is up to and including 5 MW (up from the previous 2 MW threshold),[167] and has required each RTO/ISO to revise its tariff to include a participation model for electric storage resources that establishes a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.[168] While both of these changes do not apply only to generation types that could become QFs or to RTOs/ISOs, we believe they generally show that small power production facilities below 20 MW, specifically those whose capacity exceeds 1 MW now have greater access to the markets defined in section 210(m)(1) of PURPA than they did when the Commission first established the presumptions of market access. Under this proposal, like QFs over 20 MW today, small power production facilities over 1 MW would be able to rebut the presumption of access due to operational characteristics or transmission constraints.[169]

130. The Commission does not propose to make the same reduction applicable to cogeneration facilities. Unlike small power production facilities, which are constructed solely to produce and sell electricity, cogeneration facilities seeking QF certification after February 2, 2006 are statutorily required to show that they are intended primarily to provide heat for an industrial, commercial, residential or institutional process rather than fundamentally for sale to an electric utility.[170] Consequently, the production and sale of electricity is a byproduct of these processes, and owners of cogeneration facilities might not be as familiar with energy markets and the technical requirements for such sales. Retention of the existing 20 MW level for the presumption of access to markets therefore would be appropriate for cogeneration facilities.

3. Reliance on RFPs and Liquid Market Hubs To Terminate Purchase Obligation

131. NARUC has proposed that the Commission allow utilities to rely on RFPs (in combination with liquid market hubs) to establish eligibility to terminate a utility's purchase obligation pursuant to PURPA section 210(m)(1)(C).[171] After describing generally how such a proposal might be structured, NARUC suggests that ''[t]he Commission should create a yardstick of characteristics that describe in detail how a utility could qualify for an exemption under subparagraph (C).'' [172]

132. Under the PURPA Regulations, electric utilities already may seek to terminate their mandatory purchase obligation pursuant to PURPA section 210(m)(1)(C) by demonstrating that a particular market is of comparable competitive quality to markets described in PURPA section 210(m)(1)(A) and (B).[173] The current PURPA Regulations are not prescriptive about how an electric utility must make such a demonstration and nothing in the PURPA Regulations or precedent would bar an electric utility from arguing that RFPs in combination with liquid market hubs are sufficient to satisfy PURPA section 210(m)(1)(C).

133. The Commission believes that a properly structured proposal along the lines proposed by NARUC potentially could satisfy the statutory requirements under PURPA section 210(m)(1)(C) and will consider such proposals on a case-by-case basis. Although the Commission does not in this NOPR propose additional criteria a utility or utilities may rely on to satisfy PURPA section 210(m)(1)(C), the Commission seeks comments on any specific factors that would be useful to consider in determining how a utility or utilities may satisfy PURPA section 210(m)(1)(C).

E. Legally Enforceable Obligation

134. Section 292.304(d) of the PURPA Regulations provides that a QF can choose to have its rates based on the avoided cost calculated at the time of delivery *or at the time a LEO is incurred.* However, the PURPA Regulations do not specify when or how a LEO is established.[174] To date, the Commission has not identified specific criteria that states must follow in determining when a LEO is established.

135. Although not specifying such criteria, the Commission has found that certain prerequisites to QFs obtaining a LEO imposed by some states—such as a utility's execution of an interconnection agreement or power purchase agreement—are unreasonable.[175] The

[166] *See* Order No. 688, 117 FERC ¶ 61,078 at P 76, *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 at P 97; *see also* 18 CFR 292.601(c)(1) (''sales of energy or capacity made by qualifying facilities 20 MW or smaller, or made pursuant to a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority's implementation of section 210, the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, shall be exempt from scrutiny under sections 205 and 206''); *Revised Regulations Governing Small Power Production and Cogeneration Facilities,* Order No. 671, 114 FERC ¶ 61,102, at P 98 (2006), *order on reh'g,* Order No. 671–A, 115 FERC ¶ 61,225 (2006) (establishing exemption for QFs 20 MW or below from 205 and 206 of FPA); *Standardization of Small Generator Interconnection Agreements and Procedures,* Order No. 2006, 111 FERC ¶ 61,220, at P 75, *order on reh'g,* Order No. 2006–A, 113 FERC ¶ 61,195 (2005), *order granting clarification,* Order No. 2006–B, 116 FERC ¶ 61,046 (2006).

[167] *Small Generator Interconnection Agreements and Procedures,* Order No. 792, 145 FERC ¶ 61,159, at P 103 (2013), *clarifying,* Order No. 792–A, 146 FERC ¶ 61,214 (2014).

[168] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 841, 162 FERC ¶ 61,127, at P 265 (2018).

[169] *See* 18 CFR 292.309(c), (e), (f).

[170] *See* 16 U.S.C. 824a–3(n); 18 CFR 292.205(d)(3). We recognize that cogeneration facilities seeking certification 5 MW or smaller after February 2, 2006 are presumed to satisfy this requirement. 18 CFR 292.205(d)(4).

[171] *See* NARUC Supplemental Comments, Docket No. AD16–16–000 (Oct. 17, 2018).

[172] *Id.,* attach. A at 9.

[173] Order No. 688–A, 119 FERC ¶ 61,305 at P 43 (''Congress believed the two types of markets identified in subparagraphs (A) and (B), while distinct between themselves, contain certain competitive qualities that justify termination of the purchase requirement for any QF with nondiscriminatory access to those markets. Subparagraph (C) directs the Commission to consider these competitive qualities when analyzing whether there are other markets that, while not meeting the specific requirements of subparagraphs (A) and (B), are sufficiently competitive to justify termination of the purchase requirement.''); *cf. Pub. Serv. Co. of N.M.,* 140 FERC ¶ 61,191, at PP 29–38 (2012) (denying application to terminate mandatory purchase obligation on the grounds that the Four Corners Hub is not of comparable competitive quality to markets in sections 210(m)(1)(A) and (B) of PURPA).

[174] *But see, e.g., FLS,* 157 FERC ¶ 61,211 at P 23 (''[R]equiring a QF to tender an executed interconnection agreement is equally inconsistent with PURPA and our regulations. Such a requirement allows the utility to control whether and when a legally enforceable obligation exists—*e.g.,* by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement.''); Memorandum of Agreement between Idaho Public Utilities Commission and Federal Energy Regulatory Commission at 2 (Dec. 24, 2013), *available at https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf* (Idaho Commission acknowledging that ''a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing'').

[175] *See, e.g., FLS,* 157 FERC ¶ 61,211 at P 26 (requiring signed interconnection agreement as prerequisite to legally enforceable obligation is inconsistent with PURPA Regulations); *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187, at P 40 (2013) (*Grouse Creek*) (finding that requiring a QF to file complaint as prerequisite to a legally enforceable obligation is inconsistent with PURPA Regulations); *Murphy Flat Power, LLC,* 141 FERC ¶ 61,145, at P 24 (2012) (finding that requiring a signed and executed contract with an electric utility as a prerequisite to a legally enforceable obligation

Commission does not propose to overturn this precedent because the Commission continues to believe that imposition of the prerequisites addressed in its precedent is unreasonable and does not satisfy PURPA's requirement that the Commission prescribe rules as necessary to encourage the development of QFs.

136. As discussed below, however, the Commission proposes to amend § 292.304(d) of the PURPA Regulations to require that a QF demonstrate its commercial viability and financial commitment to construct its facility through objective and reasonable state-determined criteria before being entitled to a LEO.

1. Background and Need for Reform

137. The Commission created the concept of a LEO in Order No. 69 ''to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.'' [176] The Commission has held that requiring a fully-executed contract or executed interconnection agreement as a condition precedent to obtaining a LEO is inconsistent with PURPA.[177]

138. The record indicates that some QFs believe that informing a utility that the QF intends to sell energy to that utility at some point in the future is sufficient to create a LEO and thereby establish the price for future deliveries, regardless of whether the QF project being considered ever generates electricity.[178] This approach, Xcel explains, puts the electric utility and its customers at risk since the utility is required to reliably plan its system and resources for a QF that will not be operational for many years, or not at all, thereby creating uncertainty for the utility and its consumers.[179] Conversely, QF developers argue generally that they need the certainty of a LEO to obtain the financing to build their facilities in the first place, as QFs do not have the same ability that the electric utilities have to ''rate base'' their facilities and, thereby, guarantee capital recovery.[180]

139. While it is up to states to reasonably determine the circumstances and thus when a legally enforceable obligation arises,[181] states may not impose obstacles that make it unreasonably difficult to obtain a LEO.[182] Given the significant changes in the electric industry since PURPA's enactment, as discussed above, the Commission finds that it now may be appropriate to: (1) Specify the commercial viability of a QF and financial commitment to construct the proposed project as the necessary pre-requisites for obtaining a LEO; and (2) provide guidance for states as to what types of criteria may be applied to make the necessary demonstration.

2. Commission Proposal

140. The Commission proposes to add regulatory text in § 292.304(d)(3) of the PURPA Regulations to require QFs to demonstrate that a proposed project is commercially viable and the QF has a financial commitment to construct the proposed project pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO. The Commission further proposes to provide that, although a showing of commercial viability and the QF's financial commitment to construct the project is required, states have flexibility as to what constitutes an acceptable showing of commercial viability and financial commitment.

141. Our objective in requiring a showing of commercial viability and the QF's financial commitment to construct the project is to ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning, while at the same time ensuring that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises. States may require a showing, for example, that a QF has satisfied, or is in the process of undertaking, at least some of the following prerequisites: (1) Obtaining site control adequate to commence construction of the project at the proposed location; (2) filing an interconnection application with the appropriate entity; (3) securing local permitting and zoning; or (4) other similar, objective, reasonable criteria that allow a QF to demonstrate its commercial viability and financial commitment to construct the facilities. These indicia are not intended to be exhaustive and the Commission seeks comment on these indicia and others that also might be appropriate for consideration.

142. We believe requiring QFs to demonstrate their commercial viability and financial commitment to construct the facilities based on such indicia before obtaining a LEO will allow electric utilities to reliably plan for their systems ensuring resource adequacy. Additionally, states' development and definition of objective and reasonable factors to determine commercial viability and financial commitment to construct a facility encourage the development of QFs by providing QFs

is inconsistent with PURPA Regulations); *Rainbow Ranch Wind, LLC,* 139 FERC ¶ 61,077 (2012) (same); *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006, at P 36 (2011) (*Cedar Creek*) (same).

[176] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[177] *FLS,* 157 FERC ¶ 61,211 at P 26; *Cedar Creek,* 137 FERC ¶ 61,006 at P 35.

[178] *See, e.g.,* EEI Supplemental Comments, attach. A at 7.

[179] *See* Xcel Comments, Docket No. AD16–16–000, at 15–16 (Nov. 7, 2016) (''If a utility is required to enter into a LEO with a QF, it will (or may be required to) factor the capacity associated with that LEO into its resource planning efforts. And if that project does not materialize—for whatever reason—the utility's resource plan will need to change. Depending on the amount of capacity associated with the LEO or LEOs that the utility has pending, the utility may have to scramble to replace the capacity associated with the now non-existent LEO(s). Such a scramble would very likely result in payment of above-market prices for capacity and energy, again violating the indifference standard. Moreover, additional capacity over and above the capacity associated with the non-existent QF might have been procured, at additional cost to customers, to manage the variability of that anticipated QF. Of greater concern would be a situation where additional capacity is simply not available to make up for the capacity that the QF was expected to provide under the LEO, putting system reliability at risk and potentially putting the utility at risk of violations of NERC reliability standards approved by the Commission. Further, attempting to lock in long-term prices far in advance of the start date of deliveries under a LEO creates significant potential for payments in excess of avoided cost rates.'').

[180] *Compare* EEI Supplemental Comments, attach. A at 7 *with* Renewable Energy Coalition Comments, Docket No. AD16–16–000, at 11–12 (Nov. 7, 2016) (''Long-term contracts allow existing QFs to remain economically viable in times of long resource sufficiency periods with low avoided cost rates. . . . Unlike utilities, which can spread the costs of resource acquisition over the entire useful life of a facility, QFs do not have this option because doing so could expose ratepayers to unnecessary risk from deviations in avoided costs.''); *and* Northwest and Intermountain Power Producers Coalition Comments, Docket No. AD16–16–000, at 5 (Nov. 4, 2016) (''To earn a return on investment, there must first be the prospect of a return on investment. It takes at least 15 years in most cases involving [Northwest and Intermountain Power Producers Coalition] members to recover their invested capital and to retire the debt incurred to build a renewable energy facility. It takes a contract term of 20 years to earn a justifiable return on that investment.'').

[181] *W. Penn Power Co.,* 71 FERC ¶ 61,153, at 61,495 (1995) (*West Penn*) (''It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts.'' (footnotes omitted)).

[182] *See, e.g., Cedar Creek,* 137 FERC ¶ 61,006 at P 35 & n.57 (citing *West Penn,* 71 FERC ¶ 61,153 at 61,495).

with more certainty as to when they will obtain a LEO.[183]

F. QF Certification Process

1. Background and Need for Reform

143. The Commission provides two paths for an entity to obtain QF status: self-certification and Commission certification.[184] Self-certification, the procedures for which are contained in § 292.207(a) of the PURPA Regulations,[185] is the more common method of certification. When an applicant self-certifies (or self-recertifies), it certifies that its facility satisfies the requirements for QF status. Under the self-certification (or self-recertification) approach a QF is assigned a docket number, and Commission staff reviews the filing to discern that the information required in Form No. 556 appears to have been included, but a notice of the self-certification typically is not published in the **Federal Register** and Commission staff does not otherwise evaluate whether the applicant meets the requirements for QF status.

144. The Commission recognized that the self-certification process may not always satisfy the needs of certain stakeholders or interested entities. Accordingly, the Commission established, in § 292.207(b) of the PURPA Regulations,[186] what is called the ''optional procedure'' for QF status. Under the optional procedure, an entity may file an application for a determination by the Commission that a facility meets the requirements for QF status. The application is noticed in the **Federal Register**, the Commission decides whether the applicant meets the requirements for QF status, and then issues an order either granting or denying the requested certification.

145. After the enactment of EPAct 2005, which imposed new requirements for QF status for ''new'' cogeneration facilities,[187] the Commission issued Order No. 671,[188] which implemented new requirements for QF status including a formal filing requirement for all QFs claiming QF status whether through self-certification or Commission certification.[189] As part of that implementation, for the first time, notices of some (but not all) self-certifications were required to be published in the **Federal Register**. Specifically, § 292.207(a)(iv) provides that self-certifications or self-recertifications, other than for ''new'' cogeneration facilities, would not be published in the **Federal Register**. In 2010, in Order No. 732, the Commission adopted an exemption from the filing requirement for generating facilities with net power production capacities of 1 MW or less.[190]

146. The Commission has explained that, to challenge the self-certification of a QF, an entity must file a petition for declaratory order and pay the associated filing fee, which currently is $28,990. The Commission in *Chugach Electric Association, Inc.* explained that Order No. 671 did not create a right for a challenging entity to submit a motion for revocation in response to a notice of self-certification. Rather, the Commission explained that QF self-certification is effective upon filing, and therefore challenging a self-certification requires a separate petition for declaratory order asking that the Commission revoke QF status.[191]

147. A concern with the existing procedures with respect to self-certification is whether protestors should bear the burden of filing a separate petition for declaratory order and paying the associated filing fee for a declaratory order to object to a questionable self-certification.[192]

2. Commission Proposal

148. The Commission proposes to change § 292.207(a) of the PURPA Regulations to allow a party to intervene and to file a protest of a self-certification or self-recertification of a facility without the necessity of filing a separate petition for declaratory order and without having to pay the filing fee required for a declaratory order. Because an applicant for self-certification or self-recertification is required to serve a copy of its submission on interested electric utilities (principally those it is interconnected with and those it will be selling to) as well as the relevant state regulatory authorities, the Commission will allow interested persons 30 days from the date of filing at the Commission to intervene and/or to file a protest (without paying a filing fee).[193]

149. Any party submitting a protest would have the burden of specifying facts that make a prima facie demonstration that the facility described in the self-certification or self-recertification does not satisfy the requirements for QF status.[194] General allegations that the facility is not a QF without reference to the specific regulatory provision that has not been satisfied (and without an explanation why the provision has not been satisfied), or unsupported assertions that the self-certification does not satisfy an aspect of the PURPA Regulations, would not satisfy this burden and would not be a basis for denial of certification. However, if this prima facie burden is met, then the burden would shift to the applicant submitting the self-certification or self-recertification to demonstrate that the claims raised in the protest are incorrect and that certification is, in fact, warranted.

150. As explained above, QF self-certification is effective upon filing, and remains effective if a protest is filed, until such time as the Commission rules that certification is revoked. The Commission proposes that it would issue an order within 90 days of the date the protest is filed. The Commission also reserves the right to request more information from the protester, the entity seeking QF status, or both.[195] If

[183] Because QFs already in operation have necessarily demonstrated a commitment to construct the project, the Commission does not intend commercial viability and financial commitment requirements to serve as prerequisites to QFs already in operation with existing LEOs to obtaining new LEOs.

[184] There is no fee for a self-certification; there is, however, a fee for Commission certification. 18 CFR 381.505. For 2018, an application for Commission certification requires a filing fee of $23,330 for small power production facilities and $26,410 for cogeneration facilities. In recent years, the Commission has received approximately 5 applications per year for Commission-certification, with the remaining applicants (approximately 3,400 per year) filing for self-certification of their facilities. *See Commission Information Collection Activities,* Notice of information Collection and Request for Comments, Docket No. IC19–16–000, 84 FR 9317, 9318 (Mar. 7, 2019). The Commission will not issue notice of nor process an application for Commission certification without receipt of the applicable fee.

[185] 18 CFR 292.207(a).

[186] 18 CFR 292.207(b).

[187] ''New'' cogeneration facilities are defined as any cogeneration facility that was either not certified a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification, self-recertification or an application for Commission certification or Commission recertification as a qualifying cogeneration facility prior to February 2, 2006. 18 CFR 292.205(d)(1).

[188] Order No. 671, 114 FERC ¶ 61,102, *order on reh'g,* Order No. 671–A, 115 FERC ¶ 61,225 (2006).

[189] *See* 18 CFR 292.203(a)(3), (b)(2).

[190] *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility,* Order No. 732, 130 FERC ¶ 61,214 (2010).

[191] *Chugach Elec. Assoc., Inc.,* 121 FERC ¶ 61,287, at PP 51–54 (2007); *see also Hydro Investors, Inc.* v. *Trafalgar Power, Inc.,* 94 FERC ¶ 61,207, at 61,780, *reh'g denied,* 95 FERC ¶ 61,120 (2001).

[192] EEI Supplemental Comments, attach. A at 16.

[193] 18 CFR 292.207(c)(1).

[194] *See* 18 CFR 385.211.

[195] Such information requests could be issued by the Commission or by staff under any applicable delegated authority. For example, the Director of the Office of Energy Market Regulation is authorized under 18 CFR 375.307(b)(3)(ii) to ''[i]ssue and sign requests for additional

the Commission requests more information, the time period for the Commission order would be extended to 60 days from the filing of a complete answer to the information request.

151. There may be instances, however, when the Commission needs additional time to review the record in light of the nature of the protests. In those cases, the Commission proposes that, in addition to any extension resulting from a request for information, the Commission also may toll the 90-day period during which the Commission commits to act for one additional 60-day period. The Commission proposes to delegate to the Commission's Secretary, or the Secretary's designee, the authority to toll the 90-day period for this purpose.

152. The Commission believes these procedures will allow for timely but thorough review of protested self-certifications and re-certifications. The Commission seeks comment on whether these procedures impose an undue burden on the QF even though the QF remains certified pending the review.

III. Information Collection Statement

153. The Paperwork Reduction Act [196] requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (including reporting, record keeping, and public disclosure requirements) directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contemplated by proposed rules (including deletion, revision, or implementation of new requirements).[197] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

Public Reporting Burden: In this NOPR, the Commission proposes to revise its regulations implementing PURPA. The principal changes that affect information collection, *i.e.,* the Form No. 556, are as follows: *first,* the Commission proposes to change its current ''one-mile rule'' for determining whether generation facilities should be considered to be part of a single facility for purposes of determining qualification as a qualifying small power production facility, by allowing electric utilities, state regulatory authorities, or other interested parties to show that facilities over one and less than ten miles apart actually are a single facility; and *second,* to allow a party to protest a self-certification or self-recertification of a facility without a fee.

The estimated changes to the burden and cost [198] of the information collection affected by this NOPR, *i.e.,* Form No. 556, follow.

FERC–556, AS MODIFIED BY THE NOPR IN DOCKET NOS. RM19–15–000 AND AD16–16–000

Facility type	Filing type	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Cogeneration Facility > 1 MW.	Self-certification	10	1.25	12.5	8 hrs.; $632	100 hrs.; $7,900	$790.
Cogeneration Facility > 1 MW.	Application for FERC certification.	1	1.25	1.25	55 hrs.; $4,345	68.75 hrs.; $5,431.25	$5,431.25.
Small Power Production Facility > 1 MW, > 1 Mile, < 10 Miles from Affiliated Facility.	Self-certification	20	1.25	25	8 hrs.; $632	200 hrs.; $15,800	$790.
Small Power Production Facility > 1 MW, > 1 Mile, < 10 Miles from Affiliated Facility.	Application for FERC certification.	1	1.25	1.25	55 hrs.; $4,345	68.75 hrs.; $5,431.25	$5,431.25.
Cogeneration and Small Power Production Facility ≤ 1 MW (Self-Certification) [199].	Self-certification	312	1.25	390	4 hrs.; $316	1,560 hrs.; $123,240	$395.
Small Power Production Facility > 1 MW, ≤ 1 Mile from Affiliated Facility.	Self-certification	no change	no change	no change	no change	no change	no change.
Small Power Production Facility > 1 MW, ≤ 1 Mile from Affiliated Facility.	Application for FERC certification.	1	1.25	1.25	55 hrs.; $4,345	68.75 hrs.; $5,431.25	$5,431.25.
Small Power Production Facility > 1 MW, ≥ 10 Miles from Affiliated Facility.	Self-certification	1,980	1.25	2,475	8 hrs.; $632	19,800 hrs.; $1,564,200	$790.
Small Power Production Facility > 1 MW, ≥ 10 Miles from Affiliated Facility.	Application for FERC certification.	no change	no change	no change	no change	no change	no change.
Total						22,235 hrs.; $1,727,433.75	

information regarding applications, filings, reports and data processed by the Office of Energy Market Regulation.''

[196] 44 U.S.C. 3501–21.

[197] *See* 5 CFR 1320.11.

[198] The burden costs are based on FERC's 2018 average annual salary plus benefits of $164,820 (or $79/hour). The Commission believes that industry is similarly situated in terms of staff costs and skill sets.

[199] Not required to file.

Title: FERC–556, Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility.

Action: Revisions to existing collection FERC–556.

OMB Control No.: 1902–0075.

Respondents: Facilities that are self-certifying their status as a cogenerator or small power producer or that are submitting an application for Commission certification of their status as a cogenerator or small power producer; and electric utilities, state regulatory authorities, or other entities submitting comments on, or protests to, the self-certification or application for Commission certification.

Frequency of Information: Ongoing.

Necessity of Information: The Commission proposes the changes in this NOPR in order to revise its implementation of PURPA in light of changes in the electric industry since the enactment of PURPA in 1978.

Internal Review: The Commission has reviewed the proposed changes and has determined that such changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry.

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

Comments concerning the collection of information and the associated burden estimate 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–556 and OMB Control No. 1902–0075.

IV. Environmental Analysis

154. The Commission is required to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) for any action that may have a significant adverse effect on the quality of the human environment.[200] Whether and how the revisions proposed here, however, would affect QF development and the environment is speculative.

155. The proposed changes to the PURPA Regulations do not authorize or fund particular QFs, nor do they license QFs or issue permits for QFs to operate. They do not authorize or prohibit a generator's use of any particular technologies or fuels, nor do they mandate or limit where QFs should or should not be built. They do not exempt QFs from any Federal, state or local environmental, siting, or other similar laws or regulatory requirements. And while the Commission establishes factors that are to be taken into account by the states in setting QF rates, it is the states and not the Commission that set QF rates. It is impossible to know what actions the states may take in response to the revisions proposed here, and how any such actions would, on balance, impact QF development and the environment going forward—especially given that QFs include not only renewable resources such as solar and wind resources but also renewable resources that, per Congress' directive, depend on waste (such as waste coal) as an energy input[201] and cogeneration that often depends on fossil fuels as an energy input.[202] Moreover, as explained above, PURPA requires that the Commission must prescribe, and from time to time thereafter revise, such rules as the Commission determines necessary to encourage QFs,[203] and the Commission's rules as revised as proposed here would continue to encourage QFs. Given these facts any environmental impacts analysis of the revisions proposed here would be speculative and not meaningfully inform the Commission or the public of the revisions' impact on QF development or, correspondingly, of any associated potential impacts on the environment; there are, in short, no reasonably foreseeable environmental impacts for the Commission to consider.[204] Therefore, the Commission will not prepare an environmental document.

V. Regulatory Flexibility Act Certification

156. The Regulatory Flexibility Act of 1980 (RFA)[205] generally requires a description and analysis of proposed rules that will have 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.[206]

157. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[207] The SBA size standard for electric utilities is based on the number of employees, including affiliates.[208] Under SBA's current size standards, the threshold for a small entity (including its affiliates) is 250 employees for cogeneration and small power production applicants in the following NAICS[209] categories:

- NAICS code 221114 for Solar Electric Power Generation
- NAICS code 221115 for Wind Electric Power Generation
- NAICS code 221116 for Geothermal Electric Power Generation
- NAICS code 221117 for Biomass Electric Power Generation
- NAICS code 221118 for Other Electric Power Generation

The threshold for a small entity (including its affiliates) is 500 employees for NAICS code 221111 for Hydroelectric Power Generation.

This proposed rule directly affects QFs, the majority of which the Commission estimates are small businesses. But, as reflected in the burden and cost estimates provided above, the Commission does not anticipate that any additional reporting burden or cost imposed on QFs, regardless of their status as a small or large business, would be significant.[210] The proposed revisions may result in additional information being submitted

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

[201] 16 U.S.C. 796(17); 18 CFR 292.202(b), 292.204(b).

[202] 16 U.S.C. 796(18); 18 CFR 292.205.

[203] 16 U.S.C. 824a–3(a).

[204] While courts have held that NEPA requires ''reasonable forecasting,'' an agency is not required ''to engage in speculative analysis'' or ''to do the impractical, if not enough information is available to permit meaningful consideration.'' *N. Plains Res. Council* v. *Surface Transp. Board,* 668 F.3d 1067, 1078 (9th Cir. 2011).

[205] 5 U.S.C. 601–12.

[206] 5 U.S.C. 605(b).

[207] 13 CFR 121.101.

[208] SBA Final Rule on ''Small Business Size Standards: Utilities,'' 78 FR 77,343 (Dec. 23, 2013).

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

[210] The average cost per response is estimated to be $594.39 (or $1,727,433.75/2,906.25 responses).

by some small power production QF applicants and self-certifiers (those with affiliated small power production facilities using the same fuel source located over one and less than ten miles away, and with a combined total capacity greater than 80 MW). The Commission estimates that less than ten percent of QF applications and self-certifications meet these criteria.

158. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

VI. Comment Procedures

159. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due December 3, 2019. Comments must refer to Docket No. RM19–15–000 and AD16–16–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

160. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

161. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

162. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

163. 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.

164. 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.

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

List of Subjects in 18 CFR Part 292

Electric power; Electric power plants; Electric utilities.

By direction of the Commission. Commissioner Glick is dissent in part with a separate statement attached.

Issued: September 19, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend Parts 292 and 375, Chapter I, Title 18, *Code of Federal Regulations,* as follows.

PART 292—REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

■ 1. The authority citation for part 292 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 § 292.101 by adding paragraphs (b)(12) through (16) to read as follows:

§ 292.101 Definitions.

* * * * *

(b) * * *

(12) *Locational marginal price* means the price for energy at a particular location as determined in a market defined in § 292.309(e), (f), or (g).

(13) *Competitive Price* means a Market Hub Price or a Combined Cycle Price.

(14) *Market Hub Price* means a price for as-delivered energy determined pursuant to § 292.304(b)(7)(i).

(15) *Combined Cycle Price* means a price for as-delivered energy determined pursuant to § 292.304(b)(7)(ii).

(16) *Competitive Solicitation Price* means a price for energy and/or capacity determined pursuant to § 292.304(b)(8).

■ 3. Amend § 292.202 by adding paragraph (t) to read as follows:

§ 292.202 Definitions.

* * * * *

(t) *Electrical generating equipment* means all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels and/or inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility.

■ 4. Amend § 292.204 by revising paragraph (a) to read as follows:

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (i)(A) For purposes of this paragraph (a)(2)(i)(A), there is an irrebuttable presumption that facilities located one mile or less from the facility for which qualification is sought are located at the same site as the facility for which qualification is sought.

(B) For purposes of this paragraph (a)(2)(i)(B), for facilities for which qualification is filed on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], there is an irrebuttable presumption that facilities located ten miles or more from the facility for which qualification is sought are facilities located at separate sites from the facility for which qualification is sought.

(C) For purposes of this paragraph (a)(2)(i)(C), for facilities for which qualification is filed on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], there is a rebuttable presumption that facilities located over one and less than ten miles from the facility for which qualification is sought are facilities located at separate sites from the facility for which qualification is sought.

(D) For hydroelectric facilities, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of the facility for which qualification is sought and the nearest electrical generating equipment of the other facility using the same energy resource and owned by the same person(s) or its affiliates.

(3) *Rebuttal.* (i) *Filing a Protest.* Any person who opposes either a self-certification submitted pursuant to § 292.207(a) or a Commission certification filed pursuant to § 292.207(b) may submit a protest attempting to rebut the presumption that facilities located over one mile and less than ten miles from the facility for which qualification is sought are separate facilities at separate sites from the facility for which qualification is sought.

(ii) *Limitations on rebuttal.* Once the Commission has affirmatively certified an applicant's QF status either in response to a protest opposing a self-certification or in a Commission certification proceeding, any later challenge to a QF's certification asserting that facilities more than one mile and less than ten miles apart are located at the same site must demonstrate a material change in the relevant circumstances that calls into question the continued validity of the certification.

(4) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(5) *Exception.* Facilities meeting the criteria in section 3(17)(E) of the Federal Power Act (16 U.S.C. 796(17)(E)) have no maximum size, and the power production capacity of such facilities shall be excluded from consideration when determining the maximum size of other small power production facilities less than ten miles of such facilities.

* * * * *

■ 5. Amend § 292.207 by revising paragraphs (a) and (b) to read as follows:

§ 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification.* (1) *Form No. 556.* The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (c) of this section.

(2) *Factors.* For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the Form No. 556, provide information asserting factors showing that the facility for which qualification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

(3) *Protests and Interventions.* Any protest to and any intervention in a self-certification must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 30 days from the date the self-certification is filed. Any protest must provide evidence to substantiate the claims in the protest.

(4) *Commission action.* Self-certification is effective upon filing. If no protests are timely filed, no further action by the Commission is required for a self-certification to be effective. If protests are timely filed, a self-certification will remain effective until the Commission issues an order revoking QF certification. The Commission will act on the protest within 90 days from the date the protest is filed; provided that, if the Commission requests more information from the protester, the entity seeking QF certification, or both, the time for the Commission to act will be extended to 60 days from the filing of a complete answer to the information request. In addition to any extension resulting from a request for information, the Commission also may toll the 90-day period for one additional 60-day period if so required to rule on a protest. Authority to toll the 90-day period for this purpose is delegated to the Secretary or the Secretary's designee.

(b) *Optional procedure—Commission certification.* (1) *Application for Commission certification.* In lieu of the self-certification procedures in paragraph (a) of this section, an owner or operator of an existing or a proposed facility, or its representative, may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter, and the applicant for Commission certification must comply with paragraph (c) of this section.

(2) *General contents of application.* The application must include a properly completed Form No. 556 pursuant to § 131.80 of this chapter. For small power production facilities pursuant to § 292.204, the owner or operator of the facility or its representative may, when completing the Form No. 556, provide information asserting factors showing that the facility for which qualification is sought is at a separate site from other facilities using the same energy resource and owned by the same person(s) or its affiliates.

* * * * *

■ 6. Section 292.303 is revised to read:

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Subject to paragraph (b) of this section, each electric utility shall purchase, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (e) of this section.

(b) *Reduction in purchase obligation.* The obligation of an electric utility to purchase from a qualifying facility may be reduced to the extent that a purchasing electric utility's supply obligation has been reduced by a state's retail choice program.

(c) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, unless exempted by § 292.312, energy and capacity requested by the qualifying facility.

(d) *Obligation to interconnect.*

(1) Subject to paragraph (d)(2) of this section, any electric utility shall make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under part II of the Federal Power Act.

(e) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such

electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(f) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

■ 7. Amend § 292.304 by

■ a. Adding paragraphs (b)(6), (b)(7), (b)(8); and

■ b. Revising paragraphs (d), and (e).

The addition and revisions read as follows:

§ 292.304 Rates for purchases.

* * * * *

(b) * * *

(6) *Locational Marginal Price.* A state regulatory authority or nonregulated electric utility may use a locational marginal price as a rate for as-available qualifying facility energy sales to purchasing utilities located in a market operated defined in § 292.309(e), (f), or (g).

(7) *Competitive Price.* A state regulatory authority or nonregulated electric utility may use a Competitive Price as a rate for as-available qualifying facility energy sales to purchasing electric utilities located outside a market defined in § 292.309(e), (f), or (g). A Competitive Price may be either a Market Hub Price or a Combined Cycle Price, determined as follows:

(i) A *Market Hub Price* is a price established at a liquid market hub to which a state regulatory authority or nonregulated electric utility determines the purchasing electric utility has reasonable access, based on its evaluation of the relevant factors, including but not limited to the following:

(A) Whether the hub is sufficiently liquid that prices at the hub represent a competitive price;

(B) Whether prices developed at the hub are sufficiently transparent;

(C) Whether the purchasing electric utility has the ability to deliver power from such hub to its load, even if its load is not directly connected to the hub; and

(D) Whether the hub represents an appropriate market to derive an energy price for the purchasing electric utility's purchases from the relevant QFs given the electric utility's physical proximity to the hub or other factors.

(ii) A *Combined Cycle Price* is a price determined pursuant to a formula established by a state regulatory authority or nonregulated electric utility using published natural gas price indices and a proxy heat rate for an efficient natural gas combined-cycle generating facility. Before establishing such a formula rate, a state regulatory authority or nonregulated electric utility must determine that the resulting Combined Cycle Price represents an appropriate approximation of the purchasing electric utility's avoided cost, based on its evaluation of the relevant factors, including but not limited to the following:

(A) Whether the cost of energy from an efficient natural gas combined cycle generating facility represents a reasonable approximation of a competitive price in the purchasing electric utility's region;

(B) Whether natural gas priced pursuant to particular proposed natural gas price indices would be available in the relevant market;

(C) Whether there should be an adjustment to the natural gas price to appropriately reflect the cost of transporting natural gas to the relevant market; and

(D) Whether the proxy heat rate used in the formula should be updated regularly to reflect improvements in generation technology.

(8) *Competitive Solicitation Price.* A state regulatory authority or nonregulated electric utility may use a price determined pursuant to a competitive solicitation process to establish qualifying facility energy and/or capacity rates for sales to purchasing electric utilities, provided that such competitive solicitation process is conducted pursuant to procedures ensuring the solicitation is conducted in a transparent and non-discriminatory manner including, but not limited to, the following:

(i) The solicitation process is an open and transparent process;

(ii) Solicitations should be open to all sources, to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity;

(iii) Solicitations are conducted at regular intervals;

(iv) Solicitations are subject to oversight by an independent administrator; and

(v) Solicitations are certified as fulfilling the above criteria by the relevant state regulatory authority or nonregulated electric utility.

* * * * *

(d) *Purchases ''as available'' or pursuant to a legally enforceable obligation.* (1) Each qualifying facility shall have the option either:

(i) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing electric utility's avoided costs calculated at the time of delivery; or

(ii) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, except as provided in subsection (d)(2) below, be based on either:

(A) The avoided costs calculated at the time of delivery; or

(B) The avoided costs calculated at the time the obligation is incurred.

(iii) The rate for delivery of energy calculated at the time the obligation is incurred may be based on estimates of the present value of the stream of revenue flows of future locational marginal prices, or Competitive Prices during the anticipated period of delivery.

(2) Notwithstanding paragraph (d)(1)(ii)(B) of this section, a state regulatory authority or nonregulated electric utility may require that rates for purchases of energy from a qualifying facility pursuant to a legally enforceable obligation to vary through the life of the obligation, and to be set at the as-available energy price applicable to the purchasing electric utility determined at the time of delivery.

(3) *Obtaining a legally enforceable obligation.* A qualifying facility must demonstrate commercial viability and financial commitment to construct its facility pursuant to criteria determined by the state regulatory authority or nonregulated electric utility as a prerequisite to a qualifying facility obtaining a legally enforceable obligation. Such criteria must be objective and reasonable.

(e) *Factors affecting rates for purchases.* (1) A state regulatory authority or nonregulated electric utility may establish rates for purchases of energy from a qualifying facility based on a purchasing electric utility's locational marginal price calculated by the applicable market defined in § 292.309(e), (f), or (g), or the purchasing electric utility's applicable Competitive Price. Alternatively, a state regulatory authority or nonregulated electric utility may establish rates for purchases of energy and/or capacity from a qualifying facility based on a Competitive Solicitation Price. To the extent that capacity rates are not set pursuant to this section, capacity rates shall be set pursuant to subsection (2).

(2) To the extent that a state regulatory authority or nonregulated electric utility does not to set energy and/or capacity rates pursuant to

paragraph (e)(1) of this section, the following factors shall, to the extent practicable, be taken into account in determining rates for purchases from a qualifying facility:

(i) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(ii) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the electric utility to dispatch the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the electric utility's facilities;

(E) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(G) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(iii) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2)(ii) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(iv) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

■ 8. Amend § 292.309 by revising paragraphs (d), (e), and (f) to read as follows:

§ 292.309 Termination of obligation to purchase from qualifying facilities.

* * * * *

(d)(1) For purposes of § 292.309(a)(1), (2), and (3), there is a rebuttable presumption that a qualifying cogeneration facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market.

(2) For purposes of § 292.309(a)(1), (2), and (3), there is a rebuttable presumption that a qualifying small power production facility with a capacity at or below 1 megawatt does not have nondiscriminatory access to the market.

(3) For purposes of implementing paragraphs (d)(1) and (d)(2) of this section, the Commission will not be bound by the standards set forth in § 292.204(a)(2).

(e) Midcontinent Independent System Operator, Inc. (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO–NE), and New York Independent System Operator, Inc. (NYISO) qualify as markets described in § 292.309(a)(1)(i) and (ii), and there is a rebuttable presumption that small power production facilities with a capacity greater than one megawatt and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to those markets through Commission-approved open access transmission tariffs and interconnection rules, and that electric utilities that are members of such regional transmission organizations or independent system operators (RTO/ISOs) should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia,* that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(f) The Electric Reliability Council of Texas (ERCOT) qualifies as a market described in § 292.309(a)(3), and there is a rebuttable presumption that small power production facilities with a capacity greater than one megawatt and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to that market through Public Utility Commission of Texas (PUCT) approved open access protocols, and that electric utilities that operate within ERCOT should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia,* that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

* * * * *

PART 375—THE COMMISSION

■ 1. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 2. Section 375.302(v) is revised to read:

§ 375.302 Delegations to the Secretary.

* * * * *

(v) Toll the time for action on requests for rehearing, and toll the time for action on protested self-certifications and self-recertifications of qualifying facilities.

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

FEDERAL ENERGY REGULATORY COMMISSION

	Docket Nos.
Qualifying Facility Rates and Requirements	RM19–15–000
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	AD16–16–000

(Issued September 19, 2019)

GLICK, Commissioner, *dissenting in part:*

1. I dissent in part from today's notice of proposed rulemaking (NOPR) because it would effectively gut the Public Utility Regulatory Policies Act (PURPA).[1] Our basic

[1] Public Law 95–617, 92 Stat. 3117 (1978).

responsibilities under PURPA are three-fold: (1) To encourage the development of qualifying facilities (QFs); (2) to prevent discrimination against QFs by incumbent utilities; and (3) to ensure that the resulting rates paid by electricity customers remain just and reasonable and in the public interest.[2] As discussed further below, it is not clear from the record or the discussion in today's NOPR that many of the proposed changes will satisfy those requirements. Although the record developed in response to this NOPR will give us a basis to address those issues, I am deeply concerned that the Commission has failed so far to show that certain aspects of its proposal satisfy our basic responsibilities under the law.

2. It appears that the Commission no longer believes that PURPA is necessary. I disagree. I believe that the goals of PURPA—including the need to expand competition and reduce our reliance on fossil fuels [3]—remain as relevant now as ever. But our apparent disagreement is beside the point. Whether PURPA's goals remain relevant is a decision for Congress, not an administrative agency. The Commission should not be seizing the reins from Congress in order to isolate an important debate about national energy policy within an independent regulatory agency.

I. PURPA's Continuing Relevance Is an Issue for Congress To Decide

3. A fundamental reform to a major energy statute, particularly one that Congress has been debated for decades, ought to come from Congress, not an independent regulatory agency. For more than forty years, the Commission has rather consistently interpreted Congress's directives in PURPA. During that time, Congress has repeatedly considered legislation to amend the statute, in some cases to expand its reach and in others to pare it back. Indeed, almost from the moment PURPA was passed, Congress began to hear many of the arguments being used today to justify scaling the law back. Yet Congress only on one occasion—in 2005—significantly amended the statute. After a lengthy debate, which included proposals to repeal PURPA, Congress adopted the Energy Policy Act of 2005 (EPAct 2005), which left in place PURPA's basic framework but added a series of provisions that relieved utilities of their requirements in regions of the country with robust wholesale energy markets.[4] Over the course of the last fourteen years, Congress has continued to consider a wide range of proposals to reform PURPA, some of which would have enacted into law many of the proposals advanced in this NOPR. But Congress did not enact any of these reforms.

4. Today's NOPR flips that dynamic on its head. It removes an important debate from the halls of Congress and isolates it within the Commission. That may help to achieve certain stakeholders' objectives and, no doubt, some Members of Congress that have unsuccessfully sought to further reform PURPA will applaud this outcome. But what should concern all of us is that resolving these sorts of questions by regulatory edict rather than congressional legislation is neither a durable nor desirable approach for developing energy policy.

5. With those concerns in mind, the Commission's explanation of the purported need for reform rings hollow. The majority recites statistics to show that the energy landscape has changed over the last 40 years. And there is no doubt that it has. Renewables are growing rapidly and, in some parts of the country, are being financed in large numbers without PURPA's protections.[5] Natural gas production has increased in similarly dramatic fashion and recently surpassed coal as the country's principal source of fuel for generating electricity.[6] But reams of statistics do not make a law irrelevant. The majority and I might disagree about PURPA and the importance of its objectives, but that is not a dispute that we, as Commissioners, should resolve. A policy debate about the continuing relevance of PURPA—which, make no mistake, is what this NOPR is really about—is an issue for Congress to resolve.

II. Certain Proposed Revisions Are Inconsistent With Our Statutory Obligations

6. In addition to my general concerns about the direction and intent of today's NOPR, I have a number of more discrete objections regarding aspects of the Commission's proposal. I raise these concerns in particular because I believe that neither the record established to date nor the rationale articulated in today's NOPR suggest that these changes are consistent with our obligations under PURPA. Accordingly, I am especially interested in reviewing the record developed in response to these elements of the proposed rule and I encourage parties to address these issues in detail in their comments.

A. Avoided Cost

7. No issue has consumed as much attention in the debates over PURPA as how to set avoided cost. Following PURPA's enactment in 1978, the Commission introduced a framework for setting ''avoided cost'' that allows each individual state to consider a wide range of factors in identifying the ''full'' costs that are avoided when a utility purchases energy and capacity from a QF.[7] The basic idea is that the avoided cost figure should reflect the full cost that the utility would incur *but for* the purchase of the QF output of energy or capacity, with each individual state enjoying considerable flexibility in implementing that concept.[8] The Commission's regulations also provide states the flexibility to accommodate Congress's intent that the rates paid to QFs ''look beyond'' just ''instantaneous cost savings'' in order to consider savings over a longer time horizon.[9]

8. The NOPR proposes two fundamental changes to how avoided cost is calculated and applied to QFs. First, it proposes to eliminate the requirement that a utility must afford a QF the option to enter a contract at an avoided cost energy rate that is fixed or known for the duration of the contract.[10] As things stand now, a QF generally has two options for selling its output to a utility. Under the first option, the QF can sell its energy on an as-available basis and receive an avoided cost rate calculated at the time of delivery. This is generally known as the as-available option. Under the second option, a QF can enter into a fixed duration contract at an avoided cost rate that is fixed either at the time the QF establishes a legally enforceable obligation or at the time of delivery. This is generally known as the contract option. The ability to choose between both types sale options has played an important role in fostering the development of a variety of QFs. For example, the as-available option provides a way for QFs whose principal business is not generating electricity, such as industrial cogeneration facilities, to monetize their excess electricity generation. The contract option, by contrast, provides QFs who are principally in the business of generating electricity, such as small renewable electricity generators, a relatively stable option that will allow them to secure financing. Together, the presence of these two options have allowed the Commission to satisfy its statutory mandate to encourage the development of QFs and ensure that the rates they receive are non-discriminatory.

9. I am concerned that the Commission's proposal to allow utilities to eliminate the

[2] *See* 16 U.S.C. 824a–3 (2018).

[3] *See Am. Paper Inst., Inc.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 405 (1983) (describing Congress's intent in enacting PURPA).

[4] Public Law 109–58, 119 Stat. 594 (2005).

[5] *See Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* 168 FERC ¶ 61,184, at PP 19–21 (2019) (NOPR).

[6] U.S. Energy Info. Admin., *What is U.S. electricity generation by energy source?, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3* (last visited Sept. 19, 2019).

[7] *See* 18 CFR 292.304(e) (2019).

[8] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,865 (cross-referenced 10 FERC ¶ 61,150), *order on reh'g,* Order No. 69–A, FERC Stats. & Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983) (*API*).

[9] H.R. Rep. 95–1750, at 98–99 (1978) (Conf. Rep.) (''In interpreting the incremental cost of alternative energy, the Conferees expect that the Commission and the states may look beyond the costs of alternative sources which are instantaneously available to the utility. Rather the Commission and states should look to the reliability of that power and the cost savings to the utility which may result at some later date by reasons of supply to the utility at that time of power from the cogenerate or small power producers.'').

[10] The NOPR proposes to eliminate the contract option for the energy component, keeping the long-term contract requirement in place for capacity. That sounds more reasonable than it will often be in practice. The NOPR later clarifies that the fixed capacity value may be zero if the state determines that the electric utility does not have a need for additional capacity resources. *See* NOPR, 168 FERC ¶ 61,184 at P 67. That would also mean that, in some instances, there would be no fixed element in an avoided cost contract, which would seem inconsistent with the Commission's rationale justifying variable energy price contracts. *See id.* P 70.

fixed-price contract option will make it more difficult—or in some cases impossible—for QFs to obtain financing. The option to enter a contract with a fixed or known price has played in essential role in encouraging QF development.[11] In addition, those contracts have played an important role in ensuring that QFs receive non-discriminatory rates, especially in areas of the country with vertically integrated utilities that are guaranteed to recover the costs of their prudently incurred investments through retail rates.[12] Neither the record nor the rationale in this NOPR addresses these concerns in a manner that is even remotely convincing.

10. Second, I am concerned about the implications of the Commission's proposal to determine that a locational marginal price (LMP) is a *per se* reasonable measure of an as-available avoided cost for energy and to preliminarily advance several other ''Competitive Prices'' that would also be sufficient.[13] Current regulations require states to consider factors, including reliability and when the QF is available, when calculating the avoided cost rate. Today's NOPR proposes to allow states to ignore these factors and, instead, rely entirely on LMP or a price set at a ''liquid market hub.'' That rule would apply across the country, irrespective of whether the QF has access non-discriminatory access to competitive markets.[14] That is notwithstanding the fact that the evidence the Commission relies on to justify this proposal comes overwhelmingly from regions with sophisticated RTO and ISO markets and/or restructured utilities.

11. As an initial matter, I support introducing more competition into the Commission's implementation of PURPA. Liquid price signals can be useful and transparent inputs that are worthy of *considering* as part of the overall calculation of an appropriate avoided cost number that includes both the short-term and long-term costs avoided by the utility's purchases from QFs. But referencing the words ''competitive'' and ''market'' over and over again is not the same thing as proof that there is sufficient market competition. Many regions of the country—often the same regions where the debates about PURPA are most heated—have not established competitive markets, let alone non-discriminatory access to those markets for independent generators, even if there are liquid market hubs for spot energy purchases. When combined with the Commission's proposal to allow utilities to eliminate the contract option, discussed above, QFs may be reduced to relying solely on some synthetic measure of what spot prices would be in a competitive market based on gas prices and heat rates. I am not persuaded that this will satisfy our obligation to encourage QFs.

12. Nor am I confident that this proposal will not result in discriminatory rates. In regions of the country with vertically integrated utilities (including some parts of RTO/ISO markets) the relevant utility will almost always receive guaranteed cost-recovery on its generation investments. Indeed, state regulators will often effectively pre-approve certain incumbent utility investments through those utilities' integrated resource plans, making it highly unlikely that the utility investments will ultimately be disallowed as imprudent. Under those circumstances, it is not clear to me how a rule that conclusively presumes that LMP—let alone some other measure of price—is a non-discriminatory rate in those regions.

13. I recognize that in some regions of the country—such as the RTOs and ISOs with developed real-time and day-ahead markets and largely restructured utilities—this may be an appropriate approach for calculating the as-available rate for energy, at least for relatively large QFs. But the NOPR's proposed revisions are not limited to those regions and are not even predicated on utilities themselves actually relying on LMP, liquid market hubs, or other calculations of ''Competitive Prices.'' In any case, neither the record nor the rationale in this NOPR addresses these concerns in a convincing manner.

B. Reducing the 20 MW Rebuttable Presumption

14. The Commission is also proposing to reduce the threshold for the rebuttable presumption of non-discriminatory access to competitive wholesale markets within RTOs and ISOs from 20 MW to 1 MW. This proposal would, in essence, relieve most utilities within RTOs and ISOs from the must-purchase obligation for any resource greater than 1 MW based on the theory that those resources have non-discriminatory access to the RTO and ISO markets.[15]

15. The Commission created the rebuttable presumption framework in response to Congress's enactment of section 210(m) in EPAct 2005. The Commission explained that QFs smaller than 20 MW often face more challenges than larger QFs in accessing competitive wholesale markets and therefore presumptively do not have non-discriminatory access.[16] The challenges it identified included issues such as interconnection at the distribution level, jurisdictional differences, pancaked delivery rates, and administrative burdens to obtaining access to distant buyers.[17]

16. Today's NOPR contains precious little justification to support that change and does not cite a single piece of record evidence supporting its proposal.[18] That may be because it seems a stretch to suggest that a 1 MW resource can generally access and compete in markets as sophisticated and complex as, for example, PJM Interconnection, L.L.C., on a similar footing as the resources in the portfolio of a large vertically integrated utility or merchant power generator.

17. These are among the most important issues presented in this NOPR. I hope that the parties will assemble a correspondingly robust record that allows to us to dig into them in detail and evaluate whether the Commission's proposals are consistent with our obligations under the statute.

III. PURPA Should Be Revised To Create More Competition, Not Less

18. Insofar as I can tell, the Commission interprets the success of PURPA since 1978 as evidence that the law is no longer needed and that the Commission should revise its regulations so that they do less to encourage QFs. I draw a slightly different conclusion from the same evidence. I view PURPA's success in deploying gigawatts of relatively low-cost electricity as proof of the benefits of introducing competition into the bulk power system.

19. Several proposals in the record would do just that. For example, the National Association of Regulatory Commissioners (NARUC) submitted a proposal for how the Commission might implement section 210(m)(1), which was added by the Energy Policy Act of 2005. The new provision provided three bases for FERC to terminate a utility's must-purchase obligation under PURPA, all of which hinged on QFs' access to competitive wholesale electricity markets.[19] The NARUC proposal urged the

[11] *See, e.g.,* June 29, 2016 Technical Conf. Tr. at 26–27 (Solar Energy Industries Association) (''The Power Purchase Agreement is the single most important contract of the development and financing of an energy project that's not owned by a utility. Without the long-term commitment to buy the output of that agreement at a fixed price, there is no predictable stream of revenue. Without a predictable stream of revenues, there is no financing. Without any financing, there is no project.'').

[12] *See* Statement of Travis Kavulla, Docket No. AD16–16–000, at 2 (June 29, 2016) (''Whether compensation for a QF is a matter of market clearing prices or of administrative decision-making is largely a reflection of how larger or utility-owned generation is compensated.'').

[13] NOPR, 168 FERC ¶ 61,184 at PP 50, 55–60.

[14] The NOPR proposes to allow states or utilities to use this liquid market price only for the ''as-available'' energy sales rate, not the capacity rate or for QFs that choose the contract option. But given that the Commission is also proposing to allow utilities to eliminate the fixed-price contract option for energy sales, QFs may have no choice but to rely on the ''as-available'' option for sales of energy.

[15] This issue, as much as any other, has been subject to vigorous debate in Congress. *See supra* at 3.

[16] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at PP 9–12 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008).

[17] NOPR, 168 FERC ¶ 61,184 at P 121.

[18] To the contrary, the Commission has found that QFs less than 20 MW may not have non-discriminatory access, even within RTO/ISO markets. In just the last few years, the Commission has explained that barriers such as transmission constraints are the very ''circumstances explained in Order No. 688 that gave rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets.'' *N. States Power Co.,* 151 FERC ¶ 61,110, at P 34 (2015). Today's NOPR fails to provide any explanation for the departure from the Commission's existing policy.

[19] Section 210m(1) provides:

(A)(i) Independently administered, auction-based day ahead and real-time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission approved regional transmission entity and administered

Commission to give meaning to section 210m(1)(C) of the Federal Power Act by establishing criteria by which a vertically integrated utility outside of an RTO or ISO could apply to terminate the must-purchase obligation if it conducts sufficiently competitive auctions or RFPs for energy and capacity.[20] In other words, it would use the pathway established by Congress's amendments to PURPA to create more opportunity and competition in areas where, for non-incumbent utilities, PURPA is often the only game in town.

20. The NARUC proposal was a whitepaper, not a detailed NOPR. It would surely require more development before we could determine whether it satisfies PURPA's statutory requirements. Nevertheless it represented a step in the right direction that would have been consistent with PURPA's pro-competitive purposes. It was also an idea that we could have—and should have—amply explored through a technical conference or other proceeding since the Chairman indicated his intent to go forward with revisions to PURPA.

21. The Solar Energy Industries Association also put forward a pro-competitive proposal of the type that I would like to have explored in more detail in this NOPR.[21] The proposal would address competitive solicitations as a means of procuring energy and capacity from all new generation resources, including QFs. It also discussed the potential for these competitive solicitations to set avoided cost under certain circumstances. As with the NARUC proposal, this proposal would revise PURPA to include more genuine competition rather simply revising the regulations to do less to encourage QFs.

22. Rather than seeking to expand competition, the majority is instead using the success of competition in certain parts of the country as a reason to scale back PURPA throughout the country. In some areas of the country, particularly those with developed RTO and ISO markets and with few, if any, vertically integrated utilities, competition is the norm and PURPA may not be necessary, at least for generators that are sufficiently large and sophisticated to participate on an equal footing with other market participants. But it does not necessarily follow that the healthy competition we see in those regions means that PURPA does not continue to play a vital role in other parts of the country, including those without RTO and ISO markets or where vertically integrated utilities dominate. To put it bluntly, the success that a QF might have in selling its energy and capacity within ISO New England Inc. tells you very little about the success a similar resource might have in the Southeast or the West, at least without PURPA. I worry that applying lessons learned in the truly competitive regions of the country to the less competitive regions will actually result in less competition and, ultimately, higher prices for consumers.

23. I support certain aspects of this NOPR that I believe are consistent with the Commission's proper role in administering PURPA and are supported by the record developed so far. First and foremost, I agree that it is time to address the ''one-mile'' rule, which currently provides an irrebuttable presumption that resources located more than a mile apart are separate QFs.[22] There is evidence compiled as part of the Commission's 2016 technical conference on PURPA that suggests that this rule is susceptible to gaming and that some developers are splitting what should fairly be considered one project into a series of discrete projects spread separated by a mile each.[23] I do not believe that is what Congress had in mind when it set out to promote small power production facilities in PURPA. The NOPR proposes what I believe is a reasonable framework for addressing this issue and I look forward to reviewing the comments we receive.

24. In addition, I support the proposal to require that QFs demonstrate commercial viability before securing a legally enforceable obligation with the relevant utility. It seems only fair to require that a proposed QF demonstrate that it is not speculative and will likely enter service before a utility incurs an obligation to purchase that QF's output at any particular price. The proposal in today's NOPR appears to strike a reasonable balance between allowing QFs to secure a commitment for purchase early enough in their development cycle so that they can use it to facilitate financing while preventing QFs from locking-in avoided-cost rates too far ahead of their actual delivery of any energy or capacity. Nevertheless, in contrast to the one-mile rule, the record on this question is relatively underdeveloped and I hope that parties will address the specifics of this proposal in detail.

25. Finally, I support the proposal to allow stakeholders to protest self-certification of QFs. If an entity believes a resource does not qualify as a QF, it should have the opportunity to protest the QF's filing in the same way that stakeholders have the opportunity to protest most other Commission filings. At the very least, it seems unfair to require them to file a declaratory order, and pay tens of thousands of dollars, in order to inform the Commission of their views.

* * *

26. The Commission seems to believe that PURPA's time has passed. But that is Congress's decision to make, not the Commission's. So long as PURPA is on the books, we must faithfully implement the requirements of the law. Although I support certain elements of today's NOPR, I am concerned that many of the Commission's proposals will fall short of our statutory obligations. In addition, I am also disappointed that the Commission is not doing more to explore using PURPA to expand opportunities for genuine competition, including through section 210(m)—the avenue for reform that Congress enacted in 2005. I believe that focusing on expanding opportunities for genuine competition would far better serve the public interest than simply rebalancing the scales against QFs, which seems to be the principal goal of today's NOPR.

For these reasons, I respectfully dissent in part.

Richard Glick,
Commissioner.

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pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term, and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

16 U.S.C. 824a–3(m)(1) (2018)

[20] National Association of Regulatory Utility Commissioners Supplemental Comments, Docket No. AD16–16–00 (Oct. 17, 2018), Attachment A at 8; *id.* (proposing the Commission's *Edgar-Allegheny* criteria as a basis for evaluating whether a proposal was adequately competitive).

[21] Solar Energy Industries Association Supplemental Comments, Docket No. AD16–16–000 (Aug. 28, 2019).

[22] 18 CFR 292.204(a) (2019).

[23] *See* Statement of Paul Kjellander, Docket No. AD16–16–000, at 4–5 (June 29, 2016); Portland General Electric Company Comments, Docket No. AD16–16–000, at 6 (June 29, 2016).

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Part III

National Credit Union Administration

12 CFR Parts 701 and 746

Federal Credit Union Bylaws; Final Rule

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 746

RIN 3313–AE86

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule to update, clarify, and simplify the federal credit union bylaws (FCU Bylaws). The final rule updates and conforms the FCU Bylaws to legal opinions issued by the NCUA's Office of General Counsel and provides greater flexibility to federal credit unions (FCUs). The final rule also makes other changes that are designed to remove outdated or obsolete provisions.

DATES: The final rule is effective January 2, 2020.

FOR FURTHER INFORMATION CONTACT: Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314, or by telephone at (703) 548–2601.

SUPPLEMENTARY INFORMATION:

I. Background and Legal Authority
II. Summary of the Proposed Rule
III. Final Rule and Discussion of the Comments
IV. Regulatory Procedures

I. Background and Legal Authority

Background

Section 108 of the Federal Credit Union Act (FCU Act) requires the Board to prepare periodically a form of bylaws to be used by FCU incorporators and to provide that form to FCU incorporators upon request.[1] FCU incorporators must submit proposed bylaws to the NCUA as part of the chartering process. Once the NCUA has approved an FCU's proposed bylaws, the FCU must operate according to its approved bylaws or seek agency approval for a bylaw amendment.[2] The FCU Bylaws are set out in Appendix A to part 701 of the NCUA's regulations.[3] The Board incorporated the FCU Bylaws into the NCUA's regulations to address concerns regarding bylaw enforcement.[4] As the Board stated in the final rule incorporating the FCU Bylaws, the FCU Act provides only two mechanisms for correcting bylaw violations: (1) Suspension or revocation of an FCU's charter or (2) placing an FCU into conservatorship. Aside from these extreme remedies, when adopting the final rule, the Board was concerned about identifying what, if any, supervisory action the NCUA could take to protect fundamental member rights.[5] By incorporating the FCU Bylaws into the NCUA's regulations, the Board believed that it could use additional regulatory tools, such as the issuance of a cease-and-desist order, to address material noncompliance with an FCU's bylaws.

FCUs often express concerns that the FCU Bylaws do not provide sufficient operational flexibility to allow an FCU to respond to changing market practices or to address basic corporate governance matters in a prompt and efficient manner. These arguments are well taken. Accordingly, the NCUA has engaged in an ongoing review of the FCU Bylaws to determine what, if any, changes may be necessary to provide additional flexibility to FCUs.

In 2013, the NCUA's Office of General Counsel consulted with representatives from the credit union industry regarding the FCU Bylaws. The NCUA received many comments during the 2013 consultation, many of which focused on relatively narrow aspects of the FCU Bylaws. For example, FCUs recommended that the NCUA provide more staff commentary on the meaning and interpretation of specific bylaw provisions. They also encouraged the NCUA to make a concerted effort to modernize the FCU Bylaws by using consistent terms throughout and deleting inapplicable language that is no longer useful. Commenters specifically recommended that the NCUA update the preamble to the FCU Bylaws and ensure that the instructions are current.

On March 15, 2018, the Board issued an advance notice of proposed rulemaking (ANPR) soliciting comments on how to update, clarify, and simplify the FCU Bylaws.[6] The Board solicited comment on five specific questions related to: (1) Improving the bylaw amendment process within the NCUA; (2) addressing ambiguities in the FCU Bylaws allowing for an FCU to limit services to a member and expel a member; (3) methods to facilitate recruitment and development of directors; (4) methods to encourage member attendance at annual and special meetings; and (5) eliminating regulatory overlaps between the FCU Bylaws and the NCUA's regulations. The Board also invited general comments on improvements to the FCU Bylaws.

The Board received a wide variety of comments to the ANPR from FCUs, federally insured, state-chartered credit unions, national credit union trade associations, state credit union trade associations, and law firms. Commenters generally appreciated the Board's efforts to provide an enhanced opportunity to participate in the rulemaking process. Nearly all of the commenters raised issues with specific aspects of the FCU Bylaws and requested that the Board provide the greatest amount of regulatory relief permissible under the FCU Act.

Legal Authority

The Board is issuing this proposed rule pursuant to its specific authority in the FCU Act to adopt a form of bylaws to be used by FCU incorporators when chartering an FCU,[7] as well as its plenary authority to adopt rules and regulations for the administration of the FCU Act.[8] Given the importance of proper corporate governance procedures to the safe and sound operation of FCUs, the Board believes this proposed rule is a necessary and proper exercise of this statutory rulemaking authority.

II. Summary of the Proposed Rule

Based on the comments the Board has received in response to the ANPR and throughout its ongoing review of the FCU Bylaws, the Board issued a proposed rule on October 18, 2018.[9] The proposed rule incorporated many of the suggestions the Board received in response to the ANPR and throughout the NCUA's ongoing review of the FCU Bylaws. In addition, the proposed rule clarified provisions that have created confusion in the past, as reflected by the numerous inquiries the NCUA has received from FCUs and members. In some instances, a proposed change offered more detail or further elaboration to help FCU officials, employees, and members better understand a provision.

The proposed rule also made stylistic and grammatical changes throughout the FCU Bylaws, which provided for a much clearer and more readable document. For example, the proposed rule moved the entire body of staff commentary to the end of the FCU Bylaws, with corresponding references

[1] 12 U.S.C. 1758.

[2] 12 CFR 701.2(a).

[3] 12 CFR part 701, App. A.

[4] 72 FR 61495, 61496 (Oct. 31, 2007).

[5] Specifically, these rights include the right to: (1) Maintain a share account; (2) maintain FCU membership; (3) have access to credit union facilities; (4) participate in the director election process; (5) attend annual and special meetings; and (6) petition for removal of directors and committee members. See 72 FR 30984, 30986 (June 5, 2007) (proposed rule).

[6] 83 FR 12283 (Mar. 21, 2018).

[7] 12 U.S.C. 1753.

[8] 12 U.S.C. 1766(a).

[9] 83 FR 56640 (Nov. 13, 2018).

to the articles and section numbers that are the subject of the commentary.

However, the proposed rule did not permit an FCU to draft its own bylaws. The FCU Act requires the Board to develop a form of bylaws that ''shall be used'' by FCU incorporators and mandates that FCUs operate according to their NCUA-approved bylaws.[10] While commenters to the ANPR and throughout the NCUA's ongoing review of the FCU Bylaws have advocated greater flexibility to develop their own bylaws, the Board continues to believe that having a uniform set of bylaws drafted by the NCUA is consistent with the FCU Act[11] and is necessary to protect fundamental member rights, to avoid confusion among FCUs, and to prevent the adoption of illegal bylaw provisions.[12]

III. Final Rule and Summary of the Comments

The Board received 35 comments from FCUs, federally insured, state-chartered credit unions (FISCUs), national credit union trade associations, state credit union trade associations, and one individual who provides legal services to FCUs. The commenters generally appreciated the Board's efforts to modernize the FCU Bylaws and to eliminate regulatory burden where possible. Many commenters focused on two aspects of the proposed rule—the provisions governing limitation of services and expulsion of members. Furthermore, several commenters questioned whether it was necessary to codify the bylaws or requested that the Board allow FCUs to draft their own bylaws. As noted above, the Board does not believe that it is appropriate for FCUs to draft their own bylaws. All of the commenters also expressed concerns about specific aspects of the proposal. In response to the comments received, the Board has made several changes to the final rule. The specific details of the final rule, including changes as a result of the comments received, are discussed below.

Introduction

The proposed rule modernized the introductory language to the FCU Bylaws. It changed the instructions for bylaw amendments to reflect that the NCUA's Office of Credit Union Resources and Expansion (CURE) now is the primary office handling bylaw amendments and consults with the NCUA's Office of General Counsel, as necessary.

The proposed rule also established an explicit 90-calendar-day deadline for CURE to reach a decision on a bylaw amendment. In the ANPR, the Board specifically requested comments on improving the bylaw amendment process. Commenters requested that the Board adopt a deadline for CURE to process bylaw amendments, with a majority favoring 30 calendar days. While the Board agreed in the proposed rule that the NCUA should process bylaw amendments as expeditiously as possible to allow the FCU to address any pressing operational concerns, the Board expressed concerns that 30 calendar days may be an insufficient amount of time. Accordingly, the proposed rule adopted a 90-calendar-day deadline. The Board believed that this time period would provide CURE with sufficient time to consider the bylaw amendment without imposing an undue operational burden on the FCU. The Board requested specific comments on this aspect of the proposed rule, including whether another time period, such as 60 calendar days, would be more appropriate to ensure that CURE processes proposed bylaw amendments in a timely manner.

Commenters that responded to this aspect of the proposed rule appreciated the Board's effort to provide a clear timeline for CURE to process bylaw amendment requests. A majority favored a shorter deadline of 30 calendar days for CURE to make a decision. Some of these commenters suggested that the rule allow CURE to extend the deadline for particularly difficult bylaw amendment requests. Others favored 45 or 60 calendar days as a compromise. Only a few of the commenters believed that 90 calendar days was an appropriate timeframe for CURE to consider a bylaw amendment request.

The Board is sympathetic to commenters' arguments that 90 calendar days may impose an undue burden on an FCU seeking approval of a bylaw amendment. However, the Board does not believe that a 30-calendar-day deadline for CURE to render a decision is appropriate especially in cases involving complex bylaw amendments. Accordingly, in the final rule, the Board is adopting a 60-calendar-day deadline for CURE to render a decision. The Board is convinced that 60 calendar days is an appropriate compromise between granting CURE sufficient time to render a decision on most bylaw amendment requests and remaining responsive to FCUs that may seek bylaw amendments to address pressing operational concerns.

Commenters to the ANPR also requested that the Board automatically approve any bylaw amendment that CURE does not approve within this deadline. In the proposed rule, the Board noted that it does not believe that it is appropriate to approve proposed bylaw amendments automatically, as this could result in an FCU adopting a bylaw that has a material adverse effect on fundamental member rights, poses a safety and soundness risk to the FCU, or is otherwise contrary to law. Instead, the Board adopted an approach that treated the failure to approve a bylaw amendment by the prescribed deadline as a denial, which the FCU may then appeal pursuant to the appeals procedures set out in subpart B to part 746 of the NCUA's regulations.[13]

Nearly all commenters that responded to this aspect of the proposed rule expressed concerns about the proposed automatic denial. Most commenters requested that the NCUA approve bylaw amendment requests if CURE fails to meet this deadline. These commenters expressed concerns with automatic denial because FCUs would not know, and therefore not be able to correct, any potential defects in their bylaw amendment requests prior to an appeal. Commenters also noted that there are other areas of NCUA regulations that permit automatic approval. For example, net worth restoration plans for undercapitalized credit unions are automatically approved if the NCUA Board, or the delegated official, does not reach a decision within 45 days.[14] Commenters also argued that any delay on CURE's part should inure to the benefit of FCUs and not the NCUA. Finally, several commenters expressed concern about the lack of communication between CURE and FCUs. One commenter noted that FCUs could be left wondering whether an approval was in fact sent that the FCU somehow missed or did not receive, the proposed amendment was denied because of a substantive defect, or there was no substantive issue, but CURE could not review the amendment within 90 days.

The Board does not believe that it is appropriate for the NCUA to approve proposed bylaw amendments

[10] 12 U.S.C. 1758.

[11] See 71 FR 24551 (Apr. 26, 2006) (''NCUA's longstanding position has been that [the FCU Act] expresses a congressional desire for uniformity regarding FCU operations and member rights. Accordingly, NCUA views [the FCU Act] as providing authority to issue form bylaws that apply to all FCUs, not only newly chartered FCUs, and to review proposed bylaw amendments.'').

[12] *See* 72 FR 30984, 30985 (June 5, 2007) (proposed rule) (uniform bylaws necessary to protect fundamental member rights, avoid confusion, and prevent adoption of illegal bylaws).

[13] 12 CFR part 746, subpart B. The final rule makes a conforming amendment to subpart B of part 746.

[14] 12 CFR 702.206(f)(2).

automatically, as this could result in the adoption of illegal or unsafe and unsound bylaw provisions. Instead, the Board believes that the most appropriate approach is to treat CURE's failure to approve a bylaw amendment request as a denial, which the FCU may then appeal to the Board. The Board recognizes that some credit unions may wish to continue to work with CURE on bylaw amendments even if they have the right to appeal. Accordingly, the final rule permits CURE to request additional time from the FCU to process a bylaw amendment request. If CURE fails to render a decision, even after an extension of time, the FCU may appeal to the Board. To address commenters' concerns regarding appeals to the Board in the event that CURE fails to render a timely decision, the final rule requires CURE to provide the FCU with a list of any concerns that CURE has that the FCU may use as part of its appeal. The list must be provided to the FCU within 30 days of the denial.

A few commenters also disagreed with the Board's statement that it may take action against minor or technical violations of an FCU's Bylaws. These commenters requested that the Board remove the word ''generally'' from the statement that it would not take action against minor or technical violations. The Board believes that the word ''generally'' provides sufficient flexibility to act in rare cases in which a minor or technical violation might warrant agency action while still expressing the Board's position that codification of the FCU Bylaws was not intended as a tool for the agency to pursue minor and technical violations.

Article I. Name—Purposes

Article I states the FCU's name and mission. The proposed rule amended section 2, which outlines the FCU's purposes, by changing the reference in the second sentence from ''consumers'' to ''members.'' The Board proposed to change this term because FCUs are not limited in their mission to serving consumers. There may be small businesses and other organizations within the field of membership that can benefit from the FCU's services, and this change is designed to reflect this benefit. Commenters that responded to this aspect of the proposed rule favored this change. As a result, the Board is adopting this aspect of the proposed rule without amendment.

Article II. Qualifications for Membership

Article II outlines the requirements for obtaining and continuing FCU membership. The proposed rule included an expanded discussion in the associated staff commentary of measures that an FCU may take to address abusive and disruptive members. In addition, to facilitate an FCU's implementation of any limitation of services policy, the proposed rule added a new section 5 to this Article, describing the concept of a ''member in good standing.'' So long as a member remains in good standing, that member retains all of the rights and privileges associated with FCU membership. A member not in good standing, however, may be subject to an FCU's limitation of services policy, but even a member deemed not in good standing retains fundamental rights as a credit union member, including the right to attend, participate, and vote at the annual and special meetings of the members, and maintain a share account.

In the ANPR, the Board specifically requested suggestions on ways to clarify an FCU's right to limit services or restrict access to credit union facilities to disruptive or abusive members. Some commenters recommended that the Board incorporate into the FCU Bylaws prior legal opinions by the NCUA's Office of General Counsel addressing this matter. Those legal opinions state that an FCU may limit services or access to credit union facilities to violent, belligerent, disruptive, or abusive members, provided there is a logical relationship between the objectionable conduct and the services to be suspended. The member must also receive adequate notice of the FCU's limitation of services policy.[15]

The Board agreed in the proposed rule that incorporating these legal opinions into the FCU Bylaws was appropriate to provide additional clarity on an FCU's right to limit services or access to credit union facilities. Thus, the proposed rule included staff commentary to Article II, based on these prior legal opinions, that details how an FCU may handle an abusive or disruptive member. The staff commentary noted that there is a reasonably wide range within which an FCU may fashion a limitation of services policy that is tailored to the needs of the individual FCU. An FCU has broad discretion to deny, as it deems appropriate, all or most credit union services, such as ATM services, credit cards, loans, share draft privileges, preauthorized transfers, and access to credit union facilities to a member that has engaged in conduct that has caused a loss to the FCU or that threatens the safety of credit union staff, facilities, or other members in the FCU or its surrounding property. Accordingly, an FCU may take immediate action to address situations in which a member is violent, belligerent, disruptive, or poses a threat to the credit union, or other members, or its employees even if the FCU Act prohibits the FCU from immediately expelling the member.

The staff commentary also noted that the policy need not be identical or applied uniformly in all cases, provided that the FCU has a legitimate purpose for any disparate treatment of members. For additional clarity, the staff commentary contained cross-references to procedures that FCUs must use to expel a member, and it refers to Article XVI, § 1 of the FCU Bylaws, which contains language reiterating that no member may access or utilize an FCU's services in furtherance of an illegal objective.

A vast majority of the commenters that addressed this aspect of the proposed rule appreciated staff commentary explaining the measures that an FCU may take to address abusive and disruptive members through a limitation of services policy. These commenters noted that this change is useful to FCUs because it consolidates all prior NCUA Office of General Counsel Legal Opinion Letters in one place within the regulation. However, a small number of commenters opposed this change. They argued that codifying the NCUA's prior opinions into the Code of Federal Regulations eliminated any flexibility for FCUs to exercise business judgment regarding limitation of services policies.

The Board continues to believe that incorporating prior NCUA Office of General Counsel Legal Opinion Letters into the staff commentary of the FCU Bylaws will be a useful compliance tool for FCUs that may have questions regarding the scope of an FCU's authority to impose a limitation of services policy on a member. The Board does not agree that codification of these legal opinions in the NCUA's regulations will eliminate any flexibility for FCUs to exercise business judgment regarding limitation of services policies, as the agency expects FCUs to implement their bylaws consistently with its legal opinions, regardless of whether they are incorporated into the Appendix. The sole purpose of codification is to provide FCUs with easy access to authoritative opinions issued by Office of General Counsel staff regarding the meaning of the FCU Bylaws. Accordingly, the Board is adopting this aspect of the staff commentary with no material changes.[16]

[15] *See* OGC Op. No. 08–0431 (Aug. 12, 2008).

[16] One technical change was made to the staff commentary. The proposed rule stated that FCUs must disclose any limitation of services policy to

To facilitate an FCU's implementation of its limitation of services policy, the proposed rule amended Article II to distinguish between a member that retains all the rights and privileges associated with FCU membership and a member that is subject to a limitation on services or a restriction on access to credit union facilities. As noted, the proposed rule added a new section 5, describing the concept of a ''member in good standing.'' A member in good standing retains all the rights of FCU membership. To remain in good standing, a member must maintain the minimum share established by the FCU's bylaws, not be delinquent on credit union loans, not have had any account closed due to abuse or negligent behavior, avoid engaging in any violent, belligerent, disruptive, or abusive behavior towards credit union staff or other credit union members in the FCU or its surrounding property, and not cause a financial loss to the FCU. A member that fails to observe any of these basic requirements may be subject to reasonable limitations of services or access to credit union facilities pursuant to the FCU's limitation of services policy.

A vast majority of the commenters that addressed this aspect of the proposed rule approved of the new section creating a ''member in good standing'' policy. These commenters argued that the ''member in good standing'' policy would make it easier for FCUs to enforce limitation of services policies. One commenter proposed additional clarifying language to Article II, § 4 and asked the Board to create a new section that addressed the duties of members. In contrast, a small number of commenters opposed this change. They argued that a ''member in good standing'' policy would be unduly restrictive and prohibit FCUs from tailoring limitation of services policies to the unique needs of the individual FCUs.

The Board disagrees that new section 5 restricts the ability of FCUs to tailor limitation of services policies to the unique needs of individual FCUs. In fact, it grants an FCU broad discretion on how to handle a member not in good standing through its limitation of services policy. This provision neither dictates the content of an FCU's limitation of services policy nor defines its scope. Rather, new section 5 merely provides FCUs with a convenient tool to inform members that they may be subject to limitation of services by virtue of their status as a member not in good standing, depending on the specific policy adopted by the FCU's board. It also clarifies that even if that member is not in good standing, the member still enjoys certain fundamental rights of credit union membership. Because the Board believes the benefits of this new provision outweigh any theoretical costs, it is adopting this aspect of the proposed rule.

One commenter requested that the definition of member in good standing be limited to members who are not significantly delinquent, instead of any delinquency. The Board agrees. A member should not be subject to a limitation of service for any delinquency, such as a single missed payment. An FCU should reserve limitation of services to substantial and material delinquencies. Therefore, the final rule provides that a member may be subject to a restriction of services only if the delinquency is significant.

In the proposed rule, the Board recognized that terms such as ''violent,'' ''belligerent,'' ''disruptive,'' and ''abusive'' are subjective and, therefore, may not provide FCUs with absolute clarity regarding the circumstances under which a limitation of services or access to credit union facilities may be appropriate. Accordingly, the Board requested comments on ways to clarify these terms, including whether specific examples of offending conduct would be beneficial. Depending on the persuasiveness of the comments, the Board noted that it might incorporate such examples in the staff commentary. In response to comments, the Board is adopting clarifying language to section 5. These amendments further clarify the circumstances under which an FCU may impose a limitation of services policy consistent with existing NCUA Office of General Counsel legal opinion letters and outline the obligations of members.

Commenters were split on whether the Board should provide examples of conduct that may be considered ''violent,'' ''belligerent,'' ''disruptive,'' or ''abusive.'' The Board believes that examples of conduct would be beneficial and notes that such a list is merely for illustrative purposes and it is not intended to be all-inclusive. Accordingly, the final rule incorporates staff commentary that provides examples of such conduct.

As the Board noted in the proposed rule, it believes that, without question, certain actions warrant immediate limitation of services or access to credit union facilities, such as violence against other credit union members or credit union staff in the credit union facility or the surrounding property. Other actions, such as rude behavior or potential threats of violence, may warrant limitation of services or restrictions on access to credit union facilities based on the specific facts and circumstances. The Board notes that, in addition to the rights granted under Article II, an FCU may immediately take actions such as contacting local law enforcement, seeking a restraining order, or pursuing other lawful means, to protect the credit union, credit union members, and staff. Nothing in the FCU Act or the FCU Bylaws prevents an FCU from using whatever lawful means it deems necessary to address circumstances in which a member poses a risk of harm to the FCU, its members, or its staff.

Article III. Shares of Members

Article III provides basic information about issues related to members' share accounts, including the par value of the membership share, trust accounts, and membership status of joint account holders. The proposed rule added new language under Section 1 to provide representative examples for FCUs to choose in establishing varying par values for different classes of membership (such as students, minors, or non-natural persons), provided that such differences conform to applicable legal requirements established by federal, state, or municipal anti-discrimination laws. The new language also clarified that FCUs have options regarding whether to require all members to maintain a regular share account or to permit members to base their qualification for membership on some other type of account. Additional staff commentary elaborated more fully on this option. The proposed rule revised the text of Article III to incorporate plain English writing principles and deleted unnecessary provisions.

Commenters to the ANPR requested that the Board provide additional guidance on trust accounts. New staff commentary in the proposed rule addressed some of the considerations that apply in the context of trust accounts, including a discussion of the pertinent differences between revocable and irrevocable trusts. It also clarified that, in the case of a revocable trust, the individual who establishes the trust (also known as the settlor) maintains ownership and control of the funds during that person's lifetime. Thus, the staff commentary clarified that the NCUA requires the settlor to join the

new members when they join and notify existing members of the policy at least 30 days before it becomes effective. The final rule, instead, states FCUs must provide notice of this policy, but characterizes the timeframe for providing the notice as an expectation rather than a requirement. The cited statutory provision, which relates to expulsion based on nonparticipation, has been removed to avoid conflating these subjects.

FCU in order to establish a revocable trust account for that individual, thus requiring the settlor to be within the FCU's field of membership. The staff commentary noted that there is no requirement that the settlor first establish a regular share account to become a member. Rather, the settlor may satisfy the membership through the opening of the revocable trust account itself. One commenter asked for the FCU Bylaws to define the term settlor. The Board believes the term is well defined by its customary usage.

In contrast, the staff commentary clarified that membership requirements for an irrevocable trust account may be met through the settlor, who is the original owner of the funds, *or* the beneficiary, who obtains an equitable, beneficial interest in the funds once the trust is established. So long as one or the other is eligible for membership, then the FCU may accept the account. As with revocable trusts, the membership obligation can be satisfied through the opening of the trust account itself, so it is not necessary for the beneficiary or the settlor, as applicable, to establish a regular share account as a condition precedent to membership. Furthermore, the trustee need not actually be a member of the FCU. Many irrevocable trusts have a trustee, and the NCUA received a comment on whether membership requirements for an irrevocable trust may be met through the trustee. While the trustee has administrative responsibility for the account, the trustee has no ownership interest in the account and is, therefore, irrelevant for purposes of establishing membership.

The staff commentary also noted that a trust itself, whether revocable or irrevocable, may be a member of an FCU in its own right if all parties to the trust, including the settlors, beneficiaries, and trustees, are within the field of membership. Some commenters asked clarifying questions on whether a trust must be a member in its own right and whether an FCU must view the trust as a separate legal entity. In addition, several other commenters included specific questions on trusts. These questions generally required more information or knowledge of state trust laws to answer and generally went beyond the scope of the rule.

Commenters that responded to this aspect of the proposed rule appreciated the representative examples that an FCU may choose from in establishing the par values of different classes of membership and the additional flexibility for establishing membership through one or more of these accounts. Commenters also appreciated the clarifications regarding trust accounts in the staff commentary. As a result, the Board is adopting this aspect of the proposed rule without amendment.

Article IV. Meetings of Members

Article IV addresses procedures related to annual and special meetings of an FCU's membership. In the ANPR, the Board specifically requested comments on methods to encourage member attendance at annual and special meetings. The proposed rule made several changes to Article IV to encourage greater member participation, including enhanced notice requirements and adjustments to quorum requirements.

To ensure that members receive adequate notice of an annual or special meeting, the proposed rule required that the notice for the annual meeting be posted in a conspicuous place in the FCU's physical office, such as at teller windows or on the front door of the FCU's office, at least 30 calendar days before the meeting. The notice must also be prominently displayed on the FCU's website if the FCU then maintains a website. An FCU is not required to establish and maintain a website solely for this purpose, however. Most commenters stated that an FCU should be required either to post the notice in a conspicuous place or on its website, but not both. The Board disagrees. The Board believes that these changes are appropriate because members are more likely to participate in annual and special meetings if the notice is widely announced. One commenter also asked if posting a meeting notice on its online calendar was considered conspicuous. The Board is clarifying that adding it as a date on a credit union calendar is considered conspicuous, so long as the calendar is easily accessible from the FCU's main web page.

The proposed rule also deleted the option to waive prior notice if all members entitled to vote waived the notice requirement. The Board did not receive any comment on this section and is finalizing it as proposed.

A few other commenters also recommended removing the provision setting the maximum amount of notice that may be provided to members of an annual meeting. The Board is declining to remove the maximum amount of notice because notice that is reasonably close to the meeting is important to encourage member engagement. The Board notes, however, that nothing precludes an FCU from providing additional notice.

In the staff commentary, the proposed rule encouraged FCUs to provide a live webcast of annual and special meetings for interested members, as well as post a video of the annual meeting on the FCU's website. The NCUA encouraged this policy only for FCUs with a website at the time of any such meeting; nothing requires FCUs to establish or maintain a website solely for this purpose. This policy encourages members to participate in the annual meeting, while also providing access to members who cannot attend meetings in person. A few commenters objected to encouraging FCUs to provide a live webcast of annual and special meetings. One commenter believed this would be confusing, as members could not vote or participate in the meeting, but could only passively view the webcast. The Board believes members would benefit from having a webcast of the meeting because it supports member engagement. If an FCU is concerned about member confusion, it may include a disclaimer that viewing the webcast does not permit the member to vote. The Board is finalizing this provision as proposed.

The proposed rule also adjusted the quorum requirement for meetings. It required twelve members, excluding the board, credit union staff, and officials, for a quorum. Commenters were generally opposed to this provision and did not believe it would achieve the Board's goal of additional member engagement, although a minority of commenters supported the proposed policy. Several commenters stated that the quorum changes treat board members and staff as inferior members because their presence at the meeting would be insufficient to establish quorum. One commenter believed that forcing attendance would lead to added expense, such as for food, entertainment, and prizes. Another commenter stated that happy members usually do not attend meetings. Other commenters were concerned this change would cause most annual meetings to be adjourned for a lack of quorum, followed by decisions reached by a less than optimal sub-quorum at a subsequent meeting. Finally, one commenter recommended that the NCUA allow a quorum to consist of a proportionate number of members who are directors and employees so long as a certain number of members who are not directors and employees are also present.

The Board has reconsidered its policy and is not adopting this proposed change. The Board proposed this change in a desire to encourage FCUs to have wider participation from members, rather than allowing staff and board members to control all corporate decision making within the FCU. The

Board continues to believe that wide member engagement is important and that FCUs should be creative in ways to expand member involvement in FCU decision-making. The Board, however, has reconsidered whether this provision would effectively achieve its objective to increase member engagement. Therefore, under the final rule, any 15 members of the FCU establish a quorum at an annual or special meeting.

The proposed rule did not change the total number of member signatures required to call a special meeting. During the 2013 consultation process with members of the credit union industry, commenters favored increasing the total number of member signatures required to call a special meeting. They stated that special meetings are expensive and time-consuming to conduct and, thus, should be reserved for matters of interest to a broad group of members. One commenter specifically requested requiring a percentage based on the number of members instead of providing a fixed number of maximum signatures. These comments are well taken and the Board believes that in some instances a percentage based on the number of members may be appropriate as long as it does not disenfranchise members. The Board does not generally favor adopting a blanket percentage in all circumstances, however, given its potential to disenfranchise members of smaller FCUs. The Board believes that a preferable approach is to continue the NCUA's current practice of considering requests from individual FCUs on a case-by-case basis.

Finally, the proposed rule did not generally allow an FCU to conduct a virtual or hybrid (combined virtual and in-person) annual or special meeting. Commenters were almost universally against this policy and noted that at least 22 states currently permit corporations to host virtual or hybrid meetings, with several of those states extending the same flexibility to state-chartered financial institutions. The commenters argued that FCUs with the appropriate size, complexity, and sophistication should be allowed to take advantage of these solutions to provide greater flexibility for their members to attend annual or special meetings. The Board finds commenters' arguments persuasive.

The Board continues to believe that the best way to support member engagement with the FCU is to require in-person meetings generally. The Board, however, recognizes that offering a chance to participate virtually, as a complement to an in person meeting, has the potential to increase overall member attendance and governance. Therefore, all FCUs have authority to conduct hybrid meetings. The Board cautions that FCUs should conduct hybrid meetings only if they have the operational capacity to utilize the necessary technology successfully. The Board is concerned that members may choose to forgo in-person attendance and then, due to technological difficulties, be unable to participate virtually. If technological difficulties prevent members from engaging in the meeting as anticipated, the Board expects FCUs to provide another similar opportunity for member engagement. Additionally, any FCU that chooses to conduct hybrid meetings should ensure adequate cybersecurity protections. One commenter suggested offering a registration link whereby a member's identity could be confirmed or using multifactor authentication to ensure a sufficient level of privacy and security protections are in place to prevent instances of identity fraud. The Board believes that only FCUs with the appropriate infrastructure and capabilities should conduct hybrid meetings.

At this time, the Board does not favor completely virtual meetings. The Board notes that a movement towards completely virtual meetings in an effort to increase member access to meetings could unintentionally result in member disenfranchisement. The Board is particularly concerned with the rights of members who do not have access to electronic devices or who may live in areas without access to broadband internet. To avoid the possibility of member disenfranchisement, the Board is not allowing a virtual meeting to completely supplant a member meeting. Therefore, as stated above, FCUs holding hybrid meetings must always offer an option for in-person attendance as well as online.

The FCU Bylaws already grant an FCU considerable discretion to hold meetings in a location that is convenient for most of its members. Article IV allows an FCU to hold an annual or special meeting in the county in which any office of the FCU is located or within a radius of 100 miles of such an office, provided that the FCU does not pick a location designed to limit member participation or that has such an effect. Accordingly, the Board believes that an FCU has sufficient flexibility to ensure broad participation from members without the need for entirely virtual meetings and would be reluctant to approve any bylaw amendment allowing for entirely electronic voting. The Board encourages FCUs to be mindful when selecting a location for a member meeting to choose a location that maximizes member participation.

Article V. Elections

Article V addresses procedures for electing FCU Board members, and allows FCUs to select one of four options for conducting nominations and elections. For each of the four options for conducting nominations and elections, the proposed rule amended the procedures for the nominating committee, including adding a requirement that the nominating committee widely publicize the call for nominations to all members and interview every member who volunteers. The Board sought specific comments on this change. Commenters were divided on whether to widely publicize to all FCU members the call for nominations. Most commenters objected to this policy, though a few supported it as encouraging member participation. In addition, the Board sought comments on whether the secretary should post the nominations by petition along with those of the nominating committee on the FCU's website (if the credit union maintains a website). A few commenters stated that posting the nominations in a conspicuous place in each FCU office and on the FCU's website was unduly burdensome. The Board continues to believe that widely publicizing the nomination process and posting the nominations by petition on the FCU's website is only a nominal burden, but will provide more opportunities for member participation. Therefore, the Board is finalizing this provision as proposed.

The proposed rule also required the nominating committee to interview each member who volunteers. Commenters unanimously objected to the proposal that the nominating committee interview every applicant, arguing that such a requirement would unduly burden the nomination process. Commenters generally stated that requiring all candidates to be interviewed requires significant time from the nomination committee, and interviews would have to be completed within 30 days of appointment, which would not be feasible in certain circumstances. One commenter noted that it recently received between 50 and 60 applications for one position. The credit union interviewed several people, but it would have been burdensome, according to the credit union, if it were required to interview every person that volunteered. The Board has reconsidered its position, as

commenters presented reasonable arguments that such a requirement could unduly burden the nomination process. Under the final rule, the nominating committee is not required to interview every candidate and instead is required to interview only the applicants that meet certain objective qualifications established by the nominating committee. The Board believes this approach provides flexibility to FCUs while also encouraging greater member participation. For example, under the final rule, if a nominating committee receives a large number of applications, it has the flexibility to adopt selective criteria to determine which applicants to interview. The Board encourages each nominating committee to consider establishing criteria to promote diversity on the FCU's board in a manner consistent with applicable law.

The proposed rule also provided staff commentary clarifying electronic voting. The staff commentary stated that an FCU may use as many forms of electronic voting (*e.g.,* mobile phone or internet) as it wishes for those members who choose to vote electronically. However, the proposed rule did not allow an FCU to adopt an entirely electronic voting process. Commenters overwhelmingly requested electronic-only voting as a standard option. While modern technological innovations have changed the way that corporations and other businesses conduct meetings and hold elections, the Board remains concerned that allowing electronic-only voting could disenfranchise those members who do not have access to electronic devices or who may live in areas without access to reliable internet service. Specifically, electronic-only voting presents substantial concerns regarding member disenfranchisement, particularly in rural areas with lack of access to reliable internet. The Board also believes that the differences in operational capacities among FCUs are too great to allow electronic-only voting as a standard option. The NCUA will, however, consider bylaw amendment requests allowing for electronic-only voting on a case-by-case basis.

The Board also specifically sought comment on whether the FCU Bylaws should include an additional option for conducting elections that would allow FCUs to use a combination of voting methods without needing to make individual requests to do so. Commenters expressed support for including such flexibility in the FCU Bylaws. One credit union stated that permitting members to vote online, in person at a branch, or by requesting a ballot, increased the percentage of its membership participating in elections by an average of 250 percent compared to the five years prior. The Board has declined to expand the FCU Bylaws to include this option. The Board believes that not all FCUs have the operational capacity to use a combination of voting methods successfully. Therefore, the final rule will continue to require FCUs that want to combine voting methods to make individual requests to the NCUA.

The proposed rule included a recommendation that FCUs use an age not greater than 21 years as the minimum age for holding elective or appointive office. One commenter stated that encouraging a minimum age higher than 21 years could have the unintended consequence of rendering fewer members—who would otherwise be qualified and eager candidates—able to participate in the governance of the credit union. Further, to assist with the development and recruitment of board members, a credit union may be looking to cultivate young and talented members. In order to facilitate greater flexibility, the commenter recommended that the NCUA remove the instructions specifically encouraging the adoption of a resolution regarding the minimum age. The Board has not amended the recommendation, but is clarifying that it has no objections if an FCU uses an age younger than 21 years.

The proposed rule also provided staff commentary clarifying procedures for uncontested elections. The staff commentary noted that three of the options for conducting nominations and elections provide for elections by acclamation or consensus when the number of nominees for board positions equals the number of positions to be filled. These options do not permit nominations from the floor at the meeting because members must be provided a ballot in advance of the member vote. Therefore, a petition is the only way to nominate a candidate not on the nominating committee's slate. The staff commentary also highlighted that section (1)(c) in each of these options requires the notice to members to include the fact that there are no nominations from the floor at the meeting, as well as a notice that the FCU will not conduct a vote by ballot if the number of nominees equals the number of positions to be filled. The Board is finalizing this provision as proposed.

Article VI. Board of Directors

This Article provides the requirements related to the board of directors, such as the number of members, the composition of the board, the terms of office, and the responsibilities of the board. It also describes the regular and special meetings of the board. In addition, this Article provides the requirements for quorums, attendance and removal of board or credit committee members, and the suspension of supervisory committee members.

As part of the 2013 consultation process with members of the credit union industry, the NCUA received comments suggesting that the FCU Bylaws be revised to provide specific guidance to FCUs interested in establishing director emeritus and associate director positions. Commenters suggested that greater flexibility in regard to these types of arrangements will enable an FCU to better plan for vacancies in board positions and retirements among current directors. They also recommended enhanced flexibility regarding the composition of the board and reorganization of board duties. Moreover, commenters requested greater flexibility with regard to options concerning attendance by directors at meetings, and criteria and procedures by which incumbent directors may be removed. Commenters to the ANPR reiterated the need for additional guidance on associate director positions.

In the proposed rule, the Board noted its agreement that an FCU should have the ability to establish, as a matter of FCU board policy, the position of director emeritus for former directors who faithfully fulfilled their responsibilities as members of the board for at least a specified minimum number of years. Accordingly, the proposed rule included a new section 10 that an FCU may adopt to create such positions. It also included specific staff commentary to this section that stated that the decision to establish a director emeritus position, as well as any selection of individuals to become directors emeriti, is solely within the discretion of the FCU's board. The staff commentary clarified that a director emeritus may attend and participate in board meetings, but may not vote on any matter before the board or exercise any official duties of a director.

To provide additional guidance to FCUs on associate director positions, the proposed rule clarified, through staff commentary, that an FCU may establish associate director positions through board policy. The staff commentary noted that the purpose of these positions is to provide qualified individuals with an opportunity to gain exposure to board meetings and discussions, but without formal director responsibility or the right to vote. As with the director emeritus position, the decision to establish an associate

director position, as well as the selection of the individual(s) to become associate directors, is solely within the discretion of the FCU's board. Commenters to this aspect of the proposed rule overwhelmingly favored these changes to Article VI of the FCU Bylaws. As a result, the Board is adopting these aspects of the proposed rule without amendment. The Board notes that one commenter suggested that the NCUA offer free training and volunteer education sessions for board members and associate directors. The Board notes that it has published resources for volunteer board members, including a description of the duties of directors.[17]

To provide FCUs with greater flexibility to address concerns regarding director and credit committee member attendance at monthly meetings, the proposed rule amended the option for FCUs to remove a director or a credit committee member for failure to attend regular meetings. The current FCU Bylaws language allows FCUs to remove a director or credit committee member who has missed meetings for 3 consecutive months or 4 meetings in a calendar year. Under the proposed rule, an FCU could remove a director or credit committee member for missing meetings for 3 consecutive months or for missing 4 meetings within any 12 consecutive months. The Board believed this change would provide FCUs with greater flexibility to address situations in which a director or credit committee member misses a substantial number of meetings but would otherwise not qualify for removal because the missed meetings do not all occur within the same calendar year. In addition, the proposed rule added language to allow FCUs to choose whether directors or credit committee members may be paid employees after such positions end. Commenters to this aspect of the proposed rule also favored these changes to Article VI of the FCU Bylaws. As a result, the Board is adopting this aspect of the proposed rule without amendment.

The proposed rule also added language that clarifies the existing restriction on the number of employees and family members of employees who may simultaneously serve on the board. The NCUA has received numerous questions regarding this issue since the FCU Bylaws were first incorporated into the NCUA's regulations in 2007. The current bylaw language prohibits FCU employees, their family members, or a combination of FCU employees and their family members from constituting a majority of the board. The purpose of this restriction is to prevent conflicts of interest that may arise when a majority of the board has a personal or pecuniary interest in a matter currently being reviewed by the board.

The Board has historically interpreted this provision of the FCU Bylaws to prohibit any combination of FCU employees, their family members, or FCU employees and their family members from constituting a majority of the board. To provide FCUs with additional clarity, the proposed rule stated that the total number of current voting directors serving who fall into the following categories must not constitute a majority of the board: (1) Management officials plus assistant management officials plus other employees; (2) immediate family members or persons in the same household as the management officials, assistant management officials, and other employees; or (3) management officials plus assistant management officials plus other employees, plus immediate family members or persons in the same household as management officials, assistant management officials, and other employees. The Board believed that this clarification would provide additional guidance to FCUs on this restriction. Commenters to this aspect of the proposed rule favored these changes as providing additional clarity regarding the existing restriction on the number of employees and family members of employees who may simultaneously serve on the board. As a result, the Board is adopting this aspect of the proposed rule substantively as proposed.[18]

For FCUs that elect not to have a specifically appointed credit committee, the proposed rule added two new options to provide additional flexibility in addressing an applicant's request for review of a denied loan application. The FCU Act requires a board, at the request of the applicant, to review any application that has been denied by a loan officer.[19] The FCU Bylaws allow the board, in its discretion, to establish subcommittees for the purpose of reviewing, at the request of an applicant, loan applications that have been rejected. These subcommittees are comprised of three members that serve a regular term of two years and function as mid-level appeal committees for the review of denials. The board itself must, at the request of an applicant, continue to review all applications denied by any such subcommittee. These two new options allowed for FCUs to choose different ways to form the committee and select terms for the committee members.

Under the first new option, the board may elect to establish a subcommittee of three members and two alternates. The term of office of the subcommittee members may be for up to 3 years. Any number of lending professionals within the FCU may serve on the subcommittee, provided that no loan officer reviews any loan that the loan officer denied. At least 3 members of the subcommittee must review loan denials, none of whom have been a party to denying the loan. Under the second new option, the board may, by resolution, change the number of committee members to an odd number no less than 3 and no more than 7. The board must set the length of each subcommittee member's term upon appointment and stagger terms to prevent a complete turnover of subcommittee members. This option requires the board to file a copy of the resolution covering any increase or decrease in the number of subcommittee members with the official copy of the FCU's bylaws. A few commenters favored the inclusion of these two options to provide FCUs with additional flexibility in addressing an applicant's request for review of a denied loan application. As a result, the Board is adopting these options in the final rule without amendment.

One commenter suggested that the language permitting a board to take action and vote on resolutions without a meeting should occur outside of special meeting parameters. The Board is clarifying that this provision is not limited to special meetings and is for any action that has unanimous consent.

The proposed rule also added staff commentary that encouraged FCUs to form a board of directors that reflects the FCU's field of membership. Commenters to this aspect of the proposed rule objected that the Board should not mandate diversity on FCU boards. The Board notes that the staff commentary does not create any requirements for an FCU's board of directors. This policy encourages FCUs to consider all members in its leadership. The Board believes that credit unions should strive to have a board that reflects their membership to the greatest extent possible.

Finally, the proposed rule added staff commentary that encourages FCUs to notify members, through a website

[17] See Letter to Credit Unions 11–FCU–02, Duties of Federal Credit Union Boards of Directors (Feb. 2011).

[18] There is a minor wording change for clarification that does not change the substance of this provision.

[19] *See* 12 U.S.C. 1761c(b) (''If there is not a credit committee, a member shall have the right upon written request of review by the board of directors of a loan application which has been denied.'').

posting (if the credit union then maintains a website), whenever the FCU's board adopts a resolution that changes the size of the FCU's board of directors. An FCU that does not then maintain a website can post such a notice in a conspicuous place in the FCU's offices, such as at teller windows or on the FCU's front doors. Commenters to this aspect of the proposed rule argued that such a requirement would be unduly burdensome on credit unions. The Board does not believe that notifying members through existing online channels presents an undue burden on credit unions and is adopting this aspect of the proposed rule.

Article VII. Board Officers, Management Officials and Executive Committee

Article VII provides the requirements related to board officers, such as their election and their terms of office. It lists the duties of the chair, vice chair, financial officer, management officials, and secretary of the board. Article VII also explains the board powers regarding employees and the provisions for an executive committee and an investment committee.

The proposed rule made certain clarifications and improvements to the readability of the language in this Article. For example, this Article utilizes the term ''financial officer,'' and the NCUA has received comments that this term is confusing. The proposed rule, therefore, modified the definition of ''financial officer'' in Article XVIII to mean ''treasurer.'' The proposed rule also updated the language in section 8 to allow different options for addressing when directors or committee members may serve as paid employees of the credit union after their terms as directors and/or committee members have ended.

The proposed rule added more staff commentary under this Article, addressing procedural questions that arise in connection with specified board officer positions that may be held by directors, such as the president, vice president, and secretary of the board. The staff commentary clarified that officers hold their respective board officer positions for a term of one year, until the first board meeting following the next annual meeting of the members. At that board meeting, board officer positions are again filled. Each board officer holds his or her position until the election and qualification of his or her successors. Thus, a board officer who is re-elected to the position the officer is currently holding serves for another year. Where another director is chosen to fill the position, the director takes office effective as of the date of the election, assuming the director is qualified.

The proposed rule also added staff commentary to address questions relating to temporary appointments of board officers, succession, replacement of director positions that may have become vacant between election cycles, and notifying members about membership on FCU committees. The staff commentary noted that, in the absence of both the chair and vice chair, those directors who are present at a meeting may select from among themselves an individual director to act as temporary chair for that particular meeting. Actions taken by the board under the direction of the temporary chair have the same validity and effect as if taken under the direction of the chair or the vice chair, provided a quorum of the board, including the temporary chair, is present. There is no requirement for the board to ratify actions taken under the temporary chair at a subsequent meeting of the board where either the chair or vice chair are present.

One commenter requested additional clarity on the interaction between the FCU's board of directors and its supervisory committee. The commenter recommended clarifying that the supervisory committee is a committee of the board and that it must submit its audits to the FCU's board and the NCUA. The Board believes the FCU Act is clear that the supervisory committee must submit a report of its audit to the board of directors and that additional clarity in the FCU Bylaws is unnecessary.[20]

The Board did not receive many comments on this section, but the ones received were generally favorable. Accordingly, the Board is adopting these changes as proposed in the final rule.

Article VIII. Credit Committee or Loan Officers

This Article provides the requirements for the credit committee, if an FCU elects to have one. This Article also lists the requirements for loan officers if an FCU does not have a credit committee. The proposed rule modernized the language of this Article and incorporated plain English writing principles. In addition, the proposed rule incorporated into the FCU Bylaws several NCUA Office of General Counsel opinion letters permitting FCUs to use automated systems to process, underwrite, and fund loans under certain conditions. Commenters to this aspect of the proposed rule favored this approach. One commenter, however, objected to the requirement that if an FCU uses an automated lending system, a credit committee or loan officer must review a sample of the loans for fraud. The Board believes this is an important safety and soundness function. In addition, the Board notes that this requirement will present only a minimal amount of burden, as it requires reviewing only a sample of approved loans. As a result, the Board is adopting these changes in the final rule without amendment. The Board also notes that in addition to ensuring the automated system is functioning within the lending policies the board has established, the credit committee or loan officer should ensure the automated system is compliant with all applicable laws.

Article IX. Supervisory Committee

Article IX provides the requirements for the supervisory committee, such as the appointment and membership of the committee, its duties, and the required officers. This Article also lists the powers of the supervisory committee. The FCU Act requires each FCU to have a supervisory committee. The supervisory committee must conduct or arrange for annual audits and verify members' deposits at least once every two years.[21] The NCUA has assigned additional duties to FCUs' supervisory committees, including having them serve as an initial forum for hearing FCU members' complaints.[22]

The proposed rule modernized the language of this Article. In addition, the proposed rule deleted paragraph (c) of section 3, as it is duplicative of paragraph (b). During the 2013 consultation process, commenters requested a number of changes to this Article to allow for greater flexibility. For example, one commenter requested that the Board amend section 3 to allow an FCU to call a special meeting 30 calendar days after all director positions become vacant, rather than the 7 to 14 calendar days currently set out in the FCU Bylaws. Another commenter requested that the Board amend section 6 to limit the actions members could take at a special meeting called to consider allegations of unsafe or illegal activity by an FCU director or credit committee member. These requested changes require statutory amendments to the FCU Act, so the proposed rule did not include any other substantive changes to this Article. One commenter asked that FCUs be permitted to add alternative supervisory committee

[20] 12 U.S.C. 1761d.

[21] 12 U.S.C. 1761d.

[22] *See* 12 CFR 715.3.

members. The Board is unaware of an existing problem with supervisory committee members requiring alternatives and does not believe alternative members are necessary at this time. The Board did not receive any other comments regarding these specific changes.[23] As a result, the Board is adopting these changes as proposed.

Article X. Organization Meeting

Some commenters have noted that the provisions in Article X, which govern the initial organizational meeting by which the FCU is established, effectively become obsolete and irrelevant after that initial organizational meeting. Although the Board acknowledges that this Article serves a limited purpose, it does not agree that the Article is necessarily irrelevant after the FCU has been established. Nevertheless, the proposed rule included an option whereby FCUs may eliminate the Article after five years of operation. For FCUs electing this option, Article X will become ''reserved'' and its language inoperative. One commenter suggested eliminating this article for all established FCUs. The Board does not believe retaining the article for five years presents any burden to FCUs. Therefore, the Board is adopting this change as proposed.

Article XI. Loans and Lines of Credit to Members

Article XI lists loan purposes for members and addresses member delinquencies on loans. The proposed rule slightly edited the language of this Article for readability, but did not make other substantive changes. The Board received no comments on this Article and is adopting this change as proposed.

Article XII. Dividends

Article XII establishes the power of the board to declare dividends. The proposed rule slightly edited the language of this Article for readability. There were no other substantive changes. The Board received no comments on this Article is adopting this change as proposed.

Article XIII. Reserved

The proposed rule did not make changes to this Article. The Board did not receive any comments regarding this Article and will not make any changes in the final rule.

Article XIV. Expulsion and Withdrawal

Article XIV addresses the expulsion and withdrawal procedures for members. The Board notes that expulsion from membership is a very serious remedy that may be accomplished only in accordance with the procedures set forth in the FCU Act. An FCU may expel a member only upon a two-thirds majority vote of the membership at a special meeting called for that purpose or by operation of a board-approved nonparticipation policy.[24] The FCU Act allows an FCU's board to adopt, by majority vote of a quorum of directors, and enforce a nonparticipation policy. If the FCU's board adopts such a policy, the FCU must provide written notice of the policy and its effective date to each member at least 30 calendar days prior to the policy's effective date. Each new member also must be provided a written notice of the policy prior to, or upon applying for, membership.

The proposed rule incorporated new staff commentary to this Article reiterating that the FCU Act provides only two methods for an FCU to expel a member and clarifies that only in-person voting is permitted in conjunction with a special meeting held for that purpose. This procedure gives the affected member an opportunity to present his or her case against expulsion and an opportunity to respond to the FCU's concerns. The staff commentary clarified that, short of expulsion, an FCU has a wide range of measures available to address abusive or disruptive members, and it specifically referenced Article XVI, Section 1 of the FCU Bylaws, which addresses situations when members use their accounts for unlawful purposes.

Many commenters recommended that the Board make the expulsion of a disruptive member easier to accomplish. Many commenters requested that the Board either amend the FCU Bylaws or include staff commentary interpreting the FCU Act to allow an FCU to expel a member for actions such as filing for bankruptcy, habitual default, or misconduct under the FCU's board-approved nonparticipation policy. Commenters responding to this aspect of the proposed rule almost unanimously objected to the Board's reading of the term ''nonparticipation'' in the proposed rule, which the commenters perceived as unreasonably restrictive and narrow. These commenters argued that the Board has broad discretion to interpret the term ''nonparticipation'' to include certain violent, disruptive, abusive, or belligerent conduct. The Board disagrees. The Board believes the most reasonable interpretation of the term ''nonparticipation'' is a person not being involved with or participating in something. The Board believes interpreting the term to include other disruptive conduct goes beyond the plain meaning of the term. Accordingly, the Board will not adopt a more expansive definition of ''nonparticipation'' in the final rule. The Board is adopting Article XIV and related staff commentary as proposed.

One commenter asked what information the FCU must provide in the special meeting to expel a member. The Board notes that the FCU Bylaws do not require any specific information to be provided. It provides only that the member be afforded an opportunity to be heard, in addition to a two-thirds vote, at a special meeting.

As the Board notes in the discussion of changes to Article II above, FCUs have the option to address violent, belligerent, disruptive, and abusive members by limiting their access to products and services, provided that there is a logical relationship between the objectionable conduct and the services to be suspended, and that the member has received adequate notice of the FCU's limitation of services policy.[25] Neither the FCU Act nor the NCUA's regulations prohibit an FCU, as it deems appropriate, from denying most credit union services, such as ATM services, credit cards, loans, share draft privileges, preauthorized transfers, or access to credit union facilities to a member that has engaged in some objectionable conduct that has caused a loss to the FCU or that threatens the safety of credit union staff, facilities, or members. In fact, the Board believes that, without question, certain actions warrant immediate limitations of service or access to credit union facilities, such as violence against other credit union members or credit union staff in the credit union facility or the surrounding property. Consequently, even though the FCU Act does not permit an FCU to expel a member immediately under these circumstances, an FCU may still take immediate action to address situations in which a member is disruptive or poses a threat to the credit union, its employees, or other members in the FCU or its surrounding property.

Furthermore, as noted in the discussion of changes to Article II above, neither the FCU Act nor the NCUA's regulations prohibit an FCU from using lawful means to immediately

[23] The Board received a number of helpful recommendations from one commenter that primarily represents credit unions. Unfortunately, those recommendations are outside the scope of the proposed rule. However, the Board will keep these recommendations on file and may consider them in a future rulemaking.

[24] 12 U.S.C. 1764.

[25] See OGC Op. No. 08–0431 (Aug. 12, 2008).

protect the credit union, credit union members, and staff, such as contacting local law enforcement, seeking a restraining order, or pursuing other forms of legal redress. The Board fully expects that an FCU would use these lawful means in addition to its limitation of services policy to proactively limit security threats or financial harm caused by violent, belligerent, disruptive, or abusive credit union members.

Article XV. Minors

This Article provides that minors are permitted to own shares and that the rights of minors to transact business with the FCU are governed by state law. The proposed rule slightly edited the language of this Article for readability, but there are no other substantive changes. Commenters did not raise issues with this aspect of the proposed rule. Consequently, the Board is adopting this aspect of the FCU Bylaws as proposed.

Article XVI. General

Article XVI addresses other general requirements, such as complying with other laws and regulations, confidentiality, and conflicts of interest. It also provides requirements related to records, indemnification, and the removal of directors and committee members.

During the 2013 consultation process with representatives of the credit union industry, the NCUA received comments regarding section 3, requesting a simplified procedure for confirmation by the membership of the suspension of a director or committee member by the supervisory committee. Commenters suggested that the confirmation of suspension be accomplished through balloting rather than a special meeting at which members must vote in person to accomplish the removal. The Board notes, in this respect, that these procedures are mandated by statute. The FCU Act requires that membership confirmation of supervisory committee suspension be accomplished only by majority vote of the members at a special meeting called for that purpose.[26] The proposed rule added staff commentary explaining these requirements.

The staff commentary also added new language regarding section 1 of this Article, which specifies that the FCU, its powers and duties, as well as the functions of its members, officers, and directors, are all strictly circumscribed by law and regulation. It notes that, insofar as section 1 is included in the FCU Bylaws, an FCU need not adopt a specific policy or requirement that members use credit union products or services for lawful purposes. Furthermore, it confirms that this bylaw provision supports an FCU's decision to impose limits on products and services available to any individual who is found to be using the FCU in furtherance of unlawful purposes. The Board is adopting these aspects of the proposed rule without amendment.

The proposed rule also amended section 6 to require FCUs with websites to post their bylaws on the website. The Board believed that adding this new requirement would ensure that members without access to an FCU's physical location where they can request a copy of the bylaws can still have access to the FCU's corporate governance documents. Some FCUs operate over a wide geographic area, employing shared branch networks and/or online banking as a way to provide fast and reliable services to their members. It may be difficult for members of these FCUs, particularly in rural areas, to travel to the nearest branch office to request a copy of the FCU's bylaws. Accordingly, the Board believes that, to the extent an FCU maintains a website, an FCU should post its current bylaws on that website to provide these members with immediate access.

Commenters overwhelmingly disapproved of this proposed change. One commenter went so far as to suggest that such a requirement would open up FCUs to unnecessary lawsuits. One commenter raised concerns with privacy and cybersecurity. This commenter suggested requiring that the FCU post a disclosure of the right to inspect all books of account and records, including a copy of the bylaws. One commenter stated that posting bylaws online may present a burden for smaller FCUs, even if those FCUs maintain an online presence. The Board disagrees. Allowing members to access the FCU's bylaws on its website provides a significant benefit to members and assists them in fulfilling their oversight role as member-owners of the FCU. The Board also believes that the compliance burden for FCUs will be minimal. On balance, commenters have not presented persuasive arguments why the NCUA should not require an FCU to post its bylaws on its website (if it maintains a website). Accordingly, the Board is adopting this aspect of the proposed rule without amendment. One commenter requested clarification on whether the FCU could post a copy of the bylaws within a password-protected, members-only access area of the website. The Board is clarifying that the bylaws can be posted in a password-protected, members-only access area of a FCU's website.

Finally, the proposed rule added a new section 9 which clarified the use of singular and plural terms and pronouns in the FCU Bylaws. The NCUA has received questions in the past in this regard. New section 9 clarified that, unless the context requires otherwise, words denoting the singular may be construed as denoting the plural, words of the plural may be construed as denoting the singular, and words of one gender may be construed as denoting another gender, as appropriate. The Board received no comments on this Article is adopting this aspect of the proposed rule without amendment.

Article XVII. Amendments of Bylaws and Charter

Article XVII provides the requirements for amending an FCU's bylaws or charter. The proposed rule modernized the language of this Article and incorporated plain English writing principles. In addition, in conjunction with the proposed rule's requirement for an FCU to post its current bylaws on its website (if the FCU maintains a website), the proposed rule required an FCU to update the posting if it amends its bylaws. One commenter requested a technical change to clarify that it is the board of directors that vote on bylaw amendments and not members. The Board has made this technical edit and is adopting the remainder of this provision as proposed in the final rule.

Article XVIII. Definitions

Article XVIII lists the definitions applicable to all of the FCU Bylaws. The proposed rule made a few technical changes to this Article and added several new definitions, which the Board believed were useful for purposes of clarification. These included new definitions for ''Agency,'' ''Charter,'' ''Field of Membership,'' ''Loans,'' and ''Membership Officer.'' In addition, the definitions include a listing of approved board officers. This article also included the term ''Member,'' the definition of which identifies the characteristics and actions an individual must take to become a qualified member. Finally, the definitions included the term ''Management,'' which is defined to include the Board, Financial Officer, and Management Official. One commenter suggested several additional definitions, including electronic mail, mail, settlor, board associates, natural person, and alternate members to the supervisory committee. The Board does not believe these terms are sufficiently ambiguous to warrant definitions at this

[26] 12 U.S.C. 1761d.

time. The Board is adopting this provision without amendment in the final rule.

V. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rulemaking, an agency prepare a final regulatory flexibility analysis that describes the impact of a final rule on small entities.[27] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The new bylaw amendments are simply a resource that is available to all FCUs, regardless of size. Except for newly chartered FCUs, there is nothing prescriptive or mandatory about this final rule. All FCUs are free to adopt the new bylaws, retain their current bylaws, or adopt some combination of the bylaws and their current bylaws. If an FCU elects to adopt the new version, that FCU only needs to adopt a board resolution to that effect. Accordingly, the NCUA hereby certifies this final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

In accordance with the PRA, the information collection requirements included in this final rule has been submitted to OMB for approval under control number 3133–0052.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This rule will not have a 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. This final rule will apply to FCUs only. Accordingly, the NCUA has determined this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

E. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) generally provides for congressional review of agency rules.[28] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act (APA).[29] An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a ''major rule.''[30] The NCUA does not believe this rule is a ''major rule'' within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA submitted this final rule to the Office of Management and Budget (OMB) for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. OMB determined the final rule was not a major rule. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects

12 CFR Part 701

Credit, Credit Unions, Federal Credit Union Bylaws

12 CFR Part 746

Administrative practice and procedure, Claims, Credit Unions, Investigations.

[28] 5 U.S.C. 801–804.

[29] 5 U.S.C. 551.

[30] 5 U.S.C. 804(2).

By the National Credit Union Administration Board on September 19, 2019.

Gerard S. Poliquin,

Secretary of the Board.

For the reasons stated above, the NCUA is amending 12 CFR parts 701 and 746 as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. Appendix A to part 701 is revised to read as follows:

Appendix A to Part 701—Federal Credit Union Bylaws

Introduction

Effective Date

The National Credit Union Administration (NCUA) Board first incorporated the Federal Credit Union (FCU) Bylaws as Appendix A to Part 701 of the NCUA's regulations on November 30, 2007. FCUs may retain previously adopted versions of the FCU Bylaws including the November 30, 2007 version. Unless an FCU has adopted bylaws before January 2, 2020, it must adopt these revised bylaws.

Adoption of All or Part of These Bylaws

Although FCUs may retain any previously approved version of the FCU Bylaws, the NCUA Board encourages FCUs to adopt the revised bylaws because it believes they provide greater clarity and flexibility for credit unions and their officials and members. FCUs may also adopt portions of the revised bylaws and retain the remainder of previously approved bylaws, but the NCUA Board cautions FCUs to be extremely careful in making the decision. FCUs must be careful because they run the risk of having inconsistent or conflicting provisions because of the various options the revised bylaws provide, as well as other revisions in the text.

Bylaw Amendments

1. The FCU Bylaws contain provisions allowing FCU boards to select from an option or range of options or to fill in a blank. The ''fill-in-the-blank'' provisions are changes to the FCU's bylaws. Thus, they require a two-thirds vote of the FCU's board of directors. As long as the board selects from the permissible options, the FCU does not need to submit the change to the NCUA for its approval.

2. FCUs continue to have the flexibility to request bylaw amendments. The NCUA must approve all bylaw amendments except for the

provisions noted above. In the past, the NCUA has published a ''Standard Bylaw Amendments'' booklet containing a list of ''standard'' preapproved and optional amendments not included in the FCU Bylaws. That document remains on the NCUA's website for historical purposes. However, FCUs may not adopt amendments from the ''Standard Bylaw Amendments'' booklet, as the FCU Bylaws include sufficient flexibility to make a separate list of standard bylaw amendments unnecessary. Thus, the NCUA no longer makes a distinction between ''standard'' and ''nonstandard'' bylaw amendments. Consequently, the NCUA considers any change to the FCU Bylaws that is not a ''fill-in-the-blank'' provision or part of a range of options to be a bylaw amendment that requires the NCUA approval.

3. The procedure for approval of a bylaw amendment is as follows:

a. The FCU must submit its request to the Office of Credit Union Resources and Expansion (CURE).

b. The request must include:

1. The section of the FCU Bylaws to be amended;

2. The reason for, or purpose of, the amendment;

3. An explanation of why the amendment is desirable and what it will accomplish for the federal credit union; and

4. The specific wording of the proposed amendment.

c. CURE will advise the credit union within 60 days if it approved the proposed amendment after its review and, if necessary, consultation with the NCUA's Office of General Counsel. If CURE does not reach a decision within 60 days, the proposed amendment is considered to be denied unless CURE requests an extension of time from the federal credit union and the credit union agrees to such a request. If CURE reaches an adverse decision or CURE fails to render a decision within the agreed timeframe, the credit union may appeal that decision in accordance with the procedures set out in subpart B to part 746 of this chapter. If CURE fails to render a timely decision, within thirty days it must provide the FCU with a written notice of its failure to render a timely decision and a statement of any concerns that CURE has with the bylaw amendment request.

4. Federal credit unions considering an amendment may find it useful to review the bylaws section of the agency website, which includes the NCUA's Office of General Counsel opinions on proposed bylaw amendments.[1] Opinions issued after April 2006 include the language of the approved amendment.

Because each decision by CURE is made on a case-by-case basis that depends on the unique facts and circumstances applicable to each FCU, the credit union must submit a proposed amendment to the NCUA for review under the procedure listed above, even if the NCUA previously approved an identical or similar amendment for another credit union.

[1] *http://www.ncua.gov/Legal/Pages/BylawByYear.aspx.*

The Nature of the FCU Bylaws

1. The Federal Credit Union Act requires the NCUA Board to prepare bylaws for federal credit unions.[2] The FCU Bylaws address a broad range of matters concerning a credit union's organization and governance, the relationship of the credit union to its members, and the procedures and rules a credit union follows.

The FCU Bylaws supplement the broad provisions of:

- A federal credit union's charter, which establishes the existence of a federal credit union;
- The Federal Credit Union Act, which establishes the powers of federal credit unions; and
- The NCUA's regulations, which implement the Federal Credit Union Act.

As a legal matter, a federal credit union's bylaws must conform to, and cannot be inconsistent with, any provision of its charter, the Federal Credit Union Act, the NCUA's regulations, or other laws or regulations applicable to the credit union's operations.

2. The NCUA expects federal credit unions and their members will make every effort to resolve bylaw disputes using the credit union's internal member complaint resolution process. If a bylaw dispute cannot be resolved internally, credit union officials or members should contact the regional office with oversight over the credit union for assistance in resolving the dispute.

3. The NCUA has discretion to take administrative actions when a credit union is not in compliance with its bylaws. If a potential violation is identified, the NCUA will carefully consider all of the facts and circumstances in deciding whether to take enforcement action. The NCUA will not generally take action against minor or technical violations, but emphasizes that it retains discretion to enforce the FCU Bylaws in appropriate cases, such as safety and soundness concerns or threats to fundamental, material credit union member rights.

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[2] 12 U.S.C. 1758.

Bylaws

Federal Credit Union, Charter No._____

(A corporation chartered under the laws of the United States)

Article I. Name—Purposes

Section 1. *Name.* The name of this credit union is as stated in Section 1 of its charter (approved organization certificate).

Section 2. *Purposes.* This credit union is a member-owned, democratically operated, not-for-profit organization managed by a volunteer board of directors. Its stated mission is to meet the credit and savings needs of members, especially individuals of modest means. The purpose of this credit union is to promote thrift among its members by affording them an opportunity to accumulate their savings and to create a source of credit for provident or productive purposes. *The credit union may add business as one of its purposes by placing a comma after ''provident'' and inserting ''business.''*

Article II. Qualifications for Membership

Section 1. *Field of membership.* The field of membership of this credit union is limited to that stated in Section 5 of its charter.

Section 2. *Membership application procedures.* Persons eligible for membership under Section 5 of the charter must sign a membership application on approved forms. The applicant becomes a member upon approval of the application by a membership officer, after subscription to at least one share, payment of the initial installment, and payment of a uniform entrance fee if required by the board. If the membership officer denies a person's membership application, the credit union must explain the reasons for the denial in writing upon written request.

Section 3. *Maintenance of membership share required.* A member who withdraws all shareholdings or fails to comply with the time requirements for restoring his or her account balance to par value in Article III, Section 3, ceases to be a member. By resolution, the board may require persons readmitted to membership to pay another entrance fee.

Section 4. *Continuation of membership.*

(a) *Once a member, always a member.* Once a member, always a member until the person or organization chooses to withdraw its membership or is expelled under the Act and Article XIV of these bylaws.

(b) *Limitation of services.* Notwithstanding any provision of these bylaws, the board of directors may adopt a policy that limits credit union services to any member not in good standing.

Section 5. *Member in good standing.* A member in good standing retains all their rights and privileges in the credit union. A member in good standing is a member who maintains at least the minimum share set forth in Article III, Section 1 of these bylaws; who is not significantly delinquent on any credit union loan; who has not had any account with this credit union closed due to abuse or negligent behavior; who has not caused a financial loss to this credit union; and who has not engaged in violent, belligerent, disruptive, or abusive activities, such as:

(1) Violence, intimidation, threats, harassment, or physical or verbal abuse of

duly elected or appointed officials or employees of the credit union, members, or agents of the credit union. This includes actions while on credit union premises and through use of telephone, mail, email or other electronic method.

(2) Causes or threatens damage to credit union property.

(3) Unauthorized use or access of credit union property.

(4) Knowingly disseminating incorrect, misleading, confidential, or proprietary information regarding the credit union.

(5) Any actions that may cause material risk or financial harm to the credit union.

A credit union may limit services for violent, belligerent, disruptive, or abusive activities only if there is a logical relationship between the objectionable activities and the services to be suspended. In the event of a suspension of service, the member will be notified of what accounts or services have been discontinued.

Subject to Article XIV of these bylaws and any applicable limitation of services policy approved by the board, members not in good standing retain their right to attend, participate, and vote at the annual and special meetings of the members and maintain a share account.

Article III. Shares of Members

Section 1. *Par value.* The par value of each share is $_____. Subscriptions to shares are payable at the time of subscription, or in installments of at least $_____ per month.

FCUs may establish differing par values for different classes of members or types of accounts (such as students, minors, or non-natural persons), provided this action does not violate any federal, state or local antidiscrimination laws. Below are some options an FCU can choose. The FCU may also establish differing par values for other classes of members not listed below. List all established par values in Section 1.

____ Option. *Par value for minors.* The par value of each share for members _____ years of age or younger is $_____. Subscriptions to shares are payable at the time of subscription, or in installments of at least $_____ per month.

____ Option. *Par value for students.* The par value of each share for students is $_____. Subscriptions to shares are payable at the time of subscription, or in installments of at least $_____ per month.

A student is defined as anyone enrolled ☐ full-time or ☐ part-time in _____.

____ Option. *Par value for non-natural persons.* The par value of each share for non-natural persons is $_____. Subscriptions to shares are payable at the time of subscription, or in installments of at least $_____ per month.

To establish membership, the member must subscribe to one par value of share. The share does not have to be in a regular share account. The board may choose the best account for the characteristics of its membership.

____ *Option A—Regular Share account required to establish membership*

To establish membership in the credit union, the member must subscribe to one share in a regular share account.

____ *Option B—_____account required to establish membership.*

To established members in the credit union, the member must subscribe to one share in the stated account or accounts (note the account(s) in the blank above).

Section 2. *Cap on shares held by one person.* The board may establish, by resolution, the maximum amount of shares that any one member may hold.

Section 3. *Time periods for payment and maintenance of membership share.* The credit union will terminate from membership a member who:

- Fails to complete payment of one share within _____ of admission to membership, or
- Fails to complete payment of one share within _____ from the increase in the par value of shares, or
- Reduces the share balance below the par value of one share and does not increase the balance to at least the par value of one share within _____ of the reduction.

Section 4. *Transferability.* Members may transfer shares to another member in any form approved by the board. Shares that accrue credits for unpaid dividends retain those credits when transferred.

Section 5. *Withdrawals.* Members may withdraw money paid in on shares provided that:

(a) The board has the right, at any time, to require members, or a subset of members, to give up to 60 days written notice of intention to withdraw all or part of the amounts they paid in.

(b) [Reserved].

(c) A member delinquent on any loan or obligation to the credit union may not withdraw their shares below the delinquent amount without the written approval of the credit committee or loan officer. This withdrawal restriction also applies if the member is a comaker, endorser, or guarantor of a delinquent loan. Coverage of overdrafts under an overdraft protection policy does not constitute delinquency for purposes of this paragraph. Shares issued in an irrevocable trust as provided in Section 6 of this article are not subject to withdrawal restrictions except as stated in the trust agreement.

(d) The share account of a deceased member (other than one held in joint tenancy with another member) may be continued until the close of the dividend period in which the administration of the deceased's estate is completed.

(e) The board can impose a fee for excessive share withdrawals from regular share accounts. By resolution, the board can set the number of withdrawals not subject to a fee and the amount of the fee subject to regulations relevant to the advertising and disclosure of terms and conditions on member accounts.

Section 6. *Trusts.* Shares may be issued in a revocable or irrevocable trust, subject to the following:

Shares issued in a revocable trust—the settlor must be a member of this credit union in his or her own right.

Shares issued in an irrevocable trust—either the settlor or the beneficiary must be a member of this credit union.

Both a revocable and irrevocable trust must state the name of the beneficiary. A trust may be a member of the credit union as an entity if all parties to the trust, including all settlors, beneficiaries and trustees, are within the credit union's field of membership.

Shares issued through a pension plan authorized by the rules and regulations will be treated as an irrevocable trust unless otherwise indicated in the rules and regulations.

Section 7. *Joint accounts and membership requirements.* Select one option and check the box corresponding to that option.

____ Option A—Separate account not required to establish membership.

Owners of a joint account may both be members of the credit union without opening separate accounts. For joint membership, both owners are required to fulfill all of the membership requirements including each member purchasing and maintaining at least one share in the account and filling out the membership card.

____ Option B—Separate account required to establish membership.

Each member must purchase and maintain at least one share in a share account that names the member as the sole or primary owner. Being named as a joint owner of a joint account is not sufficient to establish membership.

Article IV. Meetings of Members

Section 1. *Annual meeting.* The board must hold the annual meeting of the members [insert time for annual meeting, for example, ''during the month of March/on the third Saturday of April/no later than March 31''], in the county in which any office of the credit union is located or within a radius of 100 miles of an office, at the time and place as the board determines and announces in the notice of the annual meeting. This credit union may permit virtual attendance and participation in the annual meeting, provided that an in-person meeting complying with the geographic requirements of this paragraph is also held.

Section 2. *Notice of meetings required.* a. The secretary must give written notice to each member at least 30 but no more than 75 days before the date of any annual meeting. The secretary must give written notice to each member at least 7 days before the date of any special meeting of the members and at least 45 but no more than 90 days before the date of any meeting to vote on a merger with another credit union. The secretary may deliver the notice in person, by mail to the member's address, or, for members who have opted to receive statements and notices electronically, by electronic mail. The secretary must give notice of the annual meeting by posting the notice in a conspicuous place in the office of this credit union where members may read it at least 30 days before the meeting. The secretary must also prominently display the notice on the credit union's website if such credit union maintains a website.

b. All special meeting notices must state the purpose of the meeting. The officials and members may only transact business related to the stated purpose at the meeting.

Section 3. *Special meetings.* a. The board chair, the board of directors by majority vote, or the supervisory committee as provided in

these bylaws may call a special meeting of the members. The chair must call and hold a special meeting within 30 days of the receipt of a written request from 25 members or 5% of the members as of the date of the request, whichever number is larger. However, a request of no more than 750 members may be required to call a special meeting.

b. The credit union may hold a special meeting at any location permitted for the annual meeting.

Section 4. *Items of business for annual meeting and rules of order for annual and special meetings.* The suggested order of business at annual meetings of members is—

(a) Ascertain that a quorum is present.

(b) Reading and approval or correction of the minutes of the last meeting.

(c) Report of directors, if there is one. For credit unions participating in the Community Development Revolving Loan Program, the directors must report on the credit union's progress on providing needed community services, if required by NCUA Regulations.

(d) Report of the financial officer or the chief management official.

(e) Report of the credit committee, if there is one.

(f) Report of the supervisory committee, as required by Section 115 of the Act.

(g) Unfinished business.

(h) New business other than elections.

(i) Elections, as required by Section 111 of the Act.

(j) Adjournment.

(k) To the extent consistent with these bylaws, the board will conduct all meetings of the members according to _____. The order of business for the annual meeting may vary from the suggested order, provided it includes all required items and complies with the rules of procedure adopted by the credit union.

The credit union must fill in the blank with one of the following authorities, noting the edition to be used: Democratic Rules of Order, The Modern Rules of Order, Robert's Rules of Order, or Sturgis' Standard Code of Parliamentary Procedure.

Section 5. *Quorum.* Except as otherwise provided, 15 members constitute a quorum at annual or special meetings. If a quorum is not present, the board may adjourn to a date at least 7 but not more than 14 days thereafter. The members present at any adjourned meeting will constitute a quorum, regardless of the number of members present. The board must give the same notice for the adjourned meeting as prescribed in Section 2 of this article for the original meeting, except that they must give notice at least 5 days before the date of the meeting fixed in the adjournment.

Article V. Elections

The Credit Union must select one of the four voting options. The board may print the credit union's bylaws with the option selected or retain this copy and check the box of the option selected. All options continue with Section 3 of this article.

Option A1—In-Person Elections; Nominating Committee and Nominations From Floor

Section 1. *Nomination procedures.* At least 30 days before each annual meeting, the chair will appoint a nominating committee of three or more members. The nominating committee will nominate at least one member for each vacancy, including any unexpired term vacancy, for which elections are being held, and determine that the members nominated are agreeable to the placing of their names in nomination and will accept office if elected. The nominating committee must widely publicize the call for nominations to all members by any medium and interview each member that meets any qualifications established by the nominating committee.

Section 2. *Election procedures.* After placing the nominations of the nominating committee before the members, the chair calls for nominations from the floor. When nominations are closed, the chair appoints election tellers. The election tellers distribute the ballots, collect the ballots and tally the votes, and the chair announces the results. Except when there is only one nominee for each open office, all elections are by ballot and determined by the plurality of vote. If there is only one nominee for each open office, the chair may take a voice vote or declare the election of each nominee by general consent or acclamation.

Option A2—In-Person Elections; Nominating Committee and Nominations by Petition

Section 1. *Nomination procedures.* a. At least 120 days before each annual meeting the chair will appoint a nominating committee of three or more members. The nominating committee will nominate at least one member for each vacancy, including any unexpired term vacancy, for which elections are being held, and determine that the members nominated are agreeable to the placing of their names in nomination and will accept office if elected. The nominating committee must widely publicize the call for nominations to all members by any medium and interview each member that meets any qualifications established by the nominating committee.

b. At least 90 days before the annual meeting, the nominating committee files its nominations with the secretary of the credit union. At least 75 days before the annual meeting, the secretary notifies, in writing, all members eligible to vote that they may make nominations for vacancies by petition signed by 1% of the members with a minimum of 20 and a maximum of 500. The secretary may use electronic mail to notify members who have opted to receive notices or statements electronically.

c. The written notice must specify that the credit union will not conduct the election by ballot and there will be no nominations from the floor when the number of nominees equals the number of open positions.

d. The notice will include, in a form approved by the board of directors, a brief statement of qualifications and biographical data for each nominee submitted by the nominating committee. Each nominee by petition must submit a similar statement of qualifications and biographical data with the petition.

e. The written notice must state the closing date for receiving nominations by petition. At least 40 days before the annual meeting, nominee(s) must file the nomination petition with the secretary of the credit union. To be effective, nominee(s) must include a signed certificate with the nomination petition stating that they are agreeable to nomination and will serve if elected to office.

f. At least 35 days before the annual meeting, the secretary will post the nominations by petition along with those of the nominating committee in a conspicuous place in each credit union office and on the credit union's website (if the credit union maintains a website).

Section 2. *Election procedures.* a. The secretary must place all persons nominated by either the nominating committee or by petition before the members. When nominations are closed, the chair appoints the election tellers. The election tellers distribute the ballots, collect the ballots, and tally the votes, and the chair announces the results. Except when there is only one nominee for each open office, all elections are by ballot and determined by the plurality of vote.

b. There are no nominations from the floor if there are sufficient nominations by the nominating committee or by petition to provide at least one nominee for each open position. If there are nominations from the floor and they result in more nominees than open positions, the chair will close nominations, and appoint election tellers. The election tellers distribute the ballots, collect the ballots and tally the votes, and the chair announces the results. If there is only one nominee for each open office, the chair may take a voice vote or declare the election of each nominee by general consent or acclamation.

Option A3—Election by Ballot Boxes or Voting Machine; Nominating Committee and Nomination by Petition

Section 1. *Nomination procedures.* a. At least 120 days before each annual meeting, the chair will appoint a nominating committee of three or more members. The nominating committee will nominate at least one member for each vacancy, including any unexpired term vacancy, for which elections are being held, and determine that the members nominated are agreeable to the placing of their names in nomination and will accept office if elected. The nominating committee must widely publicize the call for nominations to all members by any medium and interview each member that meets any qualifications established by the nominating committee.

b. At least 90 days before the annual meeting, the nominating committee files its nominations with the secretary of the credit union. At least 75 days before the annual meeting, the secretary notifies, in writing, all members eligible to vote that they may make nominations for vacancies by petition signed by 1% of the members with a minimum of 20 and a maximum of 500. The secretary may use electronic mail to notify members who have opted to receive notices or statements electronically.

c. The written notice must specify that the credit union will not conduct the election by ballot and there will be no nominations from the floor when the number of nominees equals the number of open positions.

d. The notice will include, in a form approved by the board of directors, a brief statement of qualifications and biographical data for each nominee submitted by the nominating committee. Each nominee by petition must submit a similar statement of qualifications and biographical data with the petition.

e. The written notice must state the closing date for receiving nominations by petition. At least 40 days before the annual meeting, nominee(s) must file the nomination petition with the secretary of the credit union. To be effective, nominee(s) must include a signed certificate with the nomination petition stating that they are agreeable to nomination and will serve if elected to office.

f. At least 35 days before the annual meeting, the secretary will post the nominations by petition along with those of the nominating committee in a conspicuous place in each credit union office and on the credit union's website (if the credit union maintains a website).

Section 2. *Election procedures.* The plurality of the vote determines all elections. The election is conducted by ballot boxes or voting machines, subject to the following conditions:

(a) The board of directors will appoint the election tellers;

(b) At least 10 days before the annual meeting, the secretary will direct the preparation and placement of ballot boxes, printed ballots, or voting machines if there are sufficient nominations made by the nominating committee or by petition to provide more nominees than open positions. The secretary will place the boxes or voting machines in conspicuous locations as determined by the board of directors. The secretary will post the names of the candidates near the boxes or voting machines. The posting will include a brief statement of the candidates' qualifications and biographical data in a form approved by the board of directors;

(c) The members have 24 hours to vote at conspicuous locations as the board determines. After 24 hours, election tellers will open the ballot boxes or voting machines, tally the vote, place the tally in the ballot boxes, and reseal the ballot boxes. The election tellers are responsible at all times for the ballot boxes or voting machines and the integrity of the vote. The election tellers will keep a record of all persons voting and must assure themselves that each person voting is entitled to vote; and

(d) The election tellers will take the ballot boxes to the annual meeting and place them in conspicuous locations with the names of the candidates posted near them. At the annual meeting, the election tellers will distribute printed ballots to those in attendance who have not voted. Members will deposit their votes in the ballot boxes placed by the election tellers. After giving the members an opportunity to vote at the annual meeting, the chair will close balloting. The election tellers will open the ballot boxes, tally the vote, and add the vote to the previous count. The chair will then announce the result of the vote.

Option A4—Election by Electronic Device (Including But Not Limited to Telephone and Electronic Mail) or Mail Ballot; Nominating Committee and Nominations by Petition

Section 1. *Nomination procedures.* a. At least 120 days before each annual meeting, the chair will appoint a nominating committee of three or more members. The nominating committee will nominate at least one member for each vacancy, including any unexpired term vacancy, for which elections are being held, and determine that the members nominated are agreeable to the placing of their names in nomination and will accept office if elected. The nominating committee must widely publicize the call for nominations to all members by any medium and interview each member that meets any qualifications established by the nominating committee.

b. At least 90 days before the annual meeting, the nominating committee files its nominations with the secretary of the credit union. At least 75 days before the annual meeting, the secretary notifies, in writing, all members eligible to vote that they may make nominations for vacancies by petition signed by 1% of the members with a minimum of 20 and a maximum of 500. The secretary may use electronic mail to notify members who have opted to receive notices or statements electronically.

c. The written notice must specify that the credit union will not conduct the election by ballot and there will be no nominations from the floor when the number of nominees equals the number of open positions.

d. The notice will include, in a form approved by the board of directors, a brief statement of qualifications and biographical data for each nominee submitted by the nominating committee. Each nominee by petition must submit a similar statement of qualifications and biographical data with the petition.

e. The written notice must state the closing date for receiving nominations by petition. At least 40 days before the annual meeting, nominee(s) must file the nomination petition with the secretary of the credit union. To be effective, nominee(s) must include a signed certificate with the nomination petition stating that they are agreeable to nomination and will serve if elected to office.

f. At least 35 days before the annual meeting, the secretary will post the nominations by petition along with those of the nominating committee in a conspicuous place in each credit union office and on the credit union's website (if the credit union maintains a website).

Section 2. *Election procedures.* The plurality of vote determines all elections. The election is conducted by electronic device or mail ballot, subject to the following conditions:

(a) The board of directors will appoint the election tellers;

(b) At least 30 days before the annual meeting, the secretary will ensure either a printed ballot or notice of ballot is mailed to all members eligible to vote if there are sufficient nominations made by the nominating committee or by petition to provide more nominees than open positions. The secretary may use electronic mail to provide the notice of ballot to members who have opted to receive notices or statements electronically;

(c) If the credit union conducts its elections electronically, the secretary will ensure the transmission of the following materials to each eligible voter using the following procedures:

(1) One notice of balloting stating the names of the candidates for the board of directors and the candidates for other separately identified offices or committees. The notice must include a brief statement of qualifications and biographical data for each candidate in a form approved by the board of directors. The secretary may use electronic mail to provide the notice of ballot to members who have opted to receive notices or statements electronically.

(2) One mail ballot that conforms to Section 2(d) of this article, as well as instructions for the electronic election procedure, including how to access and use the system and the timeframe for voting. The instructions will state that members without the requisite electronic device necessary to vote on the system may vote by submitting the enclosed mail ballot and specify the date the mail ballot must be received by the credit union. For members who have opted to receive notices or statements electronically, the mail ballot is not required and the secretary may use electronic mail to provide the instructions for the electronic election procedure.

(3) The election tellers verify, or cause to be verified, the name of the voter and their credit union account number as registered in the electronic balloting system. The election tellers will test the integrity of the balloting system at regular intervals during the election period.

(4) Election tellers must receive ballots no later than midnight, 5 calendar days before the annual meeting.

(5) Election tellers will tally the vote and the chair will make the result of the vote public at the annual meeting.

(6) If the electronic balloting system malfunctions, the board of directors may, in its discretion, hold the election by mail ballot only. The mail ballots must conform to Section 2(d) of this article and the secretary must mail them once more to all eligible members 30 days before the annual meeting. The board may make reasonable adjustments to the voting time frames above, or postpone the annual meeting when necessary, to complete the elections before the annual meeting.

(d) If the credit union conducts its election by mail ballot, the secretary will ensure the mailing of the following materials to each member using the following procedures:

(1) One ballot, clearly identified as the ballot, with the names of the candidates for the board of directors and the candidates for other separately identified offices or committees printed in random order. A brief statement of qualifications and biographical data for each candidate, in a form approved by the board of directors, will accompany the ballot;

(2) One ballot envelope, with instructions to place the completed ballot placed in the envelope and seal the envelope;

(3) One identification form the member completes that includes their name, address, signature and credit union account number;

(4) One mailing envelope that instructs the member to insert the sealed ballot envelope and the identification form. The mailing envelope must have prepaid postage and be preaddressed for return to the election tellers;

(5) When properly designed with features that preserve the secrecy of the ballot, the ballot, identification form, and prepaid postage and preaddressed return envelope may be combined;

(6) The election tellers will verify, or cause to be verified, the name and credit union account number of the voter as appearing on the identification form. The tellers will retain the verified identification form and the sealed ballot envelope until the vote count is completed. In the event of a questionable or challenged identification form, the tellers must retain the identification form and sealed ballot envelope together until the verification or challenge is resolved;

(7) Election tellers must receive ballots mailed to them no later than midnight 5 days before the date of the annual meeting;

(8) The election tellers will tally the vote. They will verify the result at the annual meeting and the chair will make the result of the vote public at the annual meeting.

All Options Continue Here

Section 3. *Order of nominations.* Nominations may be in the following order:

(a) Nominations for directors.

(b) Nominations for credit committee members, if applicable. Elections may be by separate ballots following the same order as the above nominations or, if preferred, may be by one ballot for all offices.

Section 4. *Proxy and agent voting.* Members cannot vote by proxy. A member other than a natural person may vote through an agent designated in writing for the purpose.

Section 5. *One vote per member.* Irrespective of the number of shares, no member has more than one vote.

Section 6. *Submission of information regarding credit union officials to NCUA.* The secretary must forward the names and business addresses of board members, board officers, executive committee, credit committee members, if applicable, and supervisory committee members to the Administration in accordance with the Act and regulations in the manner as required by the Administration.

Section 7. *Minimum age requirement.* Members must be at least ____ years of age by the date of the meeting (or for appointed offices, the date of appointment) in order to vote at meetings of the members, hold elective or appointive office, sign nominating petitions, or sign petitions requesting special meetings.

The credit union may select the following option:

Section 7. Members must be at least ____ years of age by the date of the meeting in order to vote at meetings of the members, sign nominating petitions, or sign petitions requesting special meetings. Members must be at least ____ years of age to hold elective or appointive office.

The Credit Union's board should adopt a resolution inserting an age no greater than 18, or the age of majority under the state law applicable to the credit union, in the blank space for voting, or not greater than 21 for holding elective or appointive office.

The Credit Union may select the absentee ballot provision in conjunction with the selected voting procedure. The board may do this by printing the credit union's bylaws with this provision or by retaining this copy and checking the box.

____ Section 8. *Absentee ballots.* The board of directors may authorize the use of absentee ballots in conjunction with the other procedures authorized in this article, subject to the following conditions:

(a) The board of directors will appoint the election tellers;

(b) If there are sufficient nominations made by the nominating committee or by petition to provide more than one nominee for each open position, at least 30 days before the annual meeting, the secretary will ensure a printed ballot is mailed to all members of the credit union who are eligible to vote and who have submitted a written or electronic request for an absentee ballot;

(c) The secretary will ensure the following materials are mailed to each eligible voter who submitted a written or electronic request for an absentee ballot:

(1) One ballot, clearly identified as the ballot, with the names of the candidates for the board of directors and the candidates for other separately identified offices or committees printed in random order. A brief statement of qualifications and biographical data for each candidate, in a form approved by the board of directors, will accompany the ballot;

(2) One ballot envelope clearly marked with instructions to place the completed ballot placed in the envelope and seal the envelope;

(3) One identification form the member completes that includes their name, address, signature and credit union account number;

(4) One mailing envelope that instructs the member to insert the sealed ballot envelope and the identification form. The mailing envelope must have prepaid postage and be preaddressed for return to the election tellers;

(5) When properly designed with features that preserve the secrecy of the ballot, the ballot, identification form, and prepaid postage and preaddressed return envelope may be combined;

(d) The election tellers will verify, or cause to be verified, the name and credit union account number of the voter as appearing on the identification form. The tellers will retain the verified identification and the sealed ballot envelope until the vote count is completed. In the event of a questionable or challenged identification form, the tellers must retain the identification form and the sealed ballot envelope together until the verification or challenge is resolved. If more than one voting procedure is used, the tellers must verify that no eligible voter voted more than one time;

(e) Election tellers must receive ballots mailed to them no later than midnight 5 days before the date of the annual meeting;

(f) Members or authorized personnel will deposit absentee ballots in the ballot boxes taken to the annual meeting or included in a precount in accordance with procedures specified in Article V, Section 2; and

(g) If a member has chosen to receive statements and notices electronically, the credit union may provide notices required in this section by email and provide instructions for voting by electronic means instead of mail ballots.

Article VI. Board of Directors

Section 1. *Number of members.* The board consists of ____ directors, all of whom must be members. By resolution, the board may change the number of directors to an odd number not fewer than 5 or more than 15. The board may not reduce the number of directors unless there is a corresponding vacancy as a result of a death, resignation, expiration of a term of office, or other action provided by these bylaws. The board must file a copy of the resolution covering any increase or decrease in the number of directors with the official copy of the bylaws.

Section 2. *Composition of board and committees.*

____ (Fill in the number, which may be zero) director(s) may be a paid employee of the credit union. The board may appoint a management official who ____ (may or may not) be a member of the board and one or more assistant management officials who ____ (may or may not) be a member of the board. If the board permits the management official or assistant management official(s) to serve on the board, he or she may not serve as the chair.

____ (Fill in the number, which may be zero) immediate family members, or those persons living in the same household, of a director may be a paid employee of the credit union.

The total number of directors serving who fall into the categories below must not constitute a majority of the board:

- Management official plus assistant management official(s) plus other employees;
- Immediate family members or persons in the same household as the management official, assistant management official(s), and other employees; or
- Management official plus assistant management official(s) plus other employees, plus immediate family members or persons in the same household as management officials, assistant management officials, and other employees.

____ (Fill in the number, which may be zero) committee member(s) may be a paid employee of the credit union. ____ (Fill in the number, which may be zero) immediate family members, or those persons living in the same household, of a committee member(s) may be a paid employee of the credit union.

The board may also choose the option below:

____ No director or committee member, who is not then a paid employee of the credit union, may become a paid employee of this credit union for a minimum of ____ (Fill in the number, which may be zero) years from the date the official terminates his or her position as a director or committee member.

You can also add ''unless the employee position to be filled exists as a result of a death or disability'' after committee member.

For this section, you can correct the syntax by omitting the plural(s) if applicable.

Section 3. *Terms of office.* Terms for directors are for periods of 2 or 3 years as decided by the board. All terms must be for the same number of years and until the election and qualification of successors. Terms are set and staggered at the first meeting, or when the number of directors changes, so that approximately an equal number of terms expire at each annual meeting.

Section 4. *Vacancies.* The directors, by majority vote, will fill any vacancy on the board, credit committee, if applicable, or supervisory committee as soon as possible. If all director positions become vacant at once, the supervisory committee immediately becomes the temporary board of directors and must follow the procedures in Article IX, Section 3. Directors and credit committee members appointed to fill a vacancy hold office only until the next annual meeting. The FCU's members then vote to select a candidate to fill the remainder of the original director's unexpired term. Members of the supervisory committee appointed to fill a vacancy on the supervisory committee hold office through the remainder of the unexpired term.

Section 5. *Regular and special meetings.* The board must hold a regular meeting each month at the time and place fixed by resolution. The board must conduct one regular meeting each calendar year in person. If a quorum of the board is present at the in-person meeting, the remaining board members may participate by audio or video teleconference. The board may conduct the other regular meetings by audio or video teleconference. The chair, or in the chair's absence the ranking vice chair, may call a special meeting of the board at any time and must do so upon written request of a majority of the directors. The chair, or in the chair's absence the ranking vice chair, will fix the time and place of special meetings unless the board directs otherwise. The board will give notice of all meetings in the manner set by resolution. The board may conduct special meetings by audio or video teleconference. The board may take action and vote on resolutions without a meeting. The board must first obtain unanimous consent for the action in writing or by electronically recorded means.

Section 6. *Board responsibilities.* The board has the general direction and control of the affairs of this credit union. The board is responsible for performing all the duties customarily done by boards of directors. This includes but is not limited to:

(a) Directing the affairs of the credit union in accordance with the Act, these bylaws, the rules and regulations and sound business practices.

(b) Establishing programs to achieve the purposes of this credit union as stated in Article I, Section 2, of these bylaws.

(c) Establishing lending policies, a loan collection program, and authorizing the charge-off of uncollectible loans.

(d) Establishing policies to address training for directors and volunteer officials in areas such as ethics and fiduciary responsibility, regulatory compliance, and accounting.

(e) Ensuring that staff and volunteers who handle the receipt, payment or custody of money or other property of this credit union; or property in its custody as collateral or otherwise, are properly bonded in accordance with the Act and regulations.

(f) Performing additional acts and exercising additional powers as required or authorized by applicable law and regulation.

If the credit union has an elected credit committee, you do not need to check a box. If the credit union has no credit committee check Option 1, and if it has an appointed credit committee check Option 2.

____ *Option 1. No Credit Committee.*

(g) Reviewing denied loan applications of members who file written requests for review.

(h) Appointing one or more loan officers and delegating to those officers the power to approve or disapprove loans, lines of credit or advances from lines of credit.

(i) In its discretion, appointing a loan review (the credit union may fill in another name if desired) committee to review loan denials and delegating to the committee the power to overturn denials of loan applications. The committee will function as a mid-level appeal committee for the board. The board must review all loans denied by the committee upon written request of the member.

The credit union may select one of three options for the makeup and term of the committee. Enter the option selected ____

Option A. The committee must consist of three members with a term of office of ____ (enter no more than 3) years. The committee may not have more than one loan officer.

Option B. The committee must consist of three members and two alternates. The term of office of the committee members will be for ____ (enter no more than 3) years. The board may appoint any number of lending professionals within the organization to the committee, provided that no loan officer may review any loan that he or she denied. At least 3 members of the committee must review loan denials, none of whom have been a party to denying the loan.

Option C. The board may, by resolution, change the number of committee members to an odd number no less than three and no more than seven. The board will determine the length of each committee member's term upon appointment and stagger terms as necessary to prevent a complete turnover of committee members. The board must file a copy of the resolution covering any increase or decrease in the number of committee members with the official copy of the bylaws of this credit union. The committee will act by majority vote of members present at a meeting. The committee may not have more than one loan officer.

____ *Option 2. Appointed Credit Committee.*

(g) Appointing an odd number of credit committee members as provided in Article VIII of these bylaws.

Section 7. *Quorum.* A majority of directors, including any vacant positions, constitutes a quorum for the transaction of business at any meeting. A majority of the directors holding office constitutes a quorum to fill any vacancies as stated in Section 4 of this article. Less than a quorum may adjourn from time to time until a quorum is in attendance.

Section 8. *Attendance and removal.* a. If a director or a credit committee member, if applicable, fails to attend regular meetings of the board or credit committee, respectively, for 3 consecutive months, (choose one of the following) ____ or 4 meetings within a calendar year, or ____ 4 meetings within any 12 consecutive months or otherwise fails to perform any significant duties as a director or a credit committee member, the board may declare the office vacant and fill the vacancy as provided in the bylaws.

b. The board may remove any board officer from office for failure to perform any significant duties as an officer. Prior to removal, the board must give the officer reasonable notice and an opportunity to respond to the issues.

c. When any board officer, membership officer, executive committee member or investment committee member is absent, disqualified, or otherwise unable to perform the duties of the office, the board may by resolution designate another member of this credit union to fill the position temporarily. The board may also, by resolution, designate another member or members of this credit union to act on the credit committee when necessary in order to obtain a quorum.

Section 9. *Suspension of supervisory committee members.* The board may suspend any member of the supervisory committee by a majority vote. In the event of a suspension, the board must hold a special meeting of the members at least 7 but no more than 14 days after any suspension. The members will decide whether to remove or to restore the suspended committee member of the supervisory committee.

The credit union may add the optional Section 10 if desired.

Section 10. *Director Emeritus.* The board of directors may appoint any former director who served on the board at least ____ (fill in the number) years as ''Director Emeritus.'' The board may substitute suitable volunteer service time for some of the board service time provided the candidate has served at least ____ (fill in the number) years on the board. The individuals appointed directors emeritus function as an advisory committee to the board of directors. Terms for directors emeritus are ____ (fill in the number) years. The board may increase or decrease the number of directors emeritus, or shorten or extend any director emeritus's term, by resolution. Unless separately elected or appointed, directors emeritus are not members of any other committee of the credit union. Directors emeritus are not a member or officer of the board of directors; they may not vote on any matter before the board or any other committee of the credit union; they may not receive any compensation from the credit union; and they are not required to attend any meetings or authorized to perform any duties other than providing advice to the credit union's board, staff and other committees as needed.

Article VII. Board Officers, Management Officials and Executive Committee

Section 1. *Board officers.* The board elects the following officers from their number: a

chair, one or more vice chairs, a financial officer, and a secretary. The board determines the title and rank of each board officer and records them in the addendum to this article. The board may compensate one board officer, the ____, for services as they determine. If the board elects more than one vice chair, the board determines their rank as first vice chair, second vice chair, and so on. The same person may hold the offices of the financial officer and secretary. If the board permits a management official or assistant management official to serve on the board, he or she may not serve as the chair. Unless removed as provided in these bylaws, the board officers elected at the first meeting of the board hold office until the first meeting of the board following the first annual meeting of the members and until the election and qualification of their respective successors.

Section 2. *Election and term of office.* The board must hold a meeting not later than 7 days after the annual meeting to elect officers. Board officers hold office for a 1-year term and until the election and qualification of their respective successors. Any person elected to fill a vacancy caused by the death, resignation, or removal of an officer is elected by the board to serve only for the unexpired term of that officer and until a successor is duly elected and qualified.

Section 3. *Duties of Chair.* The chair presides at all meetings of the members and at all meetings of the board, unless disqualified through suspension by the supervisory committee. The chair also performs other duties customarily assigned to the office of the chair or duties directed to perform by resolution of the board that are not inconsistent with the Act, regulations, and these bylaws.

Section 4. *Approval required.* The board must approve all individuals authorized to sign all notes, checks, drafts, and other orders for disbursement of credit union funds.

Section 5. *Vice chair.* The ranking vice chair has and may exercise all the powers, authority, and duties of the chair during the chair's absence or inability to act.

Section 6. *Duties of financial officer.* i. The financial officer manages this credit union under the control and direction of the board unless the board has appointed a management official to act as general manager. Subject to limitations, controls and delegations the board may impose, the financial officer will:

(a) Have charge over all funds, securities, valuable papers and other assets of this credit union.

(b) Provide and maintain full and complete records of all the assets and liabilities of this credit union in accordance with prescribed law, regulation, and Administration guidance.

(c) Within 20 days after the close of each month, prepare and submit to the board a financial statement showing the condition of this credit union as of the end of the month, including a summary of delinquent loans; and post a copy of the statement in a conspicuous place in the office of the credit union where it will remain until replaced by the next month's financial statement.

(d) Ensure that financial and other reports the Administration may require are prepared and sent.

(e) Within standards and limitations set by the board, employ sufficient staff to run the credit union, and have the power to remove these employees.

(f) Perform other duties customarily assigned to the office of the financial officer or duties assigned by board resolution that are not inconsistent with the Act, regulations, and these bylaws.

ii. The board may employ one or more assistant financial officers, none of whom may also hold office as chair or vice chair. The board may authorize them, under the direction of the financial officer, to perform any of the duties falling to the financial officer, including the signing of checks. When designated by the board, any assistant financial officer may also act as financial officer during the financial officer's temporary absence or temporary inability to act.

Section 7. *Duties of management official and assistant management official.* The board may appoint a management official who is under the direction and control of the board or of the financial officer as determined by the board. The board may assign any or all of the responsibilities of the financial officer described in Section 6 of this article. The board will determine the title and rank of each management official and record them in the addendum to this article. The board may employ one or more assistant management officials. The board may authorize assistant management officials under the direction of the management official, to perform any of the duties falling to the management official, including the signing of checks. When designated by the board, any assistant management official may also act as management official during the management official's temporary absence or temporary inability to act.

Section 8. *Board powers regarding employees.* The board employs, fixes the compensation, and prescribes the duties of employees as necessary, and has the power to remove employees, unless it has delegated these powers to the financial officer or management official. Management does not have the power or duty to employ, prescribe the duties of, or remove necessary clerical and auditing assistance employed or used by the supervisory committee or remove any loan officer appointed by the credit committee.

The credit union may select one of the following options and add it to the end of Section 8.

No director or committee member, who is not then a paid employee of the credit union, may become a paid employee of this credit union for a minimum of ____ (Fill in the number, which may be zero) years from the date the official terminates his or her position as a director or committee member.

No director, committee member, immediate family member of a director or committee member, or person in the same household as a director or committee member, who is not then a paid employee of this credit union, may become a paid employee of the credit union for a minimum of ____ (Fill in the number, which may be zero) years from the date the official terminates his or her position as a director or committee member.

No director, committee member, immediate family member of a director or committee member, or person in the same household as a director or committee member, who is not then a paid employee of the credit union, may become a paid employee of this credit union for a minimum of ____ (Fill in the number, which may be zero) years from the date the official terminates his or her position as a director or committee member, unless the employee position to be filled exists as a result of a death or disability.

No official, who is not already a paid employee of this credit union, may become a paid employee of this credit union for a minimum of ____ (Fill in the number, which may be zero) years from the date the official terminates his or her position as a director or committee member, unless the employee position to be filled exists as a result of death or disability. The term ''official'' in this bylaw means a person who is a member of the board of directors, supervisory committee, or other volunteer committee established by the board of directors.

Section 9. *Duties of secretary.* The secretary prepares and maintains full and correct records of all meetings of the members and of the board. The secretary will prepare a record of each respective meeting within 7 days after its completion. The secretary must promptly inform the Administration in writing of any change in the address of the office of this credit union or the location of its principal records. The secretary provides the proper notice of all meetings of the members in the manner prescribed in these bylaws. The secretary also performs other duties as directed by resolution of the board that are not inconsistent with the Act, regulation, and these bylaws. The board may employ one or more assistant secretaries, none of whom may also hold office as chair, vice chair, or financial officer, and may authorize them under direction of the secretary to perform any of the duties assigned to the secretary.

Section 10. *Executive committee.* As authorized by the Act, the board may appoint an executive committee of not fewer than three directors to serve at its pleasure, to act for it with respect to the board's specifically delegated functions. When making delegations to the executive committee, the board must be specific with regard to the committee's authority and limitations related to the particular delegation. The board may also authorize any of the following to act upon membership applications under conditions the board and these bylaws may prescribe: an executive committee; a membership officer(s) appointed by the board from the membership, other than a board member paid as an officer; the financial officer; any assistant to the paid officer of the board or to the financial officer; or any loan officer. The board may not compensate the executive committee member or membership officer as such.

Section 11. *Investment committee.* The board may appoint an investment committee composed of not less than two, to serve at its pleasure to have charge of making investments under rules and procedures established by the board. The board may not

compensate any member of the investment committee as such.

Addendum: The board must list the positions of the board officers and management officials of this credit union. They are as follows:

Position	Credit union title	Officer or official name
Board Chair.		
Vice Chair.		
Treasurer.		
Secretary.		
Management Official.		
Other 1.		
Other 2.		
Other 3.		
Other 4.		

Select Option 1 if the credit union has a credit committee and Option 2 if it does not have a credit committee.

Article VIII. Option 1 Credit Committee

Section 1. *Credit committee members.* The credit committee consists of ____ members. All the members of the credit committee must be members of this credit union. The board determines the number of members on the credit committee, which must be an odd number and may not be fewer than 3 and no more than 7. The board may not reduce the number of members unless there is a corresponding vacancy as a result of a death, resignation, expiration of a term of office, or other action provided by these bylaws. The board must file a copy of the resolution covering any increase or decrease in the number of committee members with the official copy of the bylaws of this credit union.

Section 2. *Terms of office.* Regular terms of office for elected credit committee members are for periods of either 2 or 3 years as the board determines. All regular terms are for the same number of years and until the election and qualification of successors. The board will fix the regular terms at the beginning or upon any increase or decrease in the number of committee members so that approximately an equal number of regular terms expire at each annual meeting. The board determines the periods for the regular terms of office for appointed credit committee members and records these periods in the board's minutes.

Section 3. *Officers of credit committee.* The credit committee chooses from their number a chair and a secretary. The secretary of the committee prepares and maintains full and correct records of all actions taken by it. They must prepare those records within 3 days after the action. The same person may hold the offices of the chair and secretary.

Section 4. *Credit committee powers.* The credit committee may, by majority vote of its members, appoint one or more loan officers to serve at its pleasure. The committee may delegate to them the power to approve loan applications, share withdrawals, releases and substitutions of security, within limits specified by the committee and within limits of applicable law and regulations. The committee may not appoint more than one of its members as a loan officer. Each loan officer must furnish to the committee a record of each approved or not approved transaction within 7 days of the date of the filing of the application or request. This record becomes a part of the committee's records. The committee must act on all applications or requests not approved by a loan officer. No individual may disburse funds of this credit union for any application or share withdrawal that the individual has approved as a loan officer.

Section 5. *Credit committee meetings.* The credit committee must hold at least one meeting a month and as frequently as required to complete the business of this credit union. The committee will give notice of meetings to its members in the manner it prescribes by resolution.

Section 6. *Credit committee duties.* For each loan, the credit committee or loan officer must review the character and financial condition of the applicant and their surety, if any. The credit committee or loan officer will ascertain the applicant's ability to fully and promptly repay the loan. The credit union may use an automated loan processing system to conduct this review, subject to the conditions set forth in Section 7, below. Where appropriate, the credit committee or loan officers should provide, or refer applicants to, financial counseling assistance.

Section 7. *Unapproved loans prohibited.* The credit committee must approve all loans. If the credit union uses an automated lending system, the credit committee must review all loan applications the system has denied and review at least a sample of approved loans to screen for fraud and ensure the automated system is functioning within the lending policies the board has established.

Section 8. *Lending procedures.* The credit committee, loan officer, or automated system determines the required security, if any, and the terms of repayment for each application. All lending decisions and loan terms must comply with applicable law and regulations, these bylaws, and board policy. The security furnished must be adequate in quality and character as well as consistent with sound lending practices. When the credit union does not have the funds available to make all the loans requested, the credit committee should give preference, in all cases, to the smaller applications if the need and credit factors are nearly equal.

Article VIII. Option 2 Loan Officers (No Credit Committee)

Section 1. *Records of loan officer; prohibition on loan officer disbursing funds.* Each loan officer must maintain a record of each approved or not approved transaction within 7 days of the filing of the application or request. This record then becomes a part of the records of the credit union. No individual may disburse funds of this credit union for any application or share withdrawal that the individual has approved as a loan officer.

Section 2. *Loan officer duties.* For each loan, the loan officer must review the character and financial condition of the applicant and their surety, if any. The loan officer will ascertain the applicant's ability to fully and promptly repay the loan. The credit union may use an automated loan processing system to conduct this review, subject to the conditions set forth in Section 3, below. Where appropriate, the loan officer should provide, or refer applicants to, financial counseling assistance.

Section 3. *Unapproved loans prohibited.* The loan officer must approve all loans. Loan terms and rates must comply with applicable law and regulations. If the credit union uses an automated lending system, the loan officer must review all loan applications the system has denied, and review at least a sample of approved loans to screen for fraud and ensure the automated system is functioning within the lending policies the board has established.

Section 4. *Lending procedures.* The loan officer or automated lending system determine the required security, if any, and the terms of repayment for each application. All lending decisions and loan terms must comply with applicable law and regulation, these bylaws, and board policy. The security furnished must be adequate in quality and character as well as consistent with sound lending practices. When the credit union does not have the funds available to make all the loans requested, the loan officer should give preference, in all cases, to the smaller applications if the need and credit factors are nearly equal.

Article IX. Supervisory Committee

Section 1. *Appointment and membership.* The board appoints the supervisory committee from members of this credit union. One of the committee members may be a director other than the financial officer or the paid officer of the board. The board determines the number of members on the committee, which may not be fewer than 3 or more than 5. No member of the credit committee, if applicable, or employee of this credit union may be appointed to the committee. Terms of committee members are for periods of 1, 2, or 3 years as decided by the board.

However, all terms are for the same number of years and until the appointment and qualification of successors. Terms are set and staggered at the beginning, or on the increase or decrease in the number of committee members so that approximately an equal number of terms expire at each annual meeting.

Section 2. *Officers of supervisory committee.* The supervisory committee members choose from their number a chair and a secretary. The secretary prepares, maintains, and has custody of all records of the committee's actions. The same person may hold the offices of chair and secretary.

Section 3. *Duties of supervisory committee.*

a. The supervisory committee makes, or arranges for, the audits, and prepares and submits the written reports required by the Act and regulations. The committee may employ and use the clerical and auditing assistance required to carry out its responsibilities. The committee may request the board to provide compensation for this assistance. It will prepare and forward to the Administration required reports.

b. If all director positions become vacant at once, the supervisory committee immediately assumes the role of the board of directors. The supervisory committee acting as the board must generally call and hold a special meeting to elect a board. That board will serve until the next annual meeting. They must hold the special meeting at least 7 but no more than 14 days after all director positions became vacant. Nominations for the board at the special meeting are by petition or from the floor. However, the supervisory committee may forego the special meeting if the next annual meeting will occur within 45 days after all the director positions become vacant.

c. The supervisory committee acting as the board may not act on policy matters. However, directors elected at a special meeting have the same powers as directors elected at the annual meeting.

Section 4. *Verification of accounts.* The supervisory committee will cause the verification of the accounts of members with the records of the financial officer from time to time and not less frequently than as required by the Act and regulations. The committee must maintain a record of this verification.

Section 5. *Powers of supervisory committee—removal of directors and credit committee members.* By unanimous vote, the supervisory committee may suspend any director, board officer, or member of the credit committee. In the event of a suspension, the supervisory committee must call a special meeting of the members to act on the suspension. They must hold the meeting at least 7 but no more than 14 days after the suspension. The chair of the committee acts as chair of the meeting unless the members select another person to act as chair.

Section 6. *Powers of supervisory committee—special meetings.* By majority vote, the supervisory committee may call a special meeting of the members to: consider any violation of the provisions of the Act, the regulations, the credit union's charter or bylaws; or to consider any practice of this credit union the committee deems to be unsafe or unauthorized.

Article X. Organization Meeting

Section 1. *Initial meeting.* When making an application for a federal credit union charter, the subscribers to the organization certificate must meet to elect a board of directors and a credit committee, if applicable. The Agency may revoke the charter for failure to start operations within 60 days after receipt of the approved organization certificate unless the Agency approves an extension of time.

Section 2. *Election of directors and credit committee.* The subscribers elect a chair and a secretary for the meeting. The subscribers then elect a board of directors and a credit committee, if applicable. The elected directors or committee members will hold office until the first annual meeting of the members and until the election of their respective successors. Every person elected under this section or appointed under Section 3 of this article, must become a member within 30 days if they are not already. If any person elected as a director or committee member or appointed as a supervisory committee member does not become a member within 30 days of election or appointment, the office will automatically become vacant and be filled by the board.

Section 3. *Election of board officers.* Promptly after the elections held under the provisions of Section 2 of this article, the board must meet to elect the board officers. The officers will hold office until the first meeting of the board of directors after the first annual meeting of the members and until the election of their respective successors. The board also appoints a supervisory committee at this meeting as provided in Article IX, Section 1, of these bylaws and a credit committee, if applicable. The appointed members hold office until the first regular meeting of the board after the first annual meeting of the members and until the appointment of their respective successors.

After five years of operation, the credit union may select the following:

Article X of the bylaws shall be amended to read as follows:

Reserved.

Article XI. Loans and Lines of Credit to Members

Section 1. *Loan purposes.* The credit union may make loans to members for provident or productive purposes in accordance with applicable law and regulations.

The credit union may add business as one of its purposes by placing a comma after ''provident'' and inserting ''business.''.

Section 2. *Delinquency.* Any member whose loan is delinquent may be required to pay a late charge as determined by the board of directors.

Article XII. Dividends

Section 1. *Power of board to declare dividends.* The board sets dividend periods and declares dividends as permitted by the Act and applicable law and regulation.

Article XIII. Reserved

Article XIV. Expulsion and Withdrawal

Section 1. *Expulsion procedure; expulsion or withdrawal does not affect members' liability or shares.* To expel a member, the credit union must:

- Call a special meeting of the members;
- Provide the member the opportunity to be heard; and
- Obtain a two-thirds vote of the members present at the special meeting.

The credit union may also expel a member under a nonparticipation policy given to each member that follows the requirements found in the Act. Expulsion or withdrawal does not relieve a member of any liability to this credit union. The credit union will pay all of their shares upon their expulsion or withdrawal less any amounts due to this credit union.

Article XV. Minors

Section 1. *Minors permitted to own shares.* The credit union may issue shares in the name of a minor. State law governs the rights of minors to transact business with this credit union.

Article XVI. General

Section 1. *Compliance with law and regulation.* The members, directors, officers, and employees of this credit union must exercise all power, authority, duties, and functions according to the provisions of these bylaws in strict conformity with the provisions of applicable law and regulations, and the credit union's charter and bylaws.

Section 2. *Confidentiality.* The officers, directors, members of committees and employees of this credit union must keep all member transactions and all information respecting their personal affairs in confidence, unless otherwise directed by state or federal law.

Section 3. *Removal of directors and committee members.* Notwithstanding any other provisions in these bylaws, any director or committee member of this credit union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for the purpose, but only after an opportunity has been given to be heard. If member votes at a special meeting result in the removal of all directors, the supervisory committee immediately becomes the temporary board of directors and must follow the procedures in Article IX, Section 3.

Section 4. *Conflicts of interest prohibited.* No director, committee member, officer, agent, or employee of this credit union may participate in any manner, directly or indirectly, in the consideration or determination of any question affecting his or her pecuniary or personal interest or the pecuniary interest of any corporation, partnership, or association (other than this credit union) in which he or she is directly or indirectly interested.

If the board receives a matter affecting any director's interest, the director must withdraw from the consideration or determination of that matter. If the remaining qualified directors present at the meeting plus the disqualified director or directors constitute a quorum, the remaining qualified directors, by majority vote, may exercise with

respect to this matter all the powers of the board. In the event of the disqualification of any member of the credit committee, if applicable, or the supervisory committee, that committee member must withdraw from the deliberation or determination.

Section 5. *Records.* The board must preserve copies of the organization certificate of this credit union, its bylaws, any amendments to the bylaws, and any special authorizations by the Administration. The board must attach copies of the organization certificate and field of membership amendments as an appendix to these bylaws. The board must record all returns of nominations, elections, and proceedings of all regular and special meetings of the members and directors in the minutes of this credit union. The respective chair or presiding officer and the person serving as secretary of the meeting must sign all minutes of the meetings of the members, the board, and the committees. All copies and records maintained under this section may be stored physically or electronically provided that the information is readily accessible to the directors, committee members of this credit union, members, and the Administration. Moreover, signatures may be provided electronically where permissible under federal or state law.

Section 6. *Availability of credit union records.* All books of account and other records of this credit union must be available upon request at all times to the directors, committee members of this credit union, and members provided they have a proper purpose for obtaining the records. If this credit union maintains a website currently or in the future, the board must post the bylaws of this credit union on the website. The board must also make the charter and bylaws of this credit union available for inspection by any member, upon request. If the member requests a copy of the charter or bylaws, the board will provide a copy to the member. The board may provide this copy to the member in physical or electronic copy. If the member requests a physical copy, the board may charge a reasonable fee for the physical copy.

Section 7. *Member contact information.* Members must keep the credit union informed of their current mailing address or, if the member has elected to receive electronic communications, their current email address.

Section 8. *Indemnification.* (a) Subject to the limitations in § 701.33(c)(5) through (c)(7) of the regulations, the credit union may elect to indemnify to the extent authorized by (check one).

[ ] Law of the State of ____:

[ ] Model Business Corporation Act:

The following individuals from any liability asserted against them and expenses reasonably incurred by them in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties (check as appropriate).

[ ] Current officials.

[ ] Former officials.

[ ] Current employees.

[ ] Former employees.

(b) The credit union may purchase and maintain insurance on behalf of the individuals indicated in paragraph (a) of this section against any liability asserted against them and expenses reasonably incurred by them in their official capacities and arising out of the performance of their official duties to the extent such insurance is permitted by the applicable State law or the Model Business Corporation Act.

(c) The term ''official'' in this bylaw means a person who is a member of the board of directors, credit committee, supervisory committee, other volunteer committee (including elected or appointed loan officers or membership officers), established by the board of directors.

Section 9. *Pronouns, Singular and Plural.* Unless the context requires otherwise, words denoting the singular may be construed as denoting the plural, words of the plural may be construed as denoting the singular, and words of one gender may be construed as denoting such other gender as is appropriate.

Article XVII. Amendments of Bylaws and Charter

Section 1. *Amendment procedures.* The board may adopt amendments of these bylaws by an affirmative two-thirds vote of the directors. Written NCUA approval is required for the amendment of the bylaws to become effective. After adopting amendments, the credit union will update the bylaws posted on its website (if such credit union maintains a website) and ensure that members seeking to inspect the bylaws receive the most current version of the bylaws. To adopt amendments to the credit union's charter, board members must vote at a duly held meeting after receiving prior written notice of the meeting and a copy of the proposed amendment or amendments with the notice. Written NCUA approval is required for the amendment to the charter to become effective.

Article XVIII. Definitions

Section 1. *General definitions.* When used in these bylaws the terms:

''Act'' means the Federal Credit Union Act, as amended.

''Administration'' means the National Credit Union Administration.

''Agency'' means the Regional Director, the Director of the Office of National Examinations and Supervision, or the Director of the Office of Credit Union Resources and Expansion.

''Applicable law and regulations'' means the Federal Credit Union Act and rules and regulations issued thereunder or other applicable federal and state statutes and rules and regulations issued thereunder as the context indicates.

''Board'' means board of directors of the federal credit union.

''Board officers'' means:

1. ''Chair'' means Presiding Board officer, President of the Board, Presiding Board Officer, or Chairperson.

2. ''Vice Chair'' means Vice President.

3. ''Financial Officer'' means Treasurer.

4. ''Secretary'' means Recording Officer.

5. ''Management Official'' means General Manager, Manager, President, or Chief Executive Officer.

''Charter'' means the approved organization certificate and field of membership issued by the National Credit Union Administration or one of its predecessors. It is the document that authorizes a group to operate as a credit union, defines the fundamental limits of its operating authority, and includes the persons the credit union is permitted to accept for membership.

''Field of membership'' means the persons (including organizations and other legal entities) a credit union is permitted to accept for membership.

''Immediate family member'' means spouse, child, sibling, parent, grandparent, grandchild, stepparents, stepchildren, stepsiblings, and adoptive relationships.

''Loans'' means any type of loan product the credit union offers. This includes, but is not limited to, consumer loans, lines of credit, credit cards, member business loans, commercial loans, and real estate loans.

''Management'' means the Board, Financial Officer, and Management Official.

''Member'' means a person must:

1. Be eligible for membership under Section 5 of the charter;

2. Sign membership forms as approved by the credit union board;

3. Subscribe to at least one share (par value) of stock;

4. Pay the initial installment;

5. Pay an entrance fee, if required; and

6. Be eligible to vote upon reaching the minimum age the credit union establishes for voting and participation in the affairs of the credit union.

''Membership Officer'' means a majority of the board of directors, a majority of the members of a duly authorized executive committee, or an individual(s) appointed by the board of directors to serve as such.

''NCUA Board'' means the Board of the National Credit Union Administration.

''Person in the same household'' means an individual living in the same residence maintaining a single economic unit.

''Regulation'' or ''regulations'' means rules and regulations issued by the NCUA Board.

''Share'' or ''shares'' means all classes of shares and share certificates that may be held in accordance with applicable law and regulations.

Official NCUA Commentary—Federal Credit Union Bylaws

Article II. Qualifications for Membership

i. Entrance fee: FCUs may not vary the entrance fee among different classes of members (such as students, minors, or non-natural persons) because the Act requires a uniform fee. FCUs may, however, eliminate the entrance fee for all applicants.

ii. Membership application procedures: Under section 113 of the Act,[3] the board acts upon applications for membership. However, the board can appoint membership officers from among the members of the credit union. Such membership officers cannot be a paid officer of the board, the financial board officer, any assistant to the paid officer of the board or to the financial officer, or any loan officer. As described under section 2 of this Article, an applicant becomes a member upon approval by a membership officer and

[3] See 12 U.S.C. 1761b.

payment of at least one share (or installment) and uniform entrance fee, if applicable.

iii. Violent, belligerent, disruptive, or abusive members: Many credit unions have confronted the issue of handling a violent, belligerent, disruptive, or abusive individual. Doing so is not a simple matter, insofar as it requires the credit union to balance the need to preserve the safety of individual staff, other members, and the integrity of the workplace, on one hand, with the rights of the affected member on the other. In accordance with the Act and applicable interpretations by the NCUA's Office of General Counsel, there is a reasonably wide range within which FCUs may fashion a policy that works in their case. Thus, an individual that has become violent, belligerent, disruptive, or abusive may be prohibited from entering the premises or making telephone contact with the credit union, and the individual may be severely restricted in terms of eligibility for products or services. So long as the individual is not barred from exercising the right to vote at annual meetings and is allowed to maintain a regular share account, the FCU may fashion and implement a policy that is reasonably designed to preserve the safety of its employees and the integrity of the workplace.[4] The policy need not be identical nor applied uniformly in all cases—there is room for flexibility and a customized approach to fit the particular circumstances. In fact, the NCUA anticipates that some circumstances, such as violence against another member or credit union staff in the FCU or its surrounding property, an FCU may take immediate action to restrict most, if not all, services to the violent member. In other situations, such as a member that frequently writes checks with insufficient funds, the FCU may attempt to resolve the matter with the member before limiting check writing services. Once adopted, members must receive notice. The FCU should disclose the policy to new members when they join and notify existing members of the policy at least 30 days before it becomes effective. The FCU's board has the option to adopt the optional amendment addressing members in good standing. Examples of violent, belligerent, disruptive, or abusive conduct include, but are not limited to, a member threatening physical harm to employees, a member repeatedly purchasing gifts for or asking tellers on dates, a member repeatedly cursing at employees, and a member threatening to follow a loan officer home for a denying loan.

FCUs should also make specific note of Article XIV, section 1 of the bylaws, which spells out in detail the procedure required to expel an individual from membership. This procedure is mandated by the Act.[5] Furthermore, Article XVI specifies that the credit union, its powers and duties, and the functions of its members, officers and directors, are all strictly circumscribed by law and regulation. The commentary for Article XVI provides more details on members using accounts for unlawful purposes.

Article III. Shares of Members

i. Installments: FCUs may insert zero for the number of installments. The Act allows membership upon the payment of the initial installment of a membership share, but the NCUA no longer views this provision as requiring FCUs to offer the option of paying for the membership share in installments.

ii. Par value: FCUs may establish differing par values for different classes of members or types of accounts (such as students, minors, or non-natural persons), provided this action does not violate any federal, state or local antidiscrimination laws. For example, an FCU may want to establish a higher par value for recent credit union members, without requiring long-time members to bring their accounts up to the new par value. A differing par value may also be permissible for different types of accounts, such as requiring a higher par value for a member with only a share draft account. If a credit union adopts differing par values, all of the possible par values must be stated in section 1. The FCU Bylaws include several options for differing par values. The credit union may select one or more of these or establish its own.

iii. Regular share account: To establish membership, the member must subscribe to one par value of share. The share does not have to be in a regular share account. The bylaws include two options. One option requires the member to have a regular share account to open membership, and one option allows them to use any other account. The board may select which option to use. If the board does not select an option, the member must have a regular share account to open an account. Please note, if the board selects an account other than the regular share, the requirements of Article III, section 3 still apply. The member must maintain one share to remain a member.

iv. Reduction in share balance below par value: When a member's account balance falls below the par value, section 3 of this article requires FCUs to allow members a minimum time period to restore their account balance to the par value before membership is terminated. FCUs may not delete this requirement or delete references to this requirement in Article II, section 3. If the share balance falls below the par value and does not increase the balance within the time set by the board, membership is terminated.

v. Trusts: Trusts and shares issued in trust can be a complicated subject. For purposes of the FCU Bylaws, perhaps the main issue is the distinction between revocable and irrevocable trusts. In the case of a revocable trust, the individual who establishes the trust is essentially still in control of the funds during his lifetime. Thus, the account owner can change the designated beneficiary at any time, and he or she can determine whether the identified beneficiary actually receives any money simply by deciding to withdraw the funds before his or her own death. Accordingly, the requirement in the case of revocable trust accounts is simply that the owner of the funds be a member of the FCU. Furthermore, provided the owner of the funds is within the field of membership and eligible for membership, he or she may use the vehicle of the payable-on-death or revocable trust account itself as the method of becoming a member. There is no requirement that the account holder first establish a regular share account to become a member. In accordance with legal opinions issued by the NCUA's Office of General Counsel, an individual may fulfill the requirement of becoming a member by subscribing to the equivalent of the par value of one share, which can be done through the opening of any type of account the credit union offers.[6]

There is no requirement that the beneficiaries be members, since they may never actually come to own the funds or have a right to them. Furthermore, in the case of a revocable trust, since it is essentially indistinguishable from the member, there is no need for the trust to have a separate account number assigned or for it to be viewed as a legal entity separate from the member who set it up.

In the case of an irrevocable trust, the requirements are somewhat different. Membership requirements here may be met though either the settlor, who is the original owner of the funds, or the beneficiary, who obtains an equitable, beneficial interest in the funds once the trust is established. So long as one or the other is eligible for membership, the credit union may accept the account. Furthermore, as with revocable trusts, the membership obligation can be met through the opening of the trust account itself; it is not required that the beneficiary or the settlor have previously established a separate, regular share account. Most irrevocable trusts have a trustee who has administrative responsibility for the account, and so the credit union will typically deal with the trustee for purposes such as sending monthly statements and year-end tax reporting. However, the trustee need not actually be a member of the credit union, and the credit union need not necessarily view the trust account as a separate legal entity, with its own separate tax ID number. Instead, it need only verify and confirm the eligibility of either the settlor or the beneficiary (or all of the settlors or all of the beneficiaries in the case of multiple settlors or beneficiaries) to join the credit union.

A trust itself, either revocable or irrevocable, may be a member of the credit union in its own right if all parties to the trust, including all settlors, beneficiaries and trustees, are within the field of membership.[7] If all parties to the trust are within a credit union's field of membership, the trust will qualify as ''an organization of such persons,'' which is a standard clause in FCU fields of membership.

Article IV. Meetings of Members

i. Annual and special meetings: FCUs are encouraged to provide a live webcast of annual and special meetings for interested members, and/or post a video of the annual meeting on the FCU's website. The NCUA Board encourages this policy for FCUs that currently have a website.

[4] See OGC Op. No. 08–0431 (Aug. 12, 2008).

[5] 12 U.S.C. 1764.

[6] *See* OGC Op. No. 92–0522 (June 15, 1992).

[7] OGC Op. No. 99–1110 (Feb. 25, 2000).

Article V. Elections

i. Eligibility requirements: The Act and the FCU Bylaws contain the only eligibility requirements for membership on an FCU's board of directors, which are as follows:

(a) The individual must be a member of the FCU before distribution of ballots;

(b) The individual cannot have been convicted of a crime involving dishonesty or breach of trust unless the NCUA Board has waived the prohibition for the conviction; and

(c) The individual meets the minimum age requirement established under Article V, § 7 of the FCU Bylaws.

Anyone meeting the three eligibility requirements may run for a seat on the board of directors if properly nominated. It is the nominating committee's duty to ascertain that all nominated candidates, including those nominated by petition, meet the eligibility requirements.

ii. Nomination criteria for nominating committee: The Act and the FCU Bylaws do not prohibit a board of directors from establishing reasonable criteria, in addition to the eligibility requirements, for a nominating committee to follow in making its nominations, such as financial experience, years of membership, or conflict of interest provisions. The board's nomination criteria, however, applies only to individuals nominated by the nominating committee; they cannot be imposed on individuals who meet the eligibility requirements and are properly nominated from the floor or by petition.

iii. Candidates' names on ballots: When producing an election ballot, the FCU's secretary may order the names of the candidates on the ballot using any method for selection provided it is random and used consistently from year to year so as to avoid manipulation or favoritism.

iv. Secret ballots: An FCU must establish an election process that assures members their votes remain confidential and secret from all interested parties. If the election process does not separate the member's identity from the ballot, FCUs should use a third-party teller that has sole control over completed ballots. If the ballots are designed so that members' identities remain secret and are not disclosed on the ballot, FCUs may use election tellers from the FCU. In any case, FCU employees, officials, and members must not have access to ballots identifying members or to information that links members' votes to their identities.

v. Plurality voting: At least one nominee must be nominated for each vacant seat. When there are more nominees than seats open for election, the nominees who receive the greatest number of votes are elected to the vacant seats.

vi. Minimum age requirement: The age the board selects may not be greater than eighteen or the age of majority under the state law applicable to the credit union, whichever is lower.

vii. Electronic voting: Some members lack digital access or wish to have a choice to vote non-electronically. The FCU Bylaws protect members who cannot or choose not to vote electronically. For those members who vote electronically, credit unions have the flexibility to use as many forms of electronic voting (phone, internet, etc.) as they wish.

viii. Voting methods: Options A1, A2 and A3 provide for in-person voting at the annual meeting, or, for Option A3, by voting machine. Option A4 provides for remote voting by electronic device or mail ballot. The NCUA has approved several bylaw amendments for FCUs that combine in-person and remote options for member voting. The NCUA encourages FCUs using one of the first three options to consider whether they can also incorporate mail ballots or electronic voting. Likewise, the NCUA encourages FCUs using Option A4 to consider whether they can also provide a means to vote for members who come to the annual meeting but have not voted in the election, such as a paper ballot.

ix. Uncontested elections: Options A2, A3 and A4 provide for election by acclamation or consensus when the number of nominees for board positions equals the number of positions to be filled. These options do not permit nominations from the floor at the meeting, so a petition is the only way for members to nominate a candidate not on the nominating committee's slate. Accordingly, section (1)(c) in each of these options requires the notice to members to include the fact that there are no nominations from the floor at the meeting, as well as a notice that the credit union will not conduct a vote by ballot if the number of nominees equals the number of positions to be filled. The FCU Bylaws do not require a particular procedure for uncontested elections.

The contents of the notice to members required in section (1)(c) does not alter the basic election procedures the credit union has selected. Should the number of the nominating committee nominees fall below the number of positions to be filled after the member notice is sent, this section does not permit nominations from the floor. Only option A1 permits nominations from the floor.

x. Nomination procedures: Under all options under this Article, the nominating committee must widely publicize the call for nominations to all members by any medium. This requirement can be satisfied by publicizing the information to a large audience, whether by newsletter, email, or any other satisfactory medium that reaches as many members as possible. The NCUA emphasizes that member participation is important during an election, and FCUs must make sure that members are aware of the nomination process.

Article VI. Board of Directors

i. Vacancies: In accordance with the Act, when a vacancy on the board of directors occurs between annual elections, the remaining directors are to appoint a replacement. This replacement will serve as a director until the next annual meeting. The vacancy is then to be filled at the next annual meeting through the normal membership voting process, with the newly elected director serving out the remainder of the original term.[8] The number of director positions may be changed to any odd number between 5 and 15, inclusive, but a position may not be eliminated if it is currently an occupied position. As the bylaw itself specifies, no reduction in the number of director positions may be made unless there is a corresponding vacancy, caused by death, resignation, expiration of term or other action permissible under the FCU Bylaws. In other words, the FCU may not arbitrarily propose to reduce the number of director positions and terminate one or more incumbent directors.

ii. Director emeritus: As a matter of board policy, the board may establish the position of director emeritus for former directors who faithfully fulfilled their responsibilities as members of the board for at least a specified minimum number of years. The board may determine that director emeritus status confers authority to attend board meetings and to participate in discussions and other board events; however, directors emeritus may not vote on any matter before the board or exercise any official duties of a director. The position is essentially an honorary title designed to recognize and reward the good service of those designated and to retain some of their institutional knowledge for the benefit of the board and the FCU. The decision to establish a director emeritus position, as well as the selection of individuals to become directors emeritus, is solely within the discretion of the board. The board may establish a director emeritus position by adopting either the optional bylaw amendment or a board policy.

To assist them in providing advice, Directors emeriti have access to confidential information, including but not limited to the credit union's examination reports and CAMEL ratings, to the same extent as members of the board. Directors emeriti are also subject to the same confidentiality and conflict of interest standards applicable to directors.

iii. Associate directors: The board may also establish the position of associate director through board policy. This position is designed to provide qualified individuals with an opportunity to gain exposure to board meetings and discussions but without formal director responsibility or the right to vote. It may be thought of as an apprenticeship position in which the incumbent receives training and knowledge about the business of the board, with the expectation that the experience will prepare him or her for an eventual election to a director position. As with the director emeritus position, the decision to establish an associate director position, as well as the selection of individuals to become associate directors, is solely within the discretion of the board.

To assist their learning process, the board may determine to permit associate directors to have access to confidential information, including but not limited to the credit union's examination reports and CAMEL ratings, to the same extent as members of the board. Associate directors are also subject to the same confidentiality and conflict of interest standards applicable to directors.

iv. Composition of the board: The NCUA Board encourages the composition of the board of directors to reflect the field of membership of the FCU.

[8] 12 U.S.C. 1761(a).

v. Notice to members of change in size of board: The NCUA encourages FCUs changing the size of their boards to post a notice of the change on the FCU's website (if the FCU maintains a website). An FCU is not required to establish and maintain a website solely for this purpose, however. An FCU that does not maintain a website can post such a notice in a conspicuous place in the office of the FCU, such as at the teller window or on the front door of the FCU.

Article VII. Board Officers, Management Officials and Executive Committee

i. Board officers: As specified in this bylaw, members of the board are elected by the credit union membership to the board itself. Once on the board, the directors themselves vote to select individuals from among their number to serve as officers of the board (chair, one or more vice chairs, secretary and financial officer). One board officer may be compensated as such for services he or she performs in that capacity. The offices of financial officer and secretary may be held by the same person.

Members of the board must hold the vote for the specified officer positions at the first board meeting following the annual meeting of the members. This board meeting should be held not later than seven days after the annual meeting. The Act requires the credit union to file a record of the names and addresses of the executive offices, members of the supervisory committee, credit committee, and loan officers with the Administration within ten days after election or appointment.[9] The NCUA's regulations also require federally insured credit unions to file NCUA Form 4501 or its equivalent within 10 days after an election or appointment of senior management or volunteer officials.[10]

Officers hold their respective officer positions for a term of one year, until the first board meeting that follows the next annual meeting of the members. At that board meeting, officer positions are again filled. Each board officer holds his or her position until the election and qualification of his or her successor. Thus, a board officer who is re-elected to the position he or she is currently holding serves for another year. Where another director is chosen to fill the position, he or she takes office effective as of the date of the election, assuming he or she is qualified—meaning simply that he or she was properly elected by the membership to the board in the first place and is in good standing as a director.

As specified in this bylaw, the board chair presides at all board meetings. In the absence of the chair or his or her inability to act, the vice chair presides at the meeting. In the absence or inability to act of both the chair and the vice chair, those directors who are present may select from among their number an individual director to act as temporary chair for that particular meeting. Actions taken by the board under the direction of the temporary chair have the same validity and effect as if taken under the direction of the chair or the vice chair, provided a quorum of the board, including the temporary chair, is present. If the board secretary is absent for any reason from a meeting, the chair (or acting chair) must select another director to fulfill the secretary's function at the meeting.

ii. Committee Membership: The NCUA encourages FCUs to publicize the names of the members of each FCU committee to FCU members. FCUs could provide this information either on the FCU's public website or to the portion of the website only accessible to members after logging in. The NCUA encourages this policy for FCUs that have a website. An FCU is not required to establish and maintain a website solely for this purpose, however. Providing a short description of the committee's duties also assists members in better understanding the leadership structure of the FCU.

Article VIII. Credit Committee or Loan Officers

Many FCUs now use automated systems for accepting loan applications, loan underwriting, and loan processing, as permitted by several of the NCUA Office of General Counsel's legal opinions. The bylaws reflect that FCUs may use automated lending systems, as long as the credit committee or a loan officer: (1) reviews the loans the automated system granted for fraud and other purposes; and (2) reviews loans the automated system denied.

Article IX. Supervisory Committee

i. Nominations: The Act requires that the FCU's board appoint the members of the Supervisory Committee. It is permissible for the board to seek nominations from members before making Supervisory Committee appointments.

Article XIV. Expulsion and Withdrawal

i. Expulsion procedures: As noted in the commentary to Article II, there is a fairly wide range of measures available to the credit union in responding to abusive or disruptive members. However, in accordance with the Act, there are only two ways a member may be expelled: (1) A two-thirds vote of the membership present at a special meeting called for that purpose, and only after the individual is provided an opportunity to be heard; and (2) for non-participation in the affairs of the credit union, as specified in a policy adopted and enforced by the board.[11] Only in-person voting is permitted in conjunction with the special meeting, so that the affected member has an opportunity to present their case and respond to the credit union's concerns. In addition, FCUs should consider the commentary under Article XVI about members using accounts for unlawful purposes.

Article XVI. General

i. Special meeting requirements: To remove a director under section 3 of this Article requires a majority vote of members present at a special meeting called for the purpose of voting on removal. The bylaw requires that the affected director have the ''opportunity to be heard.'' NCUA interprets this provision as requiring the vote to occur at an in-person meeting rather than by mail ballot. At an in-person meeting, the director subject to the removal vote can make his or her case before the members. The director removal provisions derive from provisions of the Act, as follows:

- The bylaws govern the conduct of special meetings;[12]
- Members must have the opportunity to vote, at a meeting, on the Supervisory Committee's suspension of a director;[13] and
- FCU members may be expelled by vote of members present at a meeting called for that purpose.[14]

ii. Unlawful purposes: FCUs expressed concerns that some members may be using their accounts for unlawful purposes. Section 1 of this Article specifies that the credit union, its powers and duties, and the functions of its members, officers and directors, are all strictly circumscribed by law and regulation. Insofar as this provision is included in the bylaws, an FCU need not adopt a specific policy or requirement that members conform their use of credit union products or services to lawful purposes. Furthermore, the existence of this bylaw provides ample support should an FCU determine to impose strict limits on products and services available to any individual who is found to be using the FCU in furtherance of unlawful purposes.

iii. Posting of bylaws on website: FCUs that maintain a website must post a copy of the FCU's bylaws on the website. After adopting amendments, FCUs must post an updated copy of the bylaws. An FCU is not required to establish and maintain a website solely for this purpose, however.

PART 746—APPEALS PROCEDURES

■ 3. The authority for part 746 continues to read as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

§ 746.201 [Amended]

■ 4. In § 746.201, in paragraph (c), add the following words ''appendix A to part 701 of this chapter,'' between ''701.34(a)(4),'' and ''appendix B to part 701 of this chapter''.

[FR Doc. 2019–20826 Filed 10–3–19; 8:45 am]

BILLING CODE 7535–01–P

[9] 12 U.S.C. 1761(b).

[10] 12 CFR 741.6.

[11] *See* 12 U.S.C. 1764.

[12] 12 U.S.C. 1760.

[13] 12 U.S.C. 1761d.

[14] 12 U.S.C. 1764(a).

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