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Rules and Regulations

Federal Register

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

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1410

[Docket ID CCC–2019–0006]

RIN 0560–AI41

Conservation Reserve Program

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Interim rule.

SUMMARY: This rule is revising the Commodity Credit Corporation's (CCC) Conservation Reserve Program (CRP) regulations to specify the terms and conditions of CRP and to implement amendments made by the Agriculture Improvement Act of 2018 (2018 Farm Bill). The 2018 Farm Bill authorizes CRP through fiscal year 2023. This rule makes required changes to the eligibility criteria for enrollment in CRP, the benefits available to participants, and the land use and compliance provisions of CRP. In addition, this rule will implement two new pilot programs, the Clean Lakes, Estuaries, and Rivers 30 (CLEAR 30) Pilot Program and the Soil Heath and Income Protection Pilot (SHIPP) Program, as required by the 2018 Farm Bill.

DATES:

Effective: December 6, 2019.

Comment Date: We will consider comments that we receive by February 4, 2020.

ADDRESSES: We invite you to submit comments on this rule. In your comment, please specify RIN 0560–AI41 and include the date, volume, and page number of this issue of the **Federal Register**, and the title of the rule. You may submit comments through the:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID CCC–2019–0006. Follow the online instructions for submitting comments.

All comments received will be posted without change and publicly available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Virgil Ireland; telephone: (816) 926–6014, email: *virgil.ireland@usda.gov.* Persons with disabilities who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

CRP is authorized by the Food Security Act of 1985 (Pub. L. 99–198), which was amended by the 2018 Farm Bill (Pub. L. 115–334). The purpose of CRP continues to be cost-effectively assisting producers in conserving and improving soil, water, and wildlife resources, restoring wetlands by converting highly erodible and other environmentally-sensitive land generally devoted to the production of agricultural commodities to a long-term vegetative cover, or improving conditions of certain grasslands. CRP participants enroll land under contracts and maintain approved cover, including grasses and trees, or water cover, in exchange for annual rental payments and financial assistance to install certain conservation practices. Enrollment of eligible grassland in CRP results in adoption of sustainable grazing practices. CRP is administered by the Farm Service Agency (FSA) on behalf of CCC. Since its inception in 1985, CRP has proven to be one of the largest and most successful conservation programs in USDA.

There are three major types of CRP signups: General, continuous, and grassland. Each of the three types has specific enrollment provisions, as described below. For all signups, potential participants must submit an offer for enrollment at the local FSA county office or USDA service center.

Enrollment through general signup is based on a competitive offer process during designated signup periods. The general signup occurs when the Secretary of Agriculture (Secretary) announces USDA will accept general signup offers for enrollment. Offers from potential CRP participants are ranked against each other at the national level. Ranking is based on the environmental benefits expected to result from the proposed conservation practices, and expected costs. Each offer is assigned an Environmental Benefit Index (EBI) score using ranking factors designed to reflect the expected environmental benefits and costs. A fact sheet regarding the EBI factors will be provided on a USDA web page. These EBI factors may include, but are not limited to, wildlife habitat, water quality, and reductions in farm erosion benefits. The highly erodible cropland criteria are based on the provisions of the Food Security Act of 1985, as amended, and 7 CFR part 12. EBI may include benefits that last beyond the contract period and factors that include per acre expected costs. In a general signup, the offer process is competitive and not all offers will necessarily rank high enough to be selected for enrollment in CRP.

For practices and land with especially high environmental value, enrollment through continuous signup is usually available year-round without ranking periods. The continuous signup is focused on environmentally sensitive land, and offers are not ranked against each other. Land eligible for continuous signup may include:

- Land in riparian areas that border rivers, streams, and lakes;
- Land suitable for wetland restoration; and
- Certain land to be dedicated to other specialized conservation measures.

While land is accepted on a non-competitive basis, the practices available under CRP continuous signup provide environmental benefits that likely would consistently rank high under the EBI, making the land and practice(s) acceptable for enrollment under a general signup.

The 2018 Farm Bill changes the offer process for grassland signups from a continuous basis to an annual enrollment basis with ranking periods occurring subsequent to the announcement of general signup offers.

This rule does not change the basic administrative structure and nature of CRP.

Definitions

This rule removes the following definitions in 7 CFR 1410.2 because they are no longer used in the CRP regulations, or are provided in 7 CFR part 718, or are no longer needed because of improved clarity in the provisions throughout this rule: ''deputy administrator,'' ''field,'' ''landlord,'' ''nesting season,'' ''offeror,'' ''operator,'' ''pastureland,'' ''payment period,'' ''pollinator,'' ''rangeland,'' ''retired or retiring owner or operator,'' ''state school trust land,'' ''state water quality priority area,'' and ''veteran farmer or rancher.''

This rule adds definitions in 7 CFR 1410.2 of ''field border,'' ''grass waterway,'' and ''prairie strip'' because they are relevant to continuous signup enrollment, as provided in the 2018 Farm Bill. It also adds a definition in 7 CFR 1410.2 of ''carrying capacity'' and ''primary nesting season'' that apply to the new permissive uses, as provided in the 2018 Farm Bill, and adds a definition of ''eligible partner'' as provided in the 2018 Farm Bill relevant to the Conservation Reserve Enhancement Program (CREP). Further, it adds a definition of ''approved cover'' because the term is used throughout the regulation.

This rule revises the definition of ''conserving use'' to update the years consistent with the updated cropping history years specified by the 2018 Farm Bill. This rule revises the definitions of ''filter strip'' and ''riparian buffer'' to improve clarity regarding the required location of the practice in question and provide consistency between the definitions. This rule revises the definition of ''violation'' to clarify that an inaction by the participant may also be a violation that results in adverse consequences. This rule also revises ''annual rental payment'' to specify that certain incentive payments are not included in the definition. This rule revises the definition of ''considered planted'' to not limit prevented planted credit to those cases in which a producer received an insurance indemnity payment for prevented planting. Further, this rule revises other definitions to remove obsolete, erroneous, or duplicative references and citations, or to improve the clarity of the definition.

General Description

This rule revises the provisions in 7 CFR 1410.3 to change the term ''conserving use'' to ''approved cover'' for consistency with the definition of the term ''approved cover.'' In addition, this rule removes the provisions regarding cost-share assistance from § 1410.3, as they are duplicative of the provisions regarding cost-share payments elsewhere in this rule. This rule also revises the provisions in 7 CFR 1410.3 regarding the requirement that a producer obtain and adhere to a conservation plan that is duplicated elsewhere in the regulation.

Maximum County Acreage

The 2018 Farm Bill maintains the acreage limitation that not more than 25 percent of the cropland in any county can be enrolled in CRP. However, it changes the description in 7 CFR 1410.4 of land to which the Secretary may provide a waiver of the county acreage limitation by specifically permitting it on land enrolled under a CREP. Further, it increases the percent of the cropland in a county that may be subject to a wetland easement from not more than 10 percent to not more than 15 percent. This rule revises the maximum county acreage provisions in 7 CFR 1410.4 to incorporate the changes made by the 2018 Farm Bill.

Eligible Persons

This rule revises the provisions in 7 CFR 1410.5 to improve clarity regarding when the 12-month ownership or operatorship applies based on the type of signup under which the offer is submitted.

Eligible Land

The 2018 Farm Bill changes the cropping history requirement so that cropland must have been planted or considered planted for 4 of the 6 years preceding the date of enactment of the 2018 Farm Bill (December 20, 2018). The 2018 Farm Bill also provides that cropland enrolled in CRP is to be considered planted for purposes of cropping history eligibility.

The 2018 Farm Bill specifies certain CRP conservation practices that will have a positive impact on water quality, including grass waterways, filter strips, contour grass strips, riparian buffers, wetland practices and wetland buffers, bioreactors, and saturated buffers, as practices eligible for enrollment under a continuous basis. The 2018 Farm Bill also adds, as eligibility criteria for enrollment on a continuous basis, a new CRP conservation practice, prairie strip, and land devoted to practices to benefit State and federally identified wellhead protection areas. The 2018 Farm Bill also makes eligible for enrollment land that was enrolled in CRP under a 15-year contract that expired on September 30, 2017, or September 30, 2018, provided there was no opportunity for such land to be re-enrolled previously, and provided that the conservation practice on such land has been maintained.

The 2018 Farm Bill also limits the number of times land subject to a CRP contract that is devoted to hardwood trees, excluding riparian buffers, shelterbelts, and certain forested wetlands, can be reenrolled in CRP to only one re-enrollment.

Further, the 2018 Farm Bill makes eligible for enrollment in CRP certain land that is subject to State resource conserving or environmental protection measures or practices that would otherwise render such land ineligible for enrollment. Such land will be enrolled under a reduced annual rental payment.

This rule revises the eligible land provisions in 7 CFR 1410.6 to incorporate the changes made by the 2018 Farm Bill, to improve clarity, and to make minor technical corrections.

Duration of Contracts

The 2018 Farm Bill adds two pilot programs (discussed below) that provide for CRP contracts ranging in duration from 3 to 30 years. Accordingly, this rule revises the provisions in 7 CFR 1410.7 to address the various contract durations and improve clarity.

Conservation Priority Areas

This rule revises the provisions in 7 CFR 1410.8 to remove provisions regarding designations of National conservation priority areas and provisions allowing State FSA Committees to designate conservation priority areas. This rule revises the provisions in 7 CFR 1410.8 include provisions specifying that a State agency may submit proposals for conservation priority areas within guidelines established by CCC consistent with the Food Security Act of 1985, as amended.

Restoration of Wetlands

This rule revises 7 CFR 1410.10 to remove provisions regarding potential cost-share and incentive payments that are duplicated elsewhere in the regulation.

Farmable Wetlands Program

This rule revises 7 CFR 1410.11 to include acreage enrollment limitations, provisions regarding incentive payments for farmable wetlands, clarify cropping history requirements, and for consistency with the Food Security Act of 1985, as amended.

Grasslands Enrollments and Permitted Uses

The 2018 Farm Bill adds provisions identifying criteria for which the Secretary may give priority when evaluating offers to enroll grasslands in CRP, including land under risk of conversion, land of ecological significance, and land enrolled under an expiring CRP contract. This rule revises 7 CFR 1410.31 to include the 2018 Farm Bill's criteria that may be used in evaluating offers to enroll grasslands into CRP.

In addition, this rule revises the provisions in 7 CFR 1410.13 to include the activities permitted on grasslands enrolled in CRP, and to remove erroneous references to land previously enrolled in the Grasslands Reserve Program.

Obligations of Participant

The 2018 Farm Bill adds that under the terms and conditions of the CRP contract, participants must agree to carry out proper thinning and other practices on land devoted to trees, excluding windbreaks and shelterbelts, to enhance the conservation benefits and wildlife habitat resources, and to promote forest management. This rule revises 7 CFR 1410.20 to add the obligation to carry out such activities, and to make other minor changes to improve clarity.

Obligations of CCC

This rule revises the provisions in 7 CFR 1410.21 for clarity and consistency with the Food Security Act of 1985, as amended, by adding that CCC cost sharing must be appropriate and in the public interest.

CRP Conservation Plans

The 2018 Farm Bill retains the provision that requires participants to undertake management activities on the land as needed throughout the duration of the CRP contract to implement the conservation plan. However, the 2018 Farm Bill prohibits the Secretary from making any cost-sharing payment for management activities. In addition, under the 2018 Farm Bill, in the case where a natural disaster or adverse weather event occurs that has the same effect as the planned management activity consistent with the conservation plan, then a planned management activity is not required. This rule revises 7 CFR 1410.22 to add provisions regarding a natural disaster or adverse weather event having the same effect as a planned management activity and specifying that no cost-share payments will be provided for any management activity. In addition, this rule clarifies that the conservation plan must be approved by NRCS. Further, this rule revises 7 CFR 1410.22 for technical changes for consistency with the Food Security Act of 1985, as amended, and for clarity.

Signup

The 2018 Farm Bill requires the Secretary to hold a general signup not less often than once each year. The 2018 Farm Bill also changes enrollment of eligible grasslands from a continuous basis to an annual enrollment basis with ranking periods being subsequent to the announcement of general signup offers. In addition, the 2018 Farm Bill specifies specific land and practices that will be eligible under a CRP continuous signup basis. Further, the 2018 Farm Bill adds two pilot programs (discussed below), one of which has a statutory deadline for enrollment of December 31, 2020. This rule revises 7 CFR 1410.30 to incorporate the relevant changes made by the 2018 Farm Bill.

CRP Contract

The 2018 Farm Bill amendments add provisions to allow land enrolled in CRP during the last year of the CRP contract to be enrolled in the Environmental Quality Incentives Program (EQIP) or the Conservation Stewardship Program (CSP), and permit the participants to begin establishment of a practice under the EQIP or CSP programs without being in violation of the CRP contract. In addition, the 2018 Farm Bill adds that during the 3 years prior to the end of the CRP contract period, the participant may begin the certification process under the Organic Foods Production Act of 1990 without being in violation of the CRP contract.

This rule revises 7 CFR 1410.32 to incorporate the provisions of the 2018 Farm Bill regarding enrollment of land into EQIP and CSP and beginning the organic certification process. In addition, this rule revises 7 CFR 1410.32 to clarify that the provisions regarding the termination of CRP contracts and the refunding of payments and assessment of liquidated damages resulting from such CRP contract termination are applicable to the termination of a CRP contract in whole or in part. The policy on termination of CRP contracts is not changing with this rule; rather, the amendments clarify that termination on part of the land enrolled is, for the terminated part of the land, treated the same and has the same consequences as termination of the entire contract.

Contract Modifications

The 2018 Farm Bill amendments change the time period in which a CRP contract may be modified to facilitate the transition of land to a beginning, socially disadvantaged, or veteran farmer or rancher from the final year of the CRP contract to the last 2 years of the CRP contract. These changes are discussed further below under the Transition Incentives Program. This rule revises 7 CFR 1410.33 to incorporate the changes made by the 2018 Farm Bill with regard to needed CRP contract modifications.

In addition, this rule revises 7 CFR 1410.33 to clarify that the provisions regarding termination of a CRP contract are applicable to termination whether in whole or in part, consistent with the revisions made to this rule in 7 CFR 1410.32. Further, this rule removes the requirement that practice incentive payments must be refunded when land is transferred from CRP into Agricultural Conservation Easement Program (ACEP), because practice incentive payments are considered cost-share payments under the 2018 Farm Bill.

Cost-Share Payments and Levels and Rates for Cost-Share Payments

The 2018 Farm Bill adds provisions for practice incentive payments for certain land enrolled under continuous signup and under CREP in an amount not to exceed 50 percent of the actual cost of the practice. It also provides that in the case of seed costs for the practice, the cost-share payments are not to exceed 50 percent of the cost of the actual cost of the seed. Further, it amended the Food Security Act of 1985 to provide that in general, cost-share payments to participants, when combined with payments from all other sources, cannot exceed 100 percent of the actual cost of establishing the practice.

This rule revises §§ 1410.40 and 1410.41 for consistency with the 2018 Farm Bill changes regarding cost-share limits and the limitations for practice incentive payments. In addition, this rule revises 7 CFR 1410.40 to remove references to sections that were removed in 2015, and to add provisions regarding refunds of cost-share payments when other federal cost-share assistance is received by the participants for the same land, as required by the Food Security Act of 1985, as amended. It also clarifies that cost-share payments are not subject to the $50,000 payment limitation in 7 CFR 1410.42. Further, this rule revises 7 CFR 1410.40 to add that the benefits that would be received from the replacement or restoration of the practice must outweigh the cost of such action in order for cost-share payments to be authorized. This rule also revises 7 CFR 1410.41 to remove provisions that are duplicated in 7 CFR 1410.40.

Annual Rental Payments

The 2018 Farm Bill amendments provide an exception to the $50,000 payment limitation in the case where the participant is a rural water district or association and the land enrolled is for the purpose of protecting a wellhead. This rule revises 7 CFR 1410.42 to incorporate the 2018 Farm Bill changes regarding the exception to the $50,000 payment limitation. In addition, this rule revises the provisions to improve clarity and consistency with other sections of the regulation.

Method of Payment

This rule removes 7 CFR 1410.43 as method of payment provisions are provided in 7 CFR part 1401.

Average Adjusted Gross Income

The 2018 Farm Bill amendments provide authority for the Secretary to waive the income limitations that apply to CRP on a case-by-case basis if the Secretary determines that environmentally sensitive land of special significance would be protected as a result of the waiver. The income limitations and provisions for any applicable waiver are implemented in 7 CFR part 1400. This rule revises 7 CFR 1410.44 to add a reference to 7 CFR part 1400 regarding any waiver of the income limitations that may apply to CRP.

Incentive Payments

This rule revises 7 CFR part 1410 to add § 1410.45 to provide provisions regarding certain incentive payments authorized by the 2018 Farm Bill and incentive payments that may be made available at the sole discretion of CCC. The 2018 Farm Bill mandates a one-time signup incentive payment for the initial enrollment of certain land and CRP conservation practices, equal to 32.5 percent of the amount of the first annual rental payment of the land and practices. The 2018 Farm Bill also provides authority for CCC to provide incentive payments to encourage proper tree thinning and other practices to improve the condition of resources, promote forest management, or enhance wildlife habitat on the land. Such incentive payments cannot exceed 100 percent of the total cost of thinning and other practices. In addition, the 2018 Farm Bill provides discretionary authority for CCC to provide other incentive payments; however, such incentive payments are not required.

Enhancement Programs

Prior to the 2018 Farm Bill, the annual payment limitation did not apply to a State, or political subdivision or agency thereof, in connection with State enhancement programs approved by FSA. The State enhancement programs were separate and apart from CREP (discussed below). The 2018 Farm Bill removes the provisions regarding the State enhancement programs. Accordingly, this rule removes 7 CFR 1410.50.

Violations

This rule revises 7 CFR 1410.52 to clarify that the provisions regarding termination of a CRP contract are applicable to termination whether in whole or in part, consistent with the revisions made to this rule in §§ 1410.32 and 1410.33. In addition, this rule revises § 1410.52 to remove the crop insurance purchase requirement, as it was eliminated under the Agricultural Act of 2014.

Termination of CRP Contracts

This rule revises 7 CFR 1410.53 to clarify that the provisions regarding termination of a CRP contract are applicable to termination whether in whole or in part, consistent with the revisions made by this rule in §§ 1410.32, 1410.33, and 1410.52.

Payments Not Subject to Claims

This rule revises 7 CFR 1410.57 to clarify that any payment or portion of payment due any person under 7 CFR part 1410 will be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

Miscellaneous

This rule revises 7 CFR 1410.62 to remove the provisions regarding research projects because CCC determined such provisions are not necessary.

Permissive Uses

Uses of land enrolled in CRP is generally limited to the list of uses specified in 7 CFR 1410.63, unless provided for elsewhere in the regulation. The intent of such limits is to ensure that land enrolled in CRP is not used for activities that would tend to defeat the conservation purposes of CRP, while allowing certain activities that are authorized by the Food Security Act of 1985, as amended, and are consistent with the CRP goals and purpose. Specifically, the permissive uses must be consistent with the provisions of the Food Security Act of 1985, as amended, and consistent with the conservation of soil, water quality, and wildlife habitat, including habitat during the nesting season for certain categories of birds in the area.

The 2018 Farm Bill amendments remove provisions for managed harvesting and routine grazing of CRP land. The 2018 Farm Bill specifies the activities permitted on CRP land, and which activities result in a reduction to the annual rental payment, and the amount of the reduction, if any. Further, the 2018 Farm Bill also specifies the criteria that must be met in order to conduct emergency haying, grazing or other emergency use of the land.

All haying and grazing activities will be conducted only after a detailed conservation plan is developed for such activity in accordance with the 2018 Farm Bill, this rule, and the Natural Resource Conservation Service (NRCS) Field Office Technical Guide (FOTG).[1] The conservation plan will ensure the long-term viability of the CRP conservation practice and cover while protecting and enhancing the soil, water, wildlife, and other natural resources. All haying and grazing activities must be conducted consistent with the terms and conditions of the conservation plan.

The 2018 Farm Bill prohibits all haying and grazing activities if such activity for that year would cause long-term damage to the cover on that land. It also prohibits all haying and grazing activities on land enrolled in CRP through CREP or a State Acres for Wildlife Enhancement (also known as SAFE) project, unless such activity is specifically permitted as part of the CREP agreement or State Acres for Wildlife Enhancement project, as applicable.

This rule revises 7 CFR 1410.63 to add new provisions and revise existing provisions for permissive uses consistent with the 2018 Farm Bill amendments, reorganize the section for improved clarity, and to make minor technical corrections.

Transition Incentives Program

The 2018 Farm Bill amends the provisions regarding the Transition Incentives Program (TIP) by changing the time period in which the beginning, socially disadvantaged, or veteran farmer or rancher can make conservation and land improvements, including preparing to plant an agricultural crop, and begin the certification process under the Organic Foods Production Act of 1990, from 1 year before the end of the CRP contract period to 2 years before the end of the CRP contract period. Further, the 2018 Farm Bill changes the provisions to allow a lease with a term of less than 5 years and option to purchase to qualify as an eligible lease for the transfer of eligible land under the Transition Incentives Program. The 2018 Farm Bill also removes the requirement that the owner or operator had to be a retired or

[1] Information about FOTG and state FOTGs are available on the NRCS website at *https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/fotg/*.

retiring owner or operator to be eligible to participate in the Transition Incentives Program.

This rule revises 7 CFR 1410.64 to add and revise provisions required by the 2018 Farm Bill for the Transition Incentives Program, reorganize the section for improved clarity, and make minor technical corrections.

Pilot Programs

The 2018 Farm Bill adds two new pilot programs to CRP, the CLEAR 30 Pilot Program and SHIPP. Only certain land devoted to specific practices enrolled in CRP in the last year of the CRP contract is eligible to be enrolled under CLEAR 30. For CLEAR 30, the practices eligible are limited to those continuous signup practices that provide water quality protection by helping to reduce sediment loadings, nutrient loadings, and harmful algal blooms. A fact sheet regarding the practices eligible under CLEAR 30 will be provided on a USDA web page. Under CLEAR 30, producers must enroll land under a 30-year contract in exchange for annual rental payments.

SHIPP authorizes enrollment of certain cropland in the prairie pothole region of a State on a pilot basis. The deadline for enrollment is December 31, 2020. To be eligible to be enrolled, the cropland must have been planted or considered planted to an agricultural commodity during each of the 3 crop years preceding enrollment and must be verified to be less-productive land as compared to other land on the farm. Land that was enrolled in the CRP in any of the 3 crop years immediately preceding enrollment under SHIPP is not eligible for enrollment. Under SHIPP, producers enroll land under contracts for 3, 4, or 5 years in exchange for annual rental payments. FSA will not provide any financial assistance for the cost of installing or establishing the approved cover, except for participants who are beginning, limited resource, socially disadvantaged, or veteran farmers or ranchers, who may receive financial assistance in the form of cost-share up to 50 percent of the eligible cost of installing eligible cover. Under SHIPP, the only approved cover is the lowest practicable cost permanent vegetative cover.

This rule revises 7 CFR part 1410 to add §§ 1410.70 and 1410.80 to provide the provisions related to SHIPP and CLEAR 30, respectively.

CREP

The 2018 Farm Bill adds provisions for CREP. CCC began implementing CREP in 1997. Through CREP, CCC entered into agreements with States, their political subdivisions or agencies to use the CRP to cost-effectively address specific conservation and environmental issues of the State and the nation. Proposals, developed locally and submitted for approval by the Secretary, address resource concerns, provide for cooperation with the CREP partner, present clear goals with measurable objectives, and detail non-federal financial contributions by the partners. The 2018 Farm Bill included as potential partners under CREP Indian tribes and nongovernmental organizations, in addition to State governments and political subdivisions of states. It also specified terms and conditions that must be included in CREP agreements, provided minimum contribution requirements for nongovernmental organizations, and provided authority for certain actions and activities related to riparian buffers enrolled under a CREP agreement. The 2018 Farm Bill provisions relating to CREP agreements do not affect or modify CREP agreements existing as of December 20, 2018, unless the signatories to the existing agreements mutually agree to modify such agreements to include 2018 Farm Bill provisions.

This rule revises 7 CFR part 1410 to add § 1410.90 to provide the provisions related to CREP.

Miscellaneous Conforming and Editorial Changes

In addition to the changes required by the 2018 Farm Bill and the other changes discussed above, this rule includes other changes to make the CRP regulations consistent with the Food Security Act of 1985, as amended, and improve clarity. For example, some parts of the regulation were reorganized to be in a more logical order and easier to understand. Obsolete and erroneous parts and citations have been removed or corrected, as applicable. In general, this rule amends CRP regulations in 7 CFR part 1410 to implement changes required by the 2018 Farm Bill and make technical changes relevant to CRP implementation, for example, correcting erroneous citations.

Effective Date and Notice and Comment

The Administrative Procedure Act (APA, 5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves specified actions, including matters relating to benefits. This rule governs CRP for payments to participants and thus falls within that exemption. Further, the promulgation of regulations to implement the programs of Chapter 58 of Title 16 of the U.S. Code, as specified in 16 U.S.C. 3846, and the administration of those programs, are:

- To be made as an interim rule effective on publication, with an opportunity for notice and comment,
- Exempt from the Paperwork Reduction Act (44 U.S.C. chapter 35), and
- To use the authority in 5 U.S.C. 808 related to Congressional review and any potential delay in the effective date.

For major rules, the Congressional Review Act requires a delay in the effective date of 60-days after publication to allow for Congressional review. This rule is major under the Congressional Review Act, as defined by 5 U.S.C. 804(2). The authority in 5 U.S.C. 808 provides that when an agency finds for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, that the rule may take effect at such time as the agency determines. As noted above, the 2018 Farm Bill exempts this rule from the Congressional Review Act effective date delay requirement. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act, FSA and CCC are not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective upon publication in the **Federal Register**.

Executive Orders 12866, 13563, 13771 and 13777

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The requirements in Executive Orders 12866 and 13563 for the analysis of costs and benefits apply to rules that are determined to be significant. Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' established a federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this interim rule as economically significant under Executive Order 12866, ''Regulatory

Planning and Review,'' and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized below. The full cost benefit analysis is available on *regulations.gov*.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' requires that in order to manage the private costs required to comply with Federal regulations that for every new significant or economically significant regulation issued, the new costs must be offset by the elimination of at least two prior regulations. OMB guidance in M–17–21, dated April 5, 2017, specifies that ''transfer rules'' are not covered by Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' Transfer rules are Federal spending regulatory actions that cause only income transfers between taxpayers and program beneficiaries. Therefore, this is considered a transfer rule by OMB and is not covered by Executive Order 13771.

In a general response to the requirements of Executive Order 13777, USDA created a Regulatory Reform Task Force, and USDA agencies were directed to remove barriers, reduce burdens, and provide better customer service both as part of the regulatory reform of existing regulations and as an ongoing approach. FSA reviewed this regulation and made changes to improve any provision that was determined to be outdated, unnecessary, or ineffective.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this interim rule, we invite your comments on how to make the rule easier to understand. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

Cost Benefit Analysis

The cost-benefit assessment analyzes the costs and benefits of this interim rule. The 2018 Farm Bill, mandates changes to the CRP regulations specified in the interim rule.

Among other things, the 2018 Farm Bill extended enrollment authority to September 30, 2023, and incrementally increases overall enrollment caps from 24 million acres in FY 2019 to 27 million acres in FY 2023. The 2018 Farm Bill also sets a goal of enrolling 2 million acres of grasslands; authorizes up to $12 million in incentive payments to encourage management of CRP tree stands to improve wildlife habitat; and authorizes up to $50 million for TIP payments (including $5 million for technical assistance costs). It also revises haying and grazing rules.

The 2018 Farm Bill makes certain mandatory changes that were in the past discretionary to USDA. For example, in the past, USDA had discretion to determine whether signing incentive payments (SIPs) were offered and at what level. Under the 2018 Farm Bill, SIPs are mandatory for all new continuous sign-up practices and are set at 32.5 percent of the annual rental rate. In addition, the 2018 Farm Bill limits annual rental payments to 85 percent of average county rental rates for general signup and to 90 percent for continuous signup.

USDA continues to have discretion in certain cases. For example, the 2018 Farm Bill mandates that USDA offer one-time practice incentive payments (PIPs). USDA has discretion in setting the level of those payments, which can range up to 50 percent of the cost of installing the practice.

The 2018 Farm Bill also added two pilot programs. Under the CLEAR 30 pilot, acres in CLEAR practices expiring under the 2018 Farm Bill may be eligible for 30-year contracts. No acreage limitation is specified in the statute, although CLEAR 30 contracts are subject to the 27-million-acre CRP enrollment cap. The Soil Health and Income Protection Pilot Program covers up to 50,000 acres in the Prairie Pothole region. The program limits enrollment to the least productive croplands on the farm, enrolled lands must have been in cropland use in the three preceding years, and no more than 15 percent of the cropland on the farm can be enrolled.

Since FY 2006, CRP financial assistance outlays have averaged $1.8 billion annually. Had the 2014 Farm Bill continued, outlays would have increased over time, largely due to the increasing share of continuous sign-up enrollment, which is more expensive than general enrollment sign-up. Under the 2018 Farm Bill, financial assistance outlays are expected to average $2.2 billion annually as the acreage cap is increased and cash rents—a critical component in the CRP rental payment—have remained relatively stable and, in some cases, increased. When discounted at either 3 percent or 7 percent, annualized outlays are $2.1 billion.

Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory analysis of any rule whenever an agency is required by the Administrative Procedures Act or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because CCC and FSA are not required by the Administrative Procedure Act or any law to publish a proposed rule for this rule. The Secretary is required by section 1246 of the Food Security Act of 1985, as amended, to issue an interim rule effective on publication with an opportunity for comment. Despite the Regulatory Flexibility Act not applying to this rule, the action only affects those entities who voluntarily participate in CRP and in doing so receive its benefits. Compliance with the provisions of CRP regulations is only required for those entities who choose to participate in this voluntary program.

Environmental Review

The environmental impacts of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). While OMB has designated this rule as ''economically significant'' under Executive Order 12866, ''. . . economic or social effects are not intended by themselves to require preparation of an environmental impact statement'' (40 CFR 1508.14), when not interrelated to natural or physical environmental effects.

As part of this CRP rulemaking, FSA prepared a Programmatic Environmental Assessment (EA) to evaluate alternatives and anticipated impacts. The draft EA was announced through an FSA press release on September 27, 2019, and a Notice of Availability published in the **Federal Register** (84 FR 52868—52869); it was made available on FSA's NEPA website and by request (*https://www.fsa.usda.gov/programs-and-services/environmental-cultural-resource/nepa/current-nepa-documents/index*); comments were accepted for 30 days (through October 27, 2019) from the public, other agencies, and Tribes; responses to those comments were incorporated into the final EA, as appropriate; and, as no substantive changes to the alternatives or impacts analyses were warranted to incorporate these comments into the final EA, a Finding of No Significant Impact (FONSI) was signed. As detailed in the EA, for each individual CRP action, FSA will complete a site-specific environmental evaluation to ensure no extraordinary circumstances or other potentially significant impacts exist, individually or cumulatively. To notify interested parties, the final EA and signed FONSI will be available for review for 30 days following the publication of this document in the **Federal Register** on the FSA website at *https://www.fsa.usda.gov/programs-and-services/environmental-cultural-resource/nepa/current-nepa-documents/index.*

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities in this rule are excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule will not have retroactive effect. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' 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.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule does have significant Tribal implications. OTR has determined that further Tribal consultation under Executive Order 13175 is not required at this time. Tribal consultation for this rule was included in the 2018 Farm Bill consultation held on May 1–2, 2019, at the National Museum of American Indian, in Washington, DC, and on June 26–27, 2019, in Sparks, NV. The portion of the Tribal Consultation relative to this rule was conducted by Bill Northey, USDA Under Secretary for the Farm Production and Conservation mission area, as part of Title II session on May 1, 2019. If a Tribe requests additional consultation, FSA and CCC will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications are not expressly mandated by law.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments, or the private sector. Agencies generally need to prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates as defined in Title II of UMRA for State, local, or Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Domestic Assistance Programs

The title and number of the Federal Domestic Assistance Program found in the Catalog of Federal Domestic Assistance to which this rule applies is 10.069—Conservation Reserve Program.

E-Government Act Compliance

FSA and CCC are 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 1410

Acreage allotments, Agriculture, Environmental protection, Natural resources, Reporting and recordkeeping requirements, Soil conservation, Technical assistance, Water resources, Wildlife.

For the reasons discussed above, CCC revises 7 CFR part 1410 to read as follows:

PART 1410—CONSERVATION RESERVE PROGRAM

Sec.

Authority: 15 U.S.C. 714b and 714c; 16 U.S.C. 3801–3847.

§ 1410.1 Administration.

(a) The Conservation Reserve Program (CRP) is administered under the general supervision and direction of the Executive Vice President, Commodity Credit Corporation (CCC), the Administrator, Farm Service Agency (FSA), or a designee, or the Deputy Administrator, FSA; and will be carried out by the FSA State and county committees (''State committees'' and ''county committees,'' respectively).

(b) State executive directors, county executive directors, and State and county committees do not have the authority to modify or waive any of the provisions in this part unless specifically authorized by the Deputy Administrator.

(c) The State committee may take any action authorized or required by this part to be taken by the county committee, but which has not been taken by such county committee, including, but not limited to:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(d) No delegation of authority herein to a State or county committee will preclude the Executive Vice President, CCC, the Administrator, FSA, or a designee, or the Deputy Administrator, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Data furnished by producers will be used to determine eligibility for CRP benefits. Furnishing the data is voluntary; however, the failure to provide data could result in CRP benefits being withheld or denied.

(f) Notwithstanding other provisions of this section, the suitability of land for permanent vegetative or water cover, factors for determining the likelihood of improved water quality, and adequacy of the planned practice to achieve desired objectives will be determined by the Natural Resource Conservation Service (NRCS) or other sources approved by the Deputy Administrator, in accordance with the Field Office Technical Guide (FOTG) of NRCS or other guidelines deemed appropriate by NRCS. In no case will such determination compel the Deputy Administrator to execute a CRP contract that the Deputy Administrator does not believe will serve the purposes of CRP established by this part. Any approved technical authority will use CRP guidelines established by the Deputy Administrator.

(g) The regulations in this part apply to all CRP contracts approved after December 6, 2019.

§ 1410.2 Definitions.

(a) The definitions in part 718 of this title apply to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions also apply to this part:

Agricultural commodity means:

(i) Any crop planted and produced by annual tilling of the soil or on an annual basis by one-trip planters;

(ii) Sugarcane planted or produced in a State; or

(iii) Alfalfa and other multi-year grasses and legumes grown in a rotation practice as approved by CCC.

Agricultural Conservation Easement Program (ACEP) means the program that provides for the establishment of wetland easements on land under subtitle H of Title XII of the Food Security Act of 1985, as amended.

Annual rental payment means, unless the context indicates otherwise, the annual payment specified in the CRP contract that, subject to the availability of funds, is made to a participant to compensate a participant for placing eligible land in CRP, including any incentive payments that are not specifically cost-share payments. For purposes of this definition, practice incentive payments, and incentive payments related to forest management are not considered part of annual rental payments.

Approved cover means permanent vegetative cover or water cover specified in an approved CRP contract.

Carrying capacity has the same meaning as ''normal carrying capacity'' defined in part 1416 of this chapter.

Commercial pond-raised aquaculture facility means any earthen facility from which $1,000 or more of freshwater food fish were sold or normally would have been sold during a calendar year.

Common grazing practices means grazing practices, including those related to forage and seed production, common to the area of the subject ranching or farming operation. Included are routine management activities necessary to maintain the viability of forage or browse resources that are common to the locale of the subject ranching or farming operation.

Conservation district means a political subdivision of a State, Indian Tribe, or territory, organized pursuant to the State or territorial soil conservation district law, or Tribal law. The subdivision may be a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar legally constituted body.

Conservation plan means a record of the participant's decisions and supporting information for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures needed to solve identified natural resource problems by devoting eligible land to permanent vegetative cover, trees, water, or other comparable measures.

Conservation priority area means an area designated with adverse water quality, wildlife habitat, or other natural resource impacts related to agricultural production activities or to assist agricultural producers to comply with Federal and State environmental laws or to meet other conservation needs.

Conserving use means a use of land that meets crop rotation requirements, as specified by CCC, for: Alfalfa, multi-year grasses, and legumes planted during 2012 through 2017; for summer fallow during 2012 through 2017; or for land on which the CRP contract expired during the period 2012 through 2017 and on which the grass cover required by the CRP contract continues to be maintained as though still enrolled. Land that meets this definition of ''conserving use'' will be considered to have been planted to an agricultural commodity for the purposes of eligibility specified in § 1410.6(b)(1).

Considered planted means land devoted to a conserving use during the crop year or during any of the 2 years preceding the crop year if the contract expired; cropland enrolled in CRP; or land for which the producer received for prevented planting credit in accordance with part 718 of this title.

Contour grass strip means a vegetation area that follows the contour of the land that complies with the FOTG and a conservation plan developed under this part.

Contract period means the term of the CRP contract.

Cost-share payment means, unless the context indicates otherwise, the payment made by CCC to assist CRP participants in installing the practices required in a CRP contract.

Cropland means land defined as cropland in part 718 of this title, except for land in terraces that are no longer capable of being cropped.

Eligible partner means a State, political subdivision of a State, nongovernmental organization, or an Indian Tribe.

Erodibility index (EI) means an index, as prescribed by CCC, used to determine the inherent erodibility from either from water or wind, but not both combined, of a soil in relation to the soil loss tolerance for that soil.

Federally-owned land means land owned by the Federal Government or any department, instrumentality, bureau, or agency thereof, or any corporation whose stock is wholly owned by the Federal Government.

Field border means a strip of permanent vegetation established at the edge or around the perimeter of a field the purpose of which is to provide food and cover for quail and upland birds in cropland areas.

Field Office Technical Guide (FOTG) means the official USDA guidelines, criteria, and standards for planning and applying conservation treatments and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, animal resources, and cultural resources applicable to the local area for which it is prepared. (See *https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/fotg/* to access your State FOTG.)

Field windbreak, shelterbelt, and living snowfence mean a vegetative barrier with a linear configuration composed of trees, shrubs, or other vegetation, that are designated as such in a conservation plan and that are planted for the purpose of reducing wind erosion, controlling snow, improving wildlife habitat, or conserving energy.

Filter strip means a strip or area of vegetation immediately adjacent and parallel to an eligible water body, the purpose of which is to remove nutrients, sediment, organic matter, pesticides, and other pollutants from surface runoff and subsurface flow by deposition, absorption, plant uptake, and other processes, thereby reducing pollution and protecting surface water and subsurface water quality and of a width determined appropriate for such purpose.

Forb means any herbaceous plant other than those in the grass family.

Grassland means land described in § 1410.6(d).

Grass waterway means a shaped or graded channel that is established with suitable vegetation to convey surface water from terraces, diversions, or other water concentrations without causing erosion or flooding using a broad and shallow cross section to a stable outlet.

Highly erodible land means land determined to have an EI equal to or greater than 8 on the acreage offered.

Improved rangeland or pastureland means grazing land permanently producing naturalized forage species that receives varying degrees of periodic cultural treatment to enhance forage quality and yields and is primarily consumed by livestock.

Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Infeasible to farm means an area of land that is too small or isolated to be economically farmed, or is otherwise suitable for such classification.

Local FSA office means the FSA county office serving the area in which the FSA records are located for the farm or ranch.

Offer means, unless the context indicates otherwise, if required by CCC, the per-acre rental payment requested by the owner or operator in such owner's or operator's request to participate in the CRP.

Perennial crop means a crop that is produced from the same root structure for 2 or more years.

Permanent vegetative cover means perennial stands of approved combinations of certain grasses, legumes, forbs, shrubs and trees for the contract period.

Permanent wildlife habitat means a vegetative cover with the specific purpose of providing habitat, food, or cover for wildlife and protecting other environmental concerns for the contract period.

Practice means a conservation, wildlife habitat, or water quality measure with appropriate operations and management as agreed to in the conservation plan to accomplish the desired program objectives according to CRP and FOTG standards and specifications as a part of a conservation management system.

Prairie strip means a strip(s) of diverse, dense, herbaceous, predominately native perennial vegetation designed and positioned on the landscape to most effectively address soil erosion and water quality by intercepting surface and subsurface water flow to remove nutrients, sediment, organic matter, pesticides, and other pollutants by deposition, absorption, plant uptake, denitrification, and other processes, and thereby reduce pollution and protect surface and subsurface water quality while providing food and cover for wildlife.

Primary nesting season means the nesting season for birds in the local area that are economically significant, in significant decline, or conserved in accordance with Federal or State law, as determined by CCC in consultation with the State technical committee established as specified in part 610 of this title.

Riparian buffer means a strip or area of vegetation immediately adjacent and parallel to an eligible water body of sufficient width, the purpose of which is to remove nutrients, sediment, organic matter, pesticides, and other pollutants from surface runoff and subsurface flow by deposition, absorption, plant uptake, and other processes, thereby reducing pollution and protecting surface water and subsurface water quality, and to provide shade to reduce water temperature for improved habitat for aquatic organisms and supply large woody debris for aquatic organisms and habitat for wildlife.

Shrubland means land where the dominant plant species are shrubs, which are plants that are persistent, have woody stems, and a relatively low growth habit.

Socially disadvantaged farmer or rancher means a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Socially disadvantaged groups include the following and no others unless approved in writing by CCC:

(i) American Indians or Alaskan Natives;

(ii) Asians or Asian-Americans;

(iii) Blacks or African Americans;

(iv) Hispanics; and

(v) Native Hawaiians or other Pacific Islanders.

Soil loss tolerance (T) means the maximum average annual erosion rate specified in the FOTG that will not adversely impact the long-term productivity of the soil.

State means State agencies, departments, districts, county or city governments, municipalities or any other State or local government of the State.

State Technical Committee means a committee established pursuant to part 610 of this title to provide information, analysis, and recommendations to the U.S. Department of Agriculture.

Technical assistance means assistance in regard to determining the eligibility of land and practices, implementing and certifying practices, ensuring CRP contract performance, and providing annual rental rate surveys. The technical assistance provided in connection with CRP to owners or operators, as approved by CCC, includes, but is not limited to:

(i) Technical expertise, information, and tools necessary for the conservation of natural resources on land;

(ii) Technical services provided directly to farmers, ranchers, and other eligible entities, including, but not limited to, conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(iii) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, including, but not limited to, technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Violation means an action or inaction by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible for all or a portion of cost-share payments, incentive payments, or annual rental payments.

Water cover means flooding of land by water either to develop or restore shallow water areas for wildlife or wetlands, or as a result of a natural disaster.

Wellhead protection area means the area designated by EPA or the appropriate State agency with an Environmental Protection Agency approved Wellhead Protection Program for water being drawn for public use, as defined for public use by the Safe Drinking Water Act, as amended.

Wetland means land defined as wetland in accordance with provisions of part 12 of this title.

Wetlands Reserve Program (WRP) means the program authorized by part 1467 of this chapter in which eligible persons enter into long-term agreements to restore and protect wetlands.

§ 1410.3 General description.

(a) Under CRP, CCC will enter into contracts with eligible producers to convert eligible land to an approved cover during the contract period in return for financial and technical assistance.

(b) A producer must obtain and adhere, for the contract period, to a conservation plan prepared in accordance with CCC guidelines and the other provisions of § 1410.22.

(c) The objectives of the CRP are to cost-effectively reduce water and wind erosion, protect the Nation's long-term capability to produce food and fiber, reduce sedimentation, improve water quality, create and enhance wildlife habitat, and other objectives including, as appropriate, addressing issues raised by State, regional, and national conservation initiatives and encouraging more permanent conservation practices, including, but not limited to, tree planting.

§ 1410.4 Maximum county acreage.

(a) Except as provided in paragraph (b) of this section the maximum cropland acreage that may be placed in CRP and the wetland reserve easements of WRP and ACEP, as appropriate, may not exceed 25 percent of the total cropland in the county. No more than 15 percent of the cropland in a county may be subject, in the aggregate, to a wetland reserve easement.

(b) The restrictions in paragraph (a) of this section:

(1) May be waived by CCC as follows:

(i) If such waiver would not adversely affect the local economy of the county and that operators in the county are having difficulties complying with conservation plans implemented under part 12 of this title; or

(ii) If the cropland, in a county, is enrolled under provisions as specified in § 1410.90, provided that the county government concurs with such waiver.

(2) Do not apply to cropland that is:

(i) Subject to an easement and enrolled in CRP as a shelterbelt or windbreak; or

(ii) Designated with subclass w in the land capability classes IV through VIII because of severe use limitations due to soil saturation or inundation, as determined by NRCS.

(c) The restrictions on acreage enrollment in this section are in addition to any other restrictions imposed by law.

§ 1410.5 Eligible persons.

(a) To be eligible to enter into a CRP contract in accordance with this part, a person must be an owner, operator, or tenant of eligible land and:

(1) If an operator of eligible land seeks to participate without the owner's participation, then such operator must have operated such land for either at least 12 months prior to the close of the applicable signup period for enrollments under announced signup periods, or for at least 12 months prior to submitting an offer under continuous signup periods as provided in § 1410.30(b); further, such operator must provide satisfactory evidence to CCC that such operator will be in control of such eligible land for the full term of the contract period;

(2) If an owner of eligible land, such owner must have owned such land for either at least 12 months prior to the close of the applicable signup period for enrollment under announced signup periods, or for at least 12 months prior to submitting an offer for continuous signup periods as provided in § 1410.30(b), unless:

(i) The new owner acquired such land by will or succession as a result of the death of the previous owner;

(ii) The only ownership change in the 12-month period occurred due to foreclosure on the land, and the owner of the land, immediately before the foreclosure, exercised a timely right of redemption from the mortgage holder in accordance with State law; or

(iii) The circumstances of the acquisition present adequate assurance that a new owner of such eligible land did not acquire such land for the purpose of placing it in the CRP; or

(3) If a tenant, then the participation of an eligible owner or operator is also required.

(b) The provisions of this section do not apply to beginning, socially disadvantaged, or veteran farmers or ranchers who are eligible participants in the Transition Incentives Program as specified in § 1410.64.

§ 1410.6 Eligible land.

(a) The provisions of paragraphs (b), (c), and (d) of this section do not apply to:

(1) The Transition Incentives Program as specified in § 1410.64;

(2) The Soil Health and Income Protection Pilot Program as specified in § 1410.70; or

(3) The Clean Lakes, Estuaries, and Rivers 30 (CLEAR 30) Pilot Program as specified in § 1410.80.

(b) To be eligible for CRP, land must be one of the following:

(1) Cropland that:

(i) Has been annually planted or considered planted to an agricultural commodity in 4 of the 6 crop years from 2012 through 2017, provided that field margins that are incidental to the planting of crops may also be considered qualifying cropland; and

(ii) Is physically and legally capable of being planted in a normal manner to an agricultural commodity;

(2) Marginal pasture land that:

(i) Is located immediately adjacent and parallel to an eligible stream, other water body, or wetland, but excluding such areas as gullies or sod waterways or similar areas; and

(ii) Is capable, when permanent grass, forbs, shrubs, or trees are grown, or when planted with appropriate vegetation for the area, including vegetation suitable for wetland restoration or wildlife habitat, of either substantially reducing sediment or nutrient runoff that otherwise would be delivered to the adjacent eligible stream or water body, or serving other water quality purposes;

(3) Acreage enrolled in CRP during the final year of the contract period, unless such land is federally-owned, provided the scheduled expiration date of the current CRP contract is before the effective date of the new CRP contract;

(4) Land that meets the criteria specified in paragraph (d) of this section; or

(5) Land that meets all of the criteria in paragraphs (b)(5)(i) through (iii) of this section, which land will then be considered as land enrolled in CRP in the final year of the contract period, and therefore will be eligible to be offered for enrollment in CRP until September 30, 2020, provided the effective starting date of the new CRP contract is on or before October 1, 2020:

(i) The land was enrolled in CRP under a CRP contract, with a contract period of greater than 14 years, that expired on September 30, 2017, or September 30, 2018;

(ii) There was no opportunity for re-enrollment of the land in CRP prior to the end of the contract period; and

(iii) The conservation practice and approved cover under the expired CRP contract has been maintained in accordance with the terms of the expired CRP contract.

(c) Land qualifying under paragraph (b)(1) of this section must also meet at least one of the following criteria to be eligible for CRP:

(1) Be a field or portion of a field that:

(i) Is suitable for use as a permanent wildlife habitat, prairie strip, contour grass strip, grass waterway, field windbreak, shelterbelt, living snowfence, field border, or other suitable uses;

(ii) Poses an off-farm environmental threat or a threat of continued degradation of productivity due to soil salinity if permitted to remain in production, including any applicable recharge area;

(iii) Is an area determined eligible for CRP based on wetland or wellhead protection area criteria; or

(iv) Is suitable for use as a filter strip or riparian buffer, and the land:

(A) Is located immediately adjacent and parallel to an eligible stream, other water body, or wetland, but excluding such areas as gullies or sod waterways or similar areas; and

(B) Is capable, when permanent grass, forbs, shrubs, or trees are grown, or when planted with appropriate vegetation for the area, including vegetation suitable for wetland restoration, of either substantially reducing sediment or nutrient runoff that otherwise would be delivered to the adjacent eligible stream, or water body, or serving other water quality purposes;

(2) Be non-irrigated or irrigated cropland that would facilitate a net savings in groundwater or surface water of the agricultural operation of the producer, only as approved by CCC;

(3) Be a portion of the field not enrolled in CRP, if either:

(i) More than 50 percent of the field is enrolled as a riparian buffer or filter strip; or

(ii) More than 75 percent of the field is enrolled as a conservation practice other than a riparian buffer or filter strip; and

(iii) With respect to both paragraphs (c)(3)(i) and (ii) of this section, the remainder portion of the field is determined to be infeasible to farm and enrolled at an annual payment rate not to exceed the maximum annual calculated soil rental rate approved by CCC;

(4) Be contributing to the degradation of water quality or posing an on-site or off-site environmental threat to water quality if such land remains in production;

(5) Be devoted to certain covers that are established and maintained according to the FOTG, provided such land is not required to be maintained as such under any life-span obligations;

(6) Have an EI of greater than or equal to 8 calculated by using the weighted average of the EI's of soil map units within the acreage offered;

(7) Be within a State or federally identified wellhead protection area;

(8) Be within a designated conservation priority area; or

(9) Notwithstanding paragraph (b)(1) of this section, be cropland devoted to a perennial crop; such cropland will only be eligible for continuous signup practices authorized by § 1410.30(b) and practices authorized under a Conservation Reserve Enhancement Program agreement as specified in § 1410.90.

(d) Notwithstanding paragraph (b) or (c) of this section, to be eligible under a grassland signup as specified in § 1410.30(c), the land must be one of the following:

(1) Land that:

(i) Contains forbs or shrubland, including improved rangeland and pastureland, for which grazing is the predominant use;

(ii) Is located in an area historically dominated by grassland; and

(iii) Is able to provide habitat for animal and plant populations of significant ecological value if the land is retained in its current use or restored to a natural condition; or

(2) Land that is enrolled in CRP in the final year of the contract period, provided the scheduled expiration date of the current CRP contract is the day before the effective starting date of the new CRP contract, and the provisions of paragraph (d)(1) of this section are met.

(e) Notwithstanding paragraphs (b), (c), and (d) of this section and §§ 1410.64, 1410.70, and 1410.80, land will be ineligible for enrollment if the land is one of the following:

(1) Federally-owned land;

(2) Land on which the use of the land is either restricted through deed or other restriction prior to enrollment in CRP prohibiting the production of agricultural commodities, or requires any resource-conserving measures, during any part of the contract period;

(3) Land already enrolled in the CRP, unless authorized by paragraph (b)(3) of this section and § 1410.80;

(4) Land for which Tribal, State, or other local laws, ordinances, or other regulations require any resource conserving or environmental protection measures or practices, and the owners or operators of such land have been notified in writing of such requirements, except, such land may be eligible for enrollment in CRP if:

(i) The land is, at the time of offer, enrolled in CRP under an approved Conservation Reserve Enhancement Program agreement that was in effect on December 20, 2018, and was initially approved before January 1, 2014, including any amended or successor

Conservation Reserve Enhancement Program agreement; provided, that the CRP contract under which the land is enrolled is in the final year of the contract period, and the scheduled expiration date of the current CRP contract is before the effective starting date of the new CRP contract; or

(ii) The land is such other land in the State that CCC determines is both otherwise eligible for CRP and appropriate for enrollment in CRP; and

(iii) The land is enrolled in exchange for a 25 percent reduction to the annual rental payment that would otherwise be paid for such land were no such laws, ordinances, or regulations in effect;

(5) Land that is required to be used, or otherwise dedicated to mitigate actions undertaken, or planned to be undertaken, on other land, or to mitigate other actions taken by landowners or operators; or

(6) Land devoted to hardwood trees that has been re-enrolled in CRP one or more times while it was devoted to hardwood trees; however, such ineligibility does not extend to:

(i) Forested wetlands enrolled under a Conservation Reserve Enhancement Program agreement or under a continuous signup as specified in § 1410.30(b);

(ii) Riparian buffers; and

(iii) Shelterbelts.

§ 1410.7 Duration of contracts.

(a) In general, except as provided in paragraphs (b) and (c) of this section and §§ 1410.70 and 1410.80, the CRP contract period will be for a term of at least 10 years, and up to no more than 15 years.

(b) The CRP contract period for land enrolled under a grassland signup as specified in § 1410.30(c) will be for a term of 10 years or 15 years, as requested by the producer.

(c) CRP contracts for land devoted to hardwood trees, shelterbelts, windbreaks, and wildlife corridors will be for a term of 10 years to 15 years, as requested by the producer.

(d) All CRP contracts will expire on September 30 of the final calendar year of the contract period.

§ 1410.8 Conservation priority areas.

(a) Subject to CCC approval, a State agency may submit proposals for conservation priority areas within guidelines established by CCC. Such submission must clearly define conservation and environmental objectives, and provide analysis of how CRP can cost-effectively address such objectives. Generally, the total acreage of all conservation priority areas, in aggregate, will not total more than 25 percent of the cropland in a State unless there are identified and documented exceptional environmental needs.

(b) A region may be eligible for designation as a priority area only if the region has actual significant adverse water quality, wildlife habitat, or other natural resource impacts related to activities of agricultural production, or if the designation helps agricultural producers to comply with Federal and State environmental laws.

(c) Conservation priority area designations will expire after 5 years unless re-designated, except they may be withdrawn before 5 years by CCC.

(d) In those areas designated as conservation priority areas under this section, cropland is considered eligible for enrollment according to § 1410.6(c)(8) based on identified environmental concerns. These concerns may include water quality, such as assisting agricultural producers to comply with nonpoint source pollution requirements or wildlife habitat (especially for threatened and endangered species or those species that may become threatened and endangered).

§ 1410.10 Restoration of wetlands.

(a) An owner or operator who entered into a CRP contract on land that is suitable for restoration to wetlands or that was restored to wetlands while under such CRP contract, may, if approved by CCC, subject to any restrictions as may be imposed by law, apply to transfer such land from CRP to a wetland reserve easement under WRP or ACEP, as appropriate. Transferred land will be terminated from CRP effective the day a WRP or ACEP wetland reserve easement is filed. Participants will receive a prorated CRP annual payment for the part of the year the land was enrolled in CRP as specified in § 1410.42. Cost-share payments or applicable incentive payments need not be refunded unless specified by CCC.

(b) [Reserved]

§ 1410.11 Farmable Wetlands Program.

(a) In addition to other allowable enrollments, eligible land may be enrolled in the CRP through the Farmable Wetlands Program (FWP).

(b) Eligible owners and operators may enroll land in FWP provided that the land:

(1) Is a wetland, including a converted wetland, that has been planted or considered planted to an agricultural commodity during at least 3 of the immediately preceding 10 crop years and that does not exceed the size limitations specified in paragraph (d) of this section;

(2) Is enrolled to be a constructed wetland that is to be developed so as to receive surface and subsurface flow from row crop agricultural production and is designed to provide nitrogen removal in addition to other wetland functions and that does not exceed the size limitations specified in paragraph (d) of this section;

(3) Was a commercial pond-raised aquaculture facility in any year during the period of calendar years 2002 through 2007; or

(4) Was cropped, after January 1, 1990, and before December 31, 2002, at least 3 of 10 crop years, was subject to the natural overflow of a prairie wetland, and does not exceed the size limitations specified in paragraph (d) of this section.

(c) In addition, land may be enrolled through FWP if the land is buffer acreage that provides protection for and is contiguous to land otherwise eligible under paragraph (b) of this section, subject to the provisions of paragraph (d) of this section.

(d) Total enrollment in CRP under this section may not exceed 750,000 acres. In addition, the maximum size of land enrolled under this section may not exceed:

(1) 40 contiguous acres per tract, for land made eligible by paragraph (b)(1) of this section;

(2) 40 contiguous acres per tract, for land made eligible by paragraph (b)(2) of this section;

(3) 20 contiguous acres for land made eligible by paragraph (b)(4) of this section, not to exceed 40 acres per tract; or

(4) A suitable buffer for lands added under paragraph (c) of this section.

(e) All participants subject to a CRP contract under this section must agree to establish and maintain, as appropriate, the practice described in paragraph (b) of this section in accordance with FOTG including, as appropriate, restoring the hydrology of the wetland and establishing vegetative cover (which may include emerging vegetation in water and bottomland hardwoods, cypress, and other appropriate tree species in shallow water areas).

(f) Offers for contracts under this section must be submitted under continuous signup provisions as specified in § 1410.30(b).

(g) The annual rental payment for land enrolled under this section will be determined in accordance with the provisions of § 1410.42 for cropland. In addition, any incentive payments in the form of annual rental payments provided for enrolling filter strips under this part will also be provided to participants who enroll land under this section, provided the participant has a share of the annual rental payment greater than zero.

§ 1410.13 Grassland enrollments and permitted uses.

(a) Land may be enrolled in CRP under a grassland signup as specified in §§ 1410.30(c) and 1410.31(e) and (f).

(b) Grassland enrollments will generally be administered under all the provisions of this part, except where specific provisions apply only to grassland enrollments.

(c) Land enrolled in CRP under a grassland signup may be eligible for the Transition Incentives Program as specified in § 1410.64.

(d) The following activities may be permitted on grassland enrolled in CRP according to an approved conservation plan:

(1) Common grazing practices, including maintenance and necessary cultural practices, in a manner that is consistent with maintaining the viability of grassland, forb, and shrub species appropriate to the locality;

(2) Haying, mowing, or harvesting for seed production, subject to appropriate restrictions during the primary nesting season;

(3) Fire pre-suppression, fire-related rehabilitation, and construction of firebreaks;

(4) Grazing related activities, such as fencing and livestock watering facilities; and

(5) Other activities, when the manner, number, intensity, location, operation, and other features associated with such activity will not adversely affect the grassland resources or related conservation values protected under the CRP contract.

§ 1410.20 Obligations of participant.

(a) All participants subject to a CRP contract must agree to:

(1) Carry out the terms and conditions of such CRP contract;

(2) Implement the conservation plan, which is part of such CRP contract, in accordance with the schedule of dates included in such conservation plan unless CCC determines that the participant cannot fully implement the conservation plan for reasons beyond the participant's control, and CCC agrees to a modified plan; however, a contract will not be terminated for failure to establish an approved vegetative or water cover on the land if:

(i) The failure to plant or establish such approved cover was due to excessive rainfall, flooding, or drought;

(ii) The land subject to the CRP contract on which the participant could practicably plant or establish to such approved cover, is planted or established to such approved cover; and

(iii) The land on which the participant was unable to plant or establish such approved cover is planted or established to such approved cover after the wet or drought conditions that prevented the planting or establishment subside;

(3) Establish temporary vegetative cover either when required by the conservation plan or if the permanent approved cover cannot be timely established;

(4) Comply with part 12 of this title;

(5) Not allow grazing, harvesting, or other commercial or agricultural use of the land subject to such CRP contract, or the cover on such land, except as specified in this part;

(6) Establish and maintain the required vegetative or water cover and the required practices on the land subject to such CRP contract, and take other actions that may be required by CCC to achieve the desired environmental benefits, and to maintain the productive capability of the soil throughout the contract period;

(7) Comply with noxious weed laws of the applicable State or local jurisdiction on such land;

(8) Control, on land subject to such CRP contract, all weeds, insects, pests, and other undesirable species to the extent necessary to ensure that the establishment and maintenance of the approved cover as specified in the CRP conservation plan, and to avoid an adverse impact on surrounding land, taking into consideration water quality, wildlife, and other similar conservation factors;

(9) Be jointly and severally responsible, if the participant has a share of the annual rental payment greater than zero, with the other participants on the CRP contract, for compliance with the provisions of such CRP contract and the provisions of this part, and for any refunds or payment adjustments that may be required for violations of any of the terms and conditions of the CRP contract and this part; and

(10) On land devoted to trees, excluding windbreaks and shelterbelts, carry out thinning and similar conservation practices, as provided in the conservation plan to enhance the conservation benefits and wildlife habitat resources applicable to the CRP conservation practice on the land, and to promote forest management.

(b) [Reserved]

§ 1410.21 Obligations of the Commodity Credit Corporation.

CCC will:

(a) Share up to 50 percent of the cost with participants of installing eligible practices specified in the conservation plan for which CCC determines that cost sharing is appropriate and in the public interest, and at the levels and rates of cost-sharing determined in accordance with the provisions of this part; and

(b) Pay to eligible participants for a period of years not in excess of the contract period an annual rental payment, including applicable and available incentive payments, in such amounts as may be specified in the CRP contract.

§ 1410.22 CRP conservation plan.

(a) The producer must obtain a CRP conservation plan that complies with CCC guidelines and is approved by NRCS.

(b) The practices included in the conservation plan and agreed to by the participant must cost-effectively reduce erosion necessary to maintain the productive capability of the soil, improve water quality, protect wildlife or wetlands, protect a public wellhead, improve grassland, or achieve other environmental benefits as applicable. The participant must undertake maintenance activities on the land as needed throughout the contract period to implement the conservation plan.

(c) If applicable, a tree planting plan or forest stewardship plan must be developed and included in the conservation plan. Such tree planting or forest stewardship plan may allow up to 3 years to complete plantings if 10 or more acres of hardwood trees are to be established.

(d) If applicable, the conservation plan must address the goals included in the conservation priority area designation authorized under § 1410.8.

(e) Except for land enrolled under a grassland signup, as specified in § 1410.30(c), management activities must be conducted as needed throughout the contract period in accordance with an approved conservation plan. However, the planned management activity is not required in the case where a natural disaster or adverse weather event occurs that has the same effect of the planned management activity. CCC will not provide any cost-share payment for any management activities.

§ 1410.23 Eligible practices.

(a) Eligible practices are those CRP practices specified in the conservation plan that meet all standards needed to cost-effectively:

(1) Establish permanent vegetative or water cover, including introduced or native species of grasses and legumes, trees, permanent wildlife habitat, and grassland improvements;

(2) Meet other environmental benefits, as applicable, for the CRP contract period; and

(3) Accomplish other purposes of CRP.

(b) Water cover is eligible cover for purposes of paragraph (a) of this section only if approved by CCC for purposes such as the enhancement of wildlife or the improvement of water quality. Such water cover will not include ponds for the purpose of watering livestock, irrigating crops, or raising aquaculture for commercial purposes.

§ 1410.30 Signup.

(a) Offers for CRP contracts may be submitted only during signup periods as announced periodically by CCC, but not less often than once each year. Acceptability of otherwise eligible offers will be determined as provided in § 1410.31.

(b) Notwithstanding paragraph (a) of this section, CCC may hold a continuous signup for land to be devoted to particular uses. Generally, continuous signup is limited to those offers that provide appropriate environmental benefits, as determined by CCC, or that would otherwise rank highly under § 1410.31(b) and may include high priority practices including, but not limited to, filter strips, riparian buffers, shelterbelts, field windbreaks, living snowfences, grass waterways, shallow water areas for wildlife, salt-tolerant vegetation, prairie strips, field borders, and practices to benefit certain approved wetlands and public wellhead protection areas.

(c) Notwithstanding paragraph (a) or (b) of this section, offers to enroll acreage specified in § 1410.6(d) may be submitted only during signup periods as announced by CCC. At least 1 ranking period will be announced subsequent to the announcement of offers specified in paragraph (a) of this section. Eligible offers will be evaluated and ranked as provided in § 1410.31(e) and (f).

§ 1410.31 Acceptability of offers.

(a) Producers may submit offers for the amounts they are willing to accept as rental payments to enroll their acreage in CRP. The offers will, to the extent practicable, be evaluated on a competitive basis in which the offers selected will be those where the greatest environmental benefits relative to cost are generated, and provided that the offer is not in excess of the maximum acceptable payment rate established by CCC for the acreage offered. Acceptance or rejection of any offer, however, will be in the sole discretion of CCC and offers may be rejected for any reason as determined needed to accomplish the goals of CRP.

(b) In evaluating offers, different factors may be considered by CCC for priority purposes to accomplish the goals of CRP. Such factors may include, but are not limited to:

(1) Soil erosion;

(2) Water quality (both surface and ground water);

(3) Wildlife benefits;

(4) Soil productivity;

(5) Likelihood that enrolled land will remain in non-agriculture use beyond the contract period, considering, for example, tree planting, permanent wildlife habitat, or commitments by a participant to a State or other entity to extend the conservation plan; and

(6) Cost of enrolling acreage in CRP.

(c) Notwithstanding paragraph (b) of this section, when all other appropriate factors are equivalent, CCC may give preference to offers from residents of the county or contiguous county where the offered land is located.

(d) Notwithstanding paragraph (a) of this section, acreage determined eligible for continuous signup, as provided in § 1410.30(b), may be automatically accepted in CRP if the:

(1) Land is eligible under § 1410.6;

(2) Producer is eligible under § 1410.5; and

(3) Producer accepts either the maximum payment rate CCC is willing to offer to enroll the acreage in CRP or a lesser rate.

(e) For grassland signup offers:

(1) Notwithstanding paragraph (a) of this section, offers to enroll in CRP under grassland signup, as specified in § 1410.30(c), will be evaluated and ranked during an announced ranking period, on a competitive basis in which the offers selected will be those where the greatest environmental benefits relative to cost are generated, and further provided that:

(i) The offered land is eligible under § 1410.6(d);

(ii) The producer is eligible under § 1410.5;

(iii) The producer accepts either the maximum payment rate CCC is willing to offer to enroll the acreage in CRP, or a lesser rate; and

(iv) The offer ranks above the minimum ranking level needed for offer acceptance, as determined by CCC.

(2) Notwithstanding paragraph (e)(1) of this section, acceptance or rejection of any offer will be at the sole discretion of the CCC, and offers may be rejected for any reason as determined necessary and appropriate to accomplish the goals of CRP.

(f) In ranking and evaluating grassland signup offers, different factors may be considered by CCC for priority purposes to accomplish the goals of CRP. Such factors may include, but are not limited to:

(1) Existence of expiring CRP land;

(2) Land at risk of development or conversion; and

(3) Land of ecological significance, including land that:

(i) May assist in the restoration of threatened or endangered species under the Endangered Species Act of 1973;

(ii) May assist in preventing a species from being listed as a threatened or endangered species under the Endangered Species Act of 1973; or

(iii) Improves or creates wildlife habitat corridors.

§ 1410.32 CRP contract.

(a) In order to enroll land in CRP, the producer must enter into a contract with CCC.

(b) The CRP contract is comprised of:

(1) The terms and conditions for participation in CRP; and

(2) The CRP conservation plan.

(c) For offers:

(1) In order to enter into a CRP contract, the producer must submit an offer to participate as provided in § 1410.30.

(2) An offer to enroll land in CRP will be irrevocable for such period as is determined and announced by CCC. The producer will be liable to CCC for liquidated damages if the producer revokes an offer during the period in which the offer is irrevocable unless CCC determines to waive such liquidated damages.

(d) The CRP contract must, within the dates established by CCC, be signed by:

(1) The producer; and

(2) The owners of the land to be enrolled in the CRP and other eligible producers, if applicable.

(e) For the termination of CRP contracts:

(1) CRP contracts may be terminated in whole or in part by CCC before the end of the contract period if:

(i) The owner loses control of or transfers all or part of the acreage under the CRP contract and the new owner does not wish to continue the CRP contract;

(ii) The participant voluntarily requests in writing to terminate the contract, in whole or in part, and obtains approval from CCC;

(iii) The participant is not in compliance with the terms and conditions of the CRP contract;

(iv) All or part of the acreage under the CRP contract is enrolled in another

Federal, State or local conservation program;

(v) The CRP practice fails or is not established after a certain time period and the cost of restoring the practice outweighs the benefits received from the restoration;

(vi) The CRP contract was approved based on erroneous eligibility determinations; or

(vii) Such termination is needed in the public interest, or is otherwise necessary and appropriate to further the goals of CRP.

(2) A participant whose CRP contract has been terminated, in whole or in part in accordance with paragraph (e)(1) of this section, must refund all or part of the payments made by CCC with respect to the CRP contract, plus interest, and must also pay liquidated damages as provided for in the CRP contract, if directed to do so by CCC.

(f) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a CRP contract and the new owner or operator becomes a successor to such contract within 60 days, or such other time as CCC determines to be appropriate, then such participant will not be required to refund previous payments received under the contract; provided, that no refunds of previous payments received will be required if such participant sells such land to, or such land is purchased for, the United States Fish and Wildlife Service; provided further, that no refunds of previous payments will be required if the person or entity to whom all or part of the right and interest in, or right of occupancy of, land subject to such contract reaches an agreement with CCC to modify the contract in a way that is consistent with the objectives of the program.

(g) The participants on a CRP contract will not be in violation of the terms of the CRP contract if:

(1) During the final year of the CRP contract period the land is enrolled in the Environmental Quality Incentives Program or Conservation Stewardship Program, as specified in parts 1466 and 1470 of this chapter, and the participant begins establishment of a practice under such programs; or

(2) During the 3 years prior to the end of the CRP contract period, the participant begins the certification process under the Organic Foods Production Act of 1990.

§ 1410.33 Contract modifications.

(a) As agreed between CCC and the participant, a CRP contract may be modified in order to:

(1) Decrease acreage in CRP, provided that such modification will be considered a partial termination for purposes of § 1410.32(e);

(2) Permit the production of an agricultural commodity under exceptional circumstances during a crop year on all or part of the land subject to the CRP contract;

(3) Facilitate the practical administration of CRP; or

(4) During the last 2 years of the CRP contract period, facilitate a transition of land subject to the contract to a beginning, socially disadvantaged, or veteran farmer or rancher for the purpose of returning some or all of the land into production using sustainable grazing or crop production methods. For purposes of this paragraph (a)(4), ''sustainable grazing and crop production methods'' will be considered methods that would be designed as part of an overall plan defined on an ecosystem level to be useful in the creation of integrated systems of plant and animal production practices that have a site specific application that would:

(i) Enhance the environment and the natural resource base;

(ii) Use nonrenewable resources efficiently; and

(iii) Sustain the economic viability of the farming operation.

(b) CCC may modify CRP contracts to add or substitute practices when:

(1) The installed practice failed to adequately provide for the desired environmental benefit through no fault of the participant; or

(2) The installed measure deteriorated because of conditions beyond the control of the participant; and

(3) Another practice will achieve at least the same level of environmental benefit.

(c) Offers to extend contracts may be made as allowed by law.

(d) For the transfer of land into WRP, ACEP, or other Federal or State programs:

(1) CCC may terminate or modify a CRP contract in whole or in part when the land is transferred into WRP, ACEP, or other Federal or State programs.

(2) For contracts terminated or modified for enrollment in other Federal or State programs, participants will not be required to refund CRP payments or pay interest and liquidated damages to CCC, as otherwise required under this part.

(3) Notwithstanding paragraph (d)(2) of this section, participants must refund CRP signup incentive payments if land in CRP containing a wetland reserve easement is enrolled in ACEP.

(e) During the final year of the CRP contract period, CCC will allow an owner or operator to make conservation and land improvements for economic use that facilitate maintaining protection of enrolled land after expiration of the CRP contract, but only under the following conditions:

(1) All provisions are identified in an approved CRP conservation plan;

(2) Land improved in accordance with paragraph (e) of this section will not be eligible to be re-enrolled in CRP for 5 years after end of the CRP contract period; and

(3) CCC will reduce the final annual rental payment otherwise payable under the CRP contract by an amount commensurate with the economic value of the activity carried out.

§ 1410.40 Cost-share payments.

(a) Cost-share payments will be made available to the participant if an eligible practice, or an identifiable unit thereof, including fencing and water distribution, has been installed in compliance with the appropriate standards and specifications. Cost-share payments are not subject to the provisions of § 1410.42(d).

(b) Except as provided in paragraph (c) of this section, cost-share payments will not be made to the same owner or operator on the same acreage for any eligible practices that have been previously established, or for which such owner or operator has received cost-share assistance from any other Federal agency.

(c) Cost-share payments may be authorized for the replacement or restoration of practices for which cost-share payments have been previously allowed under CRP, only if:

(1) Replacement or restoration of the practice is needed to achieve adequate erosion control, enhance water quality, wildlife habitat, or increase protection of public wellheads, or other conservation measures approved by CCC;

(2) The failure of the original practice was due to reasons beyond the control of the participant; and

(3) The benefits that would be received from the replacement or restoration of the practice outweighs the cost of replacing or restoring the practice.

(d) Limitations on cost-share payments include:

(1) The cost-share payment made to a participant will not exceed the participant's actual contribution to the eligible costs of establishing the practice.

(2) The amount of the cost-share payments, including practice incentive payments, may not be an amount that, when added to such assistance from other sources, exceeds 100 percent of

the actual cost of establishing the practice.

(e) CCC will not make cost-share payments with respect to a CRP contract if any other Federal cost-share assistance has been, or is being, made with respect to the land subject to such CRP contract. Participants must refund to CCC all cost-share payments received under this part if other Federal cost-share assistance is received with respect to the same land.

(f) CCC may make cost-share payments for thinning of existing tree stands to benefit wildlife habitat and other resource conditions on enrolled land.

(g) In addition to cost-share payments, a practice incentive payment will be made available to a participant to whom CCC has made a cost-share payment after a determination that an eligible practice has been installed in compliance with the appropriate standards and specifications. The practice incentive payment will be considered a cost-share payment for purposes of this part, and is not subject to the provisions of § 1410.42(d). A practice incentive payment will be provided only for land enrolled under:

(1) Continuous sign-up as provided in § 1410.30(b); or

(2) The Conservation Reserve Enhancement Program as provided in § 1410.90.

§ 1410.41 Levels and rates for cost-share payments.

(a) CCC will not pay more than 50 percent of either the actual or average cost of installing eligible practices specified in the conservation plan.

(b) The average cost of performing a practice may be based on recommendations from the State Technical Committee. Such cost may be the average cost in a State, a county, or a part of a State or county.

(c) If there is any other sources of cost-share assistance:

(1) A participant may, in addition to any payment under this part, receive cost-share assistance, rental or easement payments, tax benefits, or other payments from a State or a private organization in return for enrolling lands in CRP.

(2) A participant may not receive or retain CRP cost-share payments if other Federal cost-share assistance is provided for such acreage under any law.

(d) Notwithstanding paragraphs (a) and (b) of this section, cost-share payments for eligible seed related to the establishment of approved cover will not exceed 50 percent of the actual cost of the eligible seed mixture.

(e) Practice incentive payments will not exceed an amount equal to 50 percent of the actual cost of installing the eligible practice specified in the conservation plan.

§ 1410.42 Annual rental payments.

(a) Subject to the availability of funds, annual rental payments will be made in such amount and in accordance with such time schedule as specified in the CRP contract.

(b) Annual rental payments are based on a weighted average soil rental rate, marginal pastureland rental rate, or grassland rate, as appropriate, and may include an incentive payment as a portion of the annual payment for specified practices. A per-acre national maximum rental payment rate may also be established by CCC for certain categories of CRP offers and contracts.

(c) The annual rental payment will be divided among the participants on a CRP contract as agreed to in such CRP contract.

(d) Limitations on annual rental payments include:

(1) The maximum amount of annual rental payments that a person or entity may receive, directly or indirectly, under CRP for any fiscal year must not exceed $50,000. The regulations in part 1400 of this chapter will be used to determine if the limit has been reached or exceeded.

(2) Notwithstanding paragraph (d)(1) of this section, annual rental payments received by a rural water district or association for land enrolled in CRP for the purpose of protecting a wellhead may exceed $50,000.

(e) In the case of a contract succession, annual rental payments will be divided between the predecessor and the successor participants as agreed to among the participants and approved by CCC. If there is no agreement among the participants, annual rental payments will be divided in such manner deemed appropriate by CCC, and such distribution may be prorated based on the actual days of ownership of the property by each party.

(f) CCC will prepare a schedule for each county that shows the maximum soil rental rate CCC may pay and which may be supplemented to reflect special contract requirements. Such schedule may be calculated for cropland based on the relative productivity of soils within the county using NRCS data and local FSA average cash rental estimates. For marginal pastureland, rental rates will be based on estimates of the prevailing rental values of marginal pastureland in riparian areas. Grassland rental rates will be based on not more than 75 percent of the estimated grazing value of the land. The schedule will be available in the local FSA office and will indicate, when appropriate, that:

(1) Offers by producers who request rental payments greater than the maximum payment rate for their offer will be rejected;

(2) Offers submitted under continuous signup authorized at § 1410.30(b) may be accepted without further evaluation when the requested payment rate is less than or equal to the maximum payment rate for the offer; and

(3) Otherwise qualifying offers will be ranked competitively based on factors established under § 1410.31 in order to provide the most cost-effective environmental benefits.

(g) In the case of an owner or operator who transfers acreage to a wetland reserve easement in accordance with § 1410.10, annual rental payments will be prorated based on the actual number of days the transferred acreage was enrolled in CRP.

§ 1410.44 Average adjusted gross income.

(a) Benefits under this part will not be available to persons or entities whose average adjusted gross income exceeds $900,000 for the 3 taxable years preceding the most immediately preceding complete taxable year, or who otherwise do not meet the AGI requirements specified in part 1400 of this chapter.

(b) The limit specified in paragraph (a) of this section may be waived in accordance with part 1400, subpart F, of this chapter.

§ 1410.45 Incentive payments.

(a) A signup incentive payment will be made to eligible participants only for the initial enrollment of certain land that is enrolled under:

(1) A continuous signup authorized in § 1410.30(b) for land to be devoted to particular uses as determined by CCC; and

(2) A Conservation Reserve Enhancement Program as specified in § 1410.90 for land to be devoted to particular uses as determined by CCC.

(b) The signup incentive payment will be:

(1) An amount equal to 32.5 percent of the amount of the first annual rental payment for the land referred to in paragraph (a) of this section, as determined by CCC;

(2) Divided among the participants on a CRP contract in accordance with their share of the annual rental payment as agreed to in such CRP contract;

(3) Considered an annual rental payment and thus subject to the provisions in § 1410.42(d); and

(4) Made only after the CRP contract is approved by CCC.

(c) A signup incentive payment will not be made for land that was previously enrolled in CRP or land currently enrolled in CRP that is re-enrolled.

(d) CCC may make incentive payments to owners and operators of enrolled land in an amount sufficient to encourage proper tree thinning and other practices to improve the condition of resources, promote forest management, or enhance wildlife habitat. Incentive payments for such tree thinning and other practices will:

(1) Not exceed 100 percent of the total cost of the practice;

(2) Only be available for practices outlined in the tree planting plan under the approved CRP conservation plan;

(3) Only be made to the extent that funds are available; and

(4) Not exceed $200,000 per person or entity.

(e) Additional financial incentives may be provided to participants whose contracts are expected to provide especially high environmental benefits. Such incentives will be considered annual rental payments and subject to the provisions in § 1410.42(d).

§ 1410.51 Transfer of land.

(a) If a new owner or operator purchases or obtains the right and interest in, or right to occupancy of, the land subject to a CRP contract, such new owner or operator may be approved by CCC as a participant to a new CRP contract for the transferred land. Such new owner or operator must assume all obligations of the CRP contract of the previous participant.

(b) Cost-share payments will be made by CCC to the participant who established the practice.

(c) Annual rental payments to be paid during the fiscal year when the land was transferred will be divided between the new participant and the previous participant in the manner specified in § 1410.42.

(d) If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a CRP contract and the new owner or operator does not become a successor to such CRP contract within 60 days, or such other time period as CCC determines to be appropriate, then such CRP contract will be terminated with respect to the affected portion of such land and the original participant:

(1) Forfeits all rights to any future payments for that acreage; and

(2) Will refund all previous payments received under the CRP contract by the participant(s) or prior participants, plus interest and liquidated damages, except as otherwise agreed to by CCC.

(e) Federal agencies acquiring property, by foreclosure or otherwise, that contains CRP contract acreage cannot be a party to the CRP contract by succession. However, through an addendum to the CRP contract, if the current operator of the property is one of the CRP contract participants, such operator may continue to receive payments under such CRP contract if:

(1) The property is maintained in accordance with the terms of the CRP contract;

(2) Such operator continues to be the operator of the property; and

(3) Ownership of the property remains with such Federal agency.

§ 1410.52 Violations.

(a) If a participant fails to carry out the terms and conditions of a CRP contract, CCC may terminate the CRP contract in whole or in part.

(b) If the CRP contract is terminated in whole or in part by CCC in accordance with paragraph (a) of this section, the participant will:

(1) Forfeit all rights to further payments under such CRP contract for the terminated acres, and refund all payments previously received for the terminated acres, plus interest; and

(2) Pay liquidated damages to CCC in an amount as specified in the contract.

§ 1410.53 Executed CRP contract not in conformity with this part.

If, after a CRP contract is approved by CCC, it is discovered that such CRP contract is found to contain material errors of fact or is not in conformity with this part, CCC may terminate or offer to modify the CRP contract in whole or in part.

§ 1410.54 Performance based upon advice or action of the U.S. Department of Agriculture.

The provisions of part 718 of this title relating to performance based upon the action or advice of an authorized representative of the U.S. Department of Agriculture are applicable to this part.

§ 1410.55 Access to land under CRP contract.

(a) Any representative of the U.S. Department of Agriculture, or designee thereof, will, for purposes related to CRP, be provided by the producer or participant, as the case may be, with access to land that is:

(1) The subject of an offer for a contract under this part; or

(2) Under a CRP contract or otherwise subject to this part.

(b) For land identified in paragraph (a) of this section, the producer or participant will provide the representative with access to examine records for the land to determine land classification, erosion rates, or for other purposes, and to determine whether the terms and conditions of the CRP contract are being met.

§ 1410.56 Division of payments and provisions about tenants and sharecroppers.

(a) Payments received under this part will be divided as specified in the applicable CRP contract and CCC will ensure that producers who would have an interest in acreage being offered receive treatment that is equitable. CCC may refuse to enter into a contract when there is a disagreement among producers seeking enrollment as to a producer's eligibility to participate in the CRP contract as a tenant and there is insufficient evidence to indicate whether the producer seeking participation as a tenant does or does not have an interest in the acreage offered for enrollment in CRP.

(b) CCC may remove an operator or tenant from a CRP contract when:

(1) The operator or tenant requests in writing to be removed from the CRP contract;

(2) The operator or tenant files for bankruptcy and the trustee or debtor in possession fails to affirm the contract, to the extent permitted by applicable bankruptcy laws;

(3) The operator or tenant dies during the CRP contract period and the administrator of the estate fails to succeed to the contract; or

(4) A court of competent jurisdiction orders the removal from the CRP contract of the operator or tenant and such order is received by CCC.

(c) In addition to paragraph (b) of this section, tenants must maintain their tenancy throughout the CRP contract period in order to remain on a CRP contract. Tenants who fail to maintain tenancy on the acreage under CRP contract, including failure to comply with applicable State law, may be removed from a CRP contract by CCC. CCC will assume the tenancy is being maintained unless notified otherwise by a party to the CRP contract.

§ 1410.57 Payments not subject to claims.

Subject to part 3 of this title, any payment or portion thereof due any person under this part will be allowed without regard to questions of title under State law, and without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

§ 1410.58 Assignments.

Participants may assign the right to receive cash payments, in whole or in part, as provided in part 1404 of this chapter.

§ 1410.59 Appeals.

(a) Except as provided in paragraph (b) of this section, a participant or producer seeking participation may appeal or request reconsideration of an adverse determination in accordance with the administrative appeal regulations at parts 11 and 780 of this title.

(b) Determinations by NRCS assigned to make such determination for CCC may be appealed in accordance with procedures established in part 614 of this title.

§ 1410.60 Scheme or device.

(a) If CCC determines that a person has employed a scheme or device to defeat the purposes of this part, or any part of any CCC or USDA program, payment otherwise due or paid such person during the applicable period may be required to be refunded with interest as determined by CCC.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of cost-share, incentive, or annual rental payments, or obtaining a payment that otherwise would not be payable.

(c) A new owner or operator or tenant of land subject to a CRP contract, and who succeeds to the CRP contract, must report in writing to CCC any interest of any kind in such land that is retained by a previous participant. The interest will include a present, future, or conditional interest, reversionary interest, or any option, future or present, on such land, and any interest of any lender in the land where the lender has, will, or can legally obtain, a right of occupancy to such land or an interest in the equity in the land other than an interest in the appreciation in the value of the land occurring after the loan was made. Failure to fully disclose interest will be considered a scheme or device.

§ 1410.61 Filing of false claims.

If CCC determines that any participant has knowingly supplied false information or has knowingly filed a false claim, such participant will be ineligible for payments under this part with respect to the fiscal year in which the false information or claim was filed and the CRP contract may be terminated, in which case a full refund of all prior payments may be demanded. False information or false claims include, but are not limited to, claims for payment for practices that do not comply with the conservation plan. Any amounts paid under these circumstances must be refunded, plus interest as determined by CCC and any amounts otherwise due to the participant will be withheld. The remedies provided for in this section will be in addition to any and all other remedies, criminal and civil, that may apply.

§ 1410.62 Miscellaneous.

(a) Except as otherwise provided in this part, in the case of death, incompetency, or disappearance of any participant, any payments due under this part will be paid to the participant's successor(s), as specified in part 707 of this title.

(b) Unless otherwise specified in this part, payments under this part will be subject to the requirements of part 12 of this title concerning highly erodible land and wetland conservation and payments.

(c) Any remedies permitted CCC under this part will be in addition to any other remedy, including, but not limited to, criminal remedies, or actions for damages in favor of CCC, or the United States, as may be permitted by law.

(d) When an owner loses control of CRP acreage due to foreclosure and the new owner chooses not to continue the contract in accordance with § 1410.51, refunds may not be required from any participant on the contract to the extent CCC determines that waiver of such refund is appropriate.

(e) Cropland enrolled in CRP will be classified as cropland for the time period it is enrolled in CRP. After the CRP contract ends, such land will be removed from the classification of cropland if the county committee determines the land no longer meet the definition of cropland in part 718 of this title.

(f) As determined by CCC, incentives may be authorized to foster opportunities for Indian Tribes and beginning, limited resource, socially disadvantaged, and veteran farmers and ranchers, and to enhance long-term environmental goals.

§ 1410.63 Permissive uses.

(a) Unless specified in this part or otherwise approved by CCC, no uses of any kind are authorized on CRP acreage during the contract period.

(b) Commercial shooting preserves may be operated on CRP acreage provided:

(1) The commercial shooting preserve is licensed by a State agency such as the State fish and wildlife agency or State department of natural resources;

(2) The commercial shooting preserve is operated in a manner consistent with the applicable State agency rules governing commercial shooting preserves; and

(3) The CRP cover is maintained according to the conservation plan.

(c) No barrier fencing or boundary limitations that prohibit wildlife access to or from the CRP acreage are allowed, unless required by State law.

(d) Wind turbines and associated access to the wind turbines may be installed on CRP acreage in numbers and locations as determined appropriate by CCC considering the location, size, and other physical characteristics of the land, the extent to which the land contains threatened or endangered wildlife and wildlife habitat, and the purposes of CRP, but only in exchange for a 25 percent reduction in the annual rental payment for the acres covered by the wind turbine and associated access acreage.

(e) The sale of carbon, water quality, or environmental credits may be permitted by CCC.

(f) There are specific activities that are permitted on specific land:

(1) The permitted activities provisions of paragraphs (f)(2) and (3) of this section do not apply to land enrolled under:

(i) A grassland signup authorized by § 1410.30(c);

(ii) The Soil Health and Income Protection Pilot Program described in § 1410.70;

(iii) The Conservation Reserve Enhancement Program described in § 1410.90:

(A) Except for land enrolled under Conservation Reserve Enhancement Program agreements executed before December 20, 2018; provided, that such agreements may be amended by mutual agreement to disallow such otherwise permitted activities; or

(B) Unless the approved Conservation Reserve Enhancement Program agreement under which the land was enrolled specifically permits such activity; and

(iv) A State Acres for Wildlife Enhancement project, unless the State Acres for Wildlife Enhancement project under which the land was enrolled specifically permits such activity.

(2) The following activities may be permitted on CRP acreage according to an approved conservation plan, without any reduction to the annual rental payment:

(i) Emergency haying, emergency grazing, or emergency use of the forage in response to a localized or regional drought, flooding, wildfire, or other emergency as determined by CCC on all practices, outside the primary nesting season, when:

(A) All or any part of the county in which the CRP acreage is located is designated as D2 (severe drought) or greater according to the United States Drought Monitor;

(B) There is at least a 40 percent loss in forage production in the county in which the CRP acreage is located; or

(C) CCC determines that CRP can assist in the response to a natural disaster event without permanent damage to the established cover;

(ii) Emergency grazing on all practices during the primary nesting season if payments are authorized for the county under the Livestock Forage Disaster Program under part 1416 of this chapter, at 50 percent of the normal carrying capacity determined in accordance with part 1416 of this chapter;

(iii) Emergency haying on certain practices, as determined by CCC, only outside the primary nesting season, if payments are authorized for the county under the Livestock Forage Disaster Program under part 1416 of this chapter, but on not more than 50 percent of the eligible CRP contract acres;

(iv) Grazing of all practices only outside the primary nesting season if included as an approved CRP contract management activity in accordance with § 1410.22;

(v) The intermittent and seasonal grazing of vegetative buffers, only outside the primary nesting season, that are incidental to agricultural production on land adjacent to the buffer provided such grazing:

(A) Does not destroy the permanent vegetative cover; and

(B) Retains suitable vegetative structure for wildlife cover and shelter outside the primary nesting season; and

(vi) Grazing on all practices only outside the primary nesting season if conducted by a beginning farmer or rancher who is a participant on the CRP contract with a share of the rental payment greater than zero.

(3) The following activities may be permitted on CRP acreage according to an approved conservation plan, but only in exchange for a 25 percent reduction to the annual rental payment for the acres on which the permitted activity occurred:

(i) Grazing of all practices not more frequently than every other year on the same land, except that during the primary nesting season the grazing will be subject to a 50 percent reduction in the stocking rate, as determined by CCC;

(ii) Haying and other commercial use (including the managed harvesting of biomass, but not the harvesting of vegetative cover) of all practices, on the condition the activity:

(A) Is completed only outside the primary nesting season;

(B) Occurs not more than once every 3 years; and

(C) Maintains 25 percent of the total CRP contract acres unharvested, in accordance with a conservation plan that provides for wildlife cover and shelter; and

(iii) Annual grazing of all practices, only outside the primary nesting season for the control of invasive species.

(g) Not withstanding paragraph (f) of this section, haying and grazing will not be permitted on any land enrolled in CRP if such haying and grazing for that year would cause long-term damage to the vegetative cover on that land.

§ 1410.64 Transition Incentives Program.

(a) To be eligible for the Transition Incentives Program, all the following must be met:

(1) The land must be enrolled in CRP;

(2) The conditions for the timing of the sale or lease of the land and to whom it must be sold or leased are:

(i) Beginning on the date of the end of the CRP contract period, the land must be sold or leased (under a long-term lease, or a lease with an option to purchase the land, including a lease with a term of less than 5 years and an option to purchase the land) to a beginning, veteran, or socially disadvantaged farmer or rancher who will return some or all of the land to production using sustainable grazing or crop production methods; and

(ii) The sale or lease, as applicable, must take effect on the day immediately after the end of the CRP contract period;

(3) The CRP contract is modified in accordance with § 1410.33(a)(4);

(4) The land is not subject to an easement or other restriction that prohibits the use of the land allowed under this section; and

(5) The beginning, veteran, or socially disadvantaged farmers or ranchers must:

(i) Certify that they meet the definition of either a beginning or veteran farmer or rancher as defined in part 718 of this title, or a socially disadvantaged farmer or rancher as defined in § 1410.2;

(ii) Obtain an approved conservation plan prior to approval of the Transition Incentives Program contract; and

(iii) Implement sustainable grazing or crop production on land not re-enrolled in CRP in compliance with the conservation plan by the time specified in the conservation plan.

(b) Beginning in the last 2 years of the CRP contract period, the beginning, veteran, or socially disadvantaged farmer or rancher may:

(1) In conjunction with the contract participants, make conservation and land improvements, including preparing to plant a crop, that are consistent with the conservation plan; and

(2) Begin the organic certification process under the Organic Foods Production Act of 1990.

(c) Eligible beginning, veteran, or socially disadvantaged farmers or ranchers may be eligible immediately to re-enroll certain partial field conservation practices in CRP, in accordance with the conservation plan and the provisions of this part, following the expiration of the CRP contract, provided that the beginning, veteran, or socially disadvantaged farmer or rancher has control of the land and meets all other qualifying conditions specified in this part.

(d) Eligible beginning, veteran, or socially disadvantaged farmers or ranchers will be eligible to enroll land in the Environmental Quality Incentives Program or the Conservation Stewardship Program, as specified in parts 1466 and 1470 of this chapter, provided that their offer to enroll otherwise meets all program conditions, and provided that the CRP contract has expired and the beginning, veteran, or socially disadvantaged farmer or rancher is either leasing or has possession of the property.

(e) As an incentive for selling or leasing land to a beginning, veteran, or socially disadvantaged farmer or rancher who is not a family member of the previous participants, CCC will pay 2 years of additional CRP annual rental payments at the same contract rate to the previous participants. The previous participants must certify in writing that the beginning, veteran, or socially disadvantaged farmer or rancher is not a family member.

(f) The previous participants and the eligible beginning, veteran, or socially disadvantaged farmer or rancher must agree to be jointly and severally responsible for complying with both the provisions of the Transition Incentives Program contract and the provisions of this part, and must also agree to be jointly and severally responsible for any payment adjustments that may result from violations of the terms or conditions of the Transition Incentives Program contract or this part.

§ 1410.70 Soil Health and Income Protection Pilot Program.

(a) Enrollments under the Soil Heath and Income Protection Pilot Program will be administered under the provisions of this part, except where specifically provided otherwise.

(b) Notwithstanding § 1410.6(b) and (c), to be eligible under the Soil Health and Income Protection Pilot Program, land must be cropland that:

(1) Is physically located within a Soil Health and Income Protection Pilot Program pilot area specified by CCC;

(2) Has been annually planted or considered planted to an agricultural commodity each of the 3 crop years immediately preceding the year in which the offer for enrollment is submitted; and

(3) Is verified to be less productive land, as compared to other land on the farm from which the land is offered for enrollment.

(c) Notwithstanding paragraph (b) of this section, land will be ineligible for enrollment under the Soil Health and Income Protection Pilot Program if the land was enrolled in CRP in any of the 3 crop years immediately preceding the year in which the offer for enrollment is submitted. Further, not more than 15 percent of the eligible land on a farm may be enrolled in the Soil Health and Income Protection Pilot Program.

(d) Notwithstanding § 1410.30, offers for contracts under the Soil Health and Income Protection Pilot Program may be submitted only during signup periods as announced by CCC. Further, eligible land may only be enrolled under the Soil Health and Income Protection Pilot Program through December 31, 2020. Acreage determined eligible in accordance with paragraph (b) of this section may be automatically accepted in CRP without further evaluation if:

(1) A producer is eligible under § 1410.5; and

(2) The producer accepts either the maximum payment rate CCC is willing to pay to enroll the acreage in CRP, or a lesser rate.

(e) The approved cover for land enrolled under the Soil Health and Income Protection Pilot Program is the lowest practicable cost permanent vegetative cover.

(f) Notwithstanding § 1410.40, CCC will not provide any cost-share payments for planting the approved permanent vegetative cover, except as provided for in paragraph (g) of this section.

(g) Notwithstanding paragraph (f) of this section and § 1410.41, CCC will provide cost-share payments of 50 percent of the eligible actual cost of installation of the approved permanent vegetative cover to beginning, limited resource, socially disadvantaged, and veteran farmers and ranchers, upon a determination that the approved permanent vegetative cover has been planted.

(h) The contract period for land enrolled under the Soil Health and Income Protection Pilot Program will be for a term of 3, 4, or 5 years, as requested by the producer.

(i) The following uses are permitted on land enrolled under the Soil Health and Income Protection Pilot Program:

(1) Without any reduction in the annual rental payment, the land may be:

(i) Made available for a walk-in access program of the applicable State; and

(ii) Hayed or grazed outside the primary nesting season, provided adequate stubble height of the cover is maintained to protect the soil as specified in the conservation plan; and

(2) In exchange for a 25 percent reduction to the annual rental payment, and not being eligible to be insured or reinsured under the Federal Crop Insurance Act, the land may be harvested for seed outside the primary nesting season if included in the conservation plan.

(j) A CRP contract for land enrolled under the Soil Health and Income Protection Pilot Program may be terminated before the end of the CRP contract period by either:

(1) CCC, if CCC determines that such termination is appropriate; or

(2) The participant, upon the condition that all CCC payments made with respect to the CRP contract being terminated are refunded.

§ 1410.80 CLEAR 30 Pilot Program.

(a) Not withstanding § 1410.6(b) and (c), to be eligible under the CLEAR 30 Pilot Program, land must be:

(1) Physically located within a CLEAR 30 Pilot Program area, as announced by CCC;

(2) Devoted to a grass waterway, contour grass strip, prairie strip, filter strip, riparian buffer, wetland restoration practice, or other similar water quality practice that helps reduce sediment loadings, nutrient loadings, and harmful algal blooms; and

(3) Enrolled in CRP, in the final year of the CRP contract period, provided the scheduled expiration date of the current CRP contract is:

(i) On or after December 20, 2018; and

(ii) Before the effective starting date of the new CRP contract.

(b) The contract period for land enrolled under the CLEAR 30 Pilot Program will be 30 years.

(c) In addition to the provisions in § 1410.32 and elsewhere in this part, the CRP contract for land enrolled under the CLEAR 30 Pilot Program will:

(1) Permit repairs, improvements, and inspections on the land that are necessary to maintain existing public drainage systems; and

(2) Prohibit:

(i) Alteration of wildlife habitat and other natural features of the land, unless authorized by CCC and provided for in the conservation plan;

(ii) Mowing or spraying chemicals on the land, unless such action is authorized by CCC to:

(A) Comply with Federal or State noxious weed laws;

(B) Comply with a Federal or State emergency pest management program; or

(C) Meet habitat needs of specific wildlife; and

(iii) Adoption of any other practice or action that would tend to defeat the purpose of CRP.

(d) Land enrolled under the CLEAR 30 Pilot Program may be used for compatible economic uses, including but not limited to hunting and fishing, managed timber harvest, or periodic haying or grazing, provided the use is:

(1) Included in the conservation plan; and

(2) Consistent with the long-term protection and enhancement of the conservation resource for which the land was enrolled.

(e) Notwithstanding § 1410.30, offers for contracts under the CLEAR 30 Pilot Program may be submitted only during a time period, as determined and announced by CCC, and only within the final year of the contract period of the CRP contract under which the land is currently enrolled.

(f) In addition to the provisions in § 1410.52, upon a violation of the terms and conditions of a contract for land enrolled under the CLEAR 30 Pilot Program, CCC may require the participant to refund all or part of any payments received under CRP plus interest and liquidated damages.

§ 1410.90 Conservation Reserve Enhancement Program.

(a) An agreement executed under the provisions of this section will not effect, modify, or otherwise interfere with any Conservation Reserve Enhancement Program agreement in effect on or before December 20, 2018. In order to implement other provisions of this section, the signatories to a Conservation Reserve Enhancement Program agreement in effect on or before December 20, 2018, may mutually agree in writing to modify such agreement in such a manner.

(b) CCC may enter into a Conservation Reserve Enhancement Program agreement with an eligible partner to cost-effectively assist in enrolling otherwise eligible land in CRP.

(c) To enter into a Conservation Reserve Enhancement Program agreement with CCC, eligible partners must provide required matching funds. Such matching funds provided by the eligible partners may be cash, in-kind contributions, or technical assistance. The amount and type of matching funds must be specified in the Conservation Reserve Enhancement Program agreement. At least one-half of the matching funds must be provided as a direct payment to eligible participants. The amount of matching funds an eligible partner must contribute under a Conservation Reserve Enhancement Program agreement will be either:

(1) 30 percent of the total cost of the project, unless a different amount is determined by negotiation between CCC and the eligible partner with whom CCC is entering into the Conservation Reserve Enhancement Program agreement, if the majority of the matching funds to carry out the agreement are provided by one or more eligible partners that are not nongovernmental organizations; or

(2) Not less than 30 percent of the total cost of the project, if a majority of the matching funds to carry out the agreement are provided by one or more nongovernmental organizations.

(d) Notwithstanding § 1410.40(d), cost-share payments, including practice incentive payments, from all sources may exceed 100 percent of the actual cost of establishing eligible practices, but only if specifically authorized by the Conservation Reserve Enhancement Program agreement. Furthermore, a participant may not receive or retain cost-share payments if other Federal cost-share assistance is provided for such acreage under any law.

(e) With regard only to land enrolled as a riparian buffer:

(1) The term ''management'' means an activity conducted by the owner or operator of the land after the riparian buffer is established to regularly maintain or enhance only the vegetative cover throughout the CRP contract period and in accordance with the conservation plan;

(2) Cost-share payments will be made available for approved management as provided for in the Conservation Reserve Enhancement Program agreement:

(i) If such activity has been completed in accordance with the conservation plan; and

(ii) In an amount as provided for in the agreement, but not greater than 100 percent of the normal and customary cost of such activity; but

(iii) No practice incentive payment will be made for such activity; and

(3) If provided for in the Conservation Reserve Enhancement Program agreement, a participant may plant food-producing woody plants as part of the approved cover, provided such plantings:

(i) Contribute to the conservation of soil, water quality, and wildlife habitat;

(ii) Are consistent with recommendations of the applicable State Technical Committee;

(iii) Are consistent with the FOTG; and

(iv) Are provided for in the conservation plan.

(f) Participants may harvest from the food-producing woody plants specified in paragraph (e)(3) of this section only if the following conditions are met:

(1) The criteria in paragraph (e)(3) of this section are met;

(2) The participant agrees to a reduction in the annual rental payment commensurate with the value of the crop harvested;

(3) All the food-producing woody plant species within 35 feet of the water body the riparian buffer is buffering are only native plant species;

(4) The harvesting will not damage the approved cover or otherwise have a negative impact on the resource concern being addressed by the riparian buffer; and

(5) The harvesting is conducted in accordance with the conservation plan.

(g) In the case of a Conservation Reserve Enhancement Program agreement whose purpose is to address regional drought concerns, CCC may:

(1) Enroll otherwise ineligible cropland, marginal pastureland, or grassland, on which the resource concerns identified in the Conservation Reserve Enhancement Program agreement can be addressed if the enrollment of such land is critical to the accomplishment of the purposes of the agreement; and

(2) Determine annual rental payments so as to be consistent with similar Conservation Reserve Enhancement Program agreements, and to ensure regional consistency regarding such payments.

(h) Notwithstanding § 1410.30, generally, enrollment under a Conservation Reserve Enhancement Program will be held on a continuous signup basis. However, the terms and conditions of the Conservation Reserve Enhancement Program agreement will determine the basis of enrollment.

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William Beam,

Acting Administrator,

Farm Service Agency.

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Margo Erny,

Acting Executive Vice President,

Commodity Credit Corporation.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 327

RIN 3064–AE98

Assessments

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending its deposit insurance assessment regulations to apply the community bank leverage ratio (CBLR) framework to the deposit insurance assessment system (CBLR Assessments final rule). The FDIC, the Board of Governors of the Federal Reserve System (Federal Reserve) and the Office of the Comptroller of the Currency (OCC) (collectively, the Federal banking agencies) are considering, and are expected to adopt, a final rule that provides for a simple measure of capital adequacy for certain community banking organizations (CBLR final rule). The CBLR Assessments final rule: prices all insured depository institutions (IDIs) that elect to use the CBLR framework as small institutions; makes technical amendments to the FDIC's assessment regulations to ensure that the assessment regulations continue to reference the prompt corrective action (PCA) regulations for the definitions of capital categories used in the deposit insurance assessment system; and clarifies that an IDI that elects to use the CBLR framework and also meets the definition of a custodial bank will have no change to its custodial bank deduction or reporting items required to calculate the deduction. The final rule does not make any changes to the FDIC's assessment methodology for small or large institutions.

DATES: The final rule is effective January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Ashley Mihalik, Chief, Banking and Regulatory Policy Section, Division of Insurance and Research, (202) 898–3793, *amihalik@fdic.gov;* Daniel Hoople, Senior Financial Economist, Banking and Regulatory Policy Section, Division of Insurance and Research, *dhoople@fdic.gov;* (202) 898–3835; Nefretete Smith, Counsel, Legal Division, (202) 898–6851, *nefsmith@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

The Federal Deposit Insurance Act (FDI Act) requires that the FDIC establish a risk-based deposit insurance assessment system.[1] Pursuant to this requirement, the FDIC first adopted a risk-based deposit insurance assessment system that applied to all insured depository institutions (IDIs) and became effective in 1993.[2] The FDIC implemented a risk-based assessment system with the goals of making the deposit insurance system fairer to well-run institutions and encouraging weaker institutions to improve their condition, and thus, promote the safety and soundness of IDIs.[3] Deposit insurance assessments based on risk also provide incentives for IDIs to monitor and reduce risks that could increase potential losses to the deposit insurance fund (DIF). Since 1993, the FDIC has met its statutory mandate and has pursued these policy goals by periodically introducing improvements to the deposit insurance assessment system's ability to differentiate for risk.

The primary objective of the CBLR Assessments final rule is to incorporate the CBLR framework [4] into the current risk-based deposit insurance assessment system in a manner that maximizes regulatory relief for small institutions and maintains fair and appropriate pricing of deposit insurance. This final rule will only result in a change to assessments for a very limited subset of banks [5]—those banks that elect to use the CBLR framework and would have otherwise been assessed as a large institution under current assessment regulations. Based on data from the Consolidated Reports of Condition and Income (Call Report) as of March 31, 2019, only one bank that was assessed as a large institution also met the qualifying criteria to be eligible to opt into the CBLR framework.

II. Background

The FDIC assesses all IDIs an amount for deposit insurance equal to the bank's deposit insurance assessment base multiplied by its risk-based assessment rate.[6] A bank's assessment base and risk-based assessment rate depend, in part, on items reported on the capital schedule of the Call Report. Under the CBLR final rule, a bank that elects to use the framework will only be required to report the components of its tier 1 leverage ratio (leverage ratio), which will be used to determine whether a bank is deemed ''well capitalized'' and thus in compliance with all regulatory capital requirements.

A. CBLR Framework

On February 8, 2019, the Federal banking agencies published in the **Federal Register** a notice of proposed rulemaking (CBLR NPR) that would have provided a simple alternative methodology to measure capital adequacy for qualifying community banking organizations, consistent with Section 201 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA or the Act).[7] [8] In the CBLR NPR, the Federal banking agencies proposed, among other things, to define tangible equity capital (tangible equity).[9] The Federal banking agencies further proposed that a qualifying community banking organization [10] could have elected to use the CBLR framework if its CBLR [11] was greater than 9 percent. Under the proposed CBLR framework, a bank would have reported its CBLR and other relevant information on a simpler regulatory capital schedule in the Call Report, as opposed to the current schedule RC–R of the Call Report.[12] Finally, under the CBLR NPR, a bank that elected to use the CBLR framework would have been required to have a CBLR greater than 9 percent to be considered well capitalized.[13] For banks with a CBLR equal to or less than 9 percent, the Federal banking agencies proposed proxy CBLR thresholds for the adequately capitalized, undercapitalized, and significantly undercapitalized PCA categories.[14]

In response to comments received on the CBLR NPR, the Federal banking agencies adopted a final rule (CBLR final rule) that makes several changes to the proposed CBLR framework.[15] The CBLR final rule provides that to be a ''qualified community banking organization,'' a depository institution or depository institution holding company must not be an advanced approaches banking organization [16] and must have less than $10 billion in total consolidated assets, meet certain risk-based qualifying criteria, and have a leverage ratio of greater than 9 percent.[17] Under the final rule, the numerator of the CBLR is the existing measure of tier 1 capital used by non-advanced approaches banking organizations (replacing the proposed

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[1] 12 U.S.C. 1817(b). Generally, a ''risk-based assessment system'' means a system for calculating a depository institution's assessment based on the institution's probability of causing a loss to the Deposit Insurance Fund (DIF) due to the composition and concentration of the institution's assets and liabilities, the likely amount of any such loss, and the revenue needs of the DIF. *See* 12 U.S.C. 1817(b)(1)(C).

[2] 57 FR 45263 (Oct. 1, 1992).

[3] *See* 57 FR 45264.

[4] In this rule, the term ''CBLR framework'' refers to the simplified reporting of capital adequacy that was adopted by the Federal banking agencies in the CBLR final rule.

[5] As used in this rule, the term ''bank'' is synonymous with the term ''insured depository institution'' as it is used in section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2).

[6] *See* 12 CFR 327.3(b)(1).

[7] *See* 84 FR 3062 (February 8, 2019).

[8] Public Law 115–174 (May 24, 2018). The Act defines a qualifying community banking organization as a depository institution or depository institution holding company with total consolidated assets of less than $10 billion. *See* section 201(a)(3)(A) of the Act. In addition, the Act states that the Federal banking agencies may determine that a banking organization is not a qualifying community bank based on its risk profile. *See* section 201(a)(3)(B) of the Act. A qualifying community banking organization that reports a CBLR (defined in the Act as the ratio of tangible equity capital to average total consolidated assets, both as reported on an institution's applicable regulatory filing) exceeding the level established by the Federal banking agencies of not less than 8 percent and not more than 10 percent shall be considered well capitalized. *See generally* section 201(b) of the Act.

[9] *See* 84 FR 3068–69 (defining tangible equity capital as total bank equity capital, prior to including minority interests, and excluding accumulated other comprehensive income, deferred tax assets arising from net operating loss and tax credit carryforwards, goodwill, and certain other intangible assets, calculated in accordance with a qualifying community bank organization's regulatory reports).

[10] In accordance with the Act, the Federal banking agencies proposed to define a qualifying community bank generally as a depository institution or depository institution holding company that is not an advanced approaches banking organization and that has less than $10 billion in total consolidated assets and limited amounts of off-balance sheet exposures, trading assets and liabilities, mortgage servicing assets, and certain deferred tax assets. *See* 84 FR 3065–67.

[11] *See* 84 FR 3064 (stating that the CBLR would be calculated as the ratio of tangible equity capital divided by average total consolidated assets).

[12] The Federal banking agencies separately sought comment on proposed revisions to regulatory reports consistent with the changes proposed in the CBLR NPR. *See* 84 FR 16560 (April 19, 2019).

[13] *See* 84 FR 3064 and 3071. However, to be considered and treated as well capitalized under the proposed CBLR framework, and consistent with the Federal banking agencies' current PCA rule, the qualifying community banking organization would have been required to demonstrate that it was not subject to any written agreement, order, capital directive, or prompt corrective action directive to meet and maintain a specific capital level for any capital measure. *See* 84 FR 3064.

[14] *See* 84 FR 3071–72.

[15] *See* 84 FR 61776 (November 13, 2019).

[16] An advanced approaches banking organization is generally defined as a firm with at least $250 billion in total consolidated assets or at least $10 billion in total on-balance sheet foreign exposure, and depository institution subsidiaries of those firms. Proposed rulemakings to tailor capital and liquidity requirements applicable to large banking organizations may result in changing the definition of advanced approaches banking organization. See 83 FR 66024 (December 21, 2018) and 84 FR 24296 (May 24, 2019).

[17] The risk-based qualifying criteria under the CBLR final rule include 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 and total trading assets plus trading liabilities of 5 percent or less of total consolidated assets. The Federal banking agencies did not adopt the deferred tax asset and mortgage servicing asset qualifying criteria included as part of the CBLR NPR. *See* 84 FR 61779–82.

measure of tangible equity.) [18] [19] Due to the adoption of tier 1 capital, the CBLR generally is calculated in the same manner as the leverage ratio under the Federal banking agencies' generally applicable risk-based and leverage capital requirements in the agencies' capital rule (generally applicable capital rule)—tier 1 capital divided by average total consolidated assets minus amounts deducted from tier 1 capital.[20] Thus, the CBLR final rule incorporates and refers to the generally applicable capital rule's leverage ratio.

Finally, the Federal banking agencies did not adopt use of the proposed proxy CBLR thresholds for the adequately capitalized, undercapitalized, and significantly undercapitalized PCA categories in the CBLR final rule.[21] Under the CBLR final rule, if a bank that has opted to use the CBLR framework subsequently fails to satisfy one or more of the qualifying criteria, but continues to report a leverage ratio of greater than 8 percent, the bank may continue to use the framework and will be deemed ''well capitalized'' for a grace period of up to two quarters.[22] A qualifying community banking organization will be required to comply with the generally applicable capital rule and file the relevant regulatory reports if the banking organization: (1) Is unable to restore compliance with all qualifying criteria during the two-quarter grace period (including coming into compliance with the greater than 9 percent leverage ratio requirement); (2) reports a leverage ratio of 8 percent or less; or (3) ceases to satisfy the qualifying criteria due to consummation of a merger transaction.[23]

B. Use of Capital Measures in the Current Deposit Insurance Assessment System

Under the FDI Act, the FDIC has the authority to ''establish separate risk-based assessment systems for large and small members of the Deposit Insurance Fund.'' [24] Separate systems for large banks and small banks have been in place since 2007.[25] A bank's quarterly deposit insurance assessment is calculated by multiplying its assessment base by its assessment rate.[26] A bank's assessment base is equal to its average consolidated total assets minus the average tangible equity.[27] Average tangible equity is defined as tier 1 capital.[28] The FDIC also provides a deduction to the assessment base for custodial banks equal to a certain amount of low risk-weighted assets.[29]

Assessment rates for established small banks [30] are calculated based on a formula that uses financial measures and a weighted average of supervisory ratings (CAMELS).[31] The financial measures are derived from a statistical model estimating the probability of failure over three years. The measures are shown in Table 1 below.

TABLE 1—FINANCIAL MEASURES USED TO DETERMINE ASSESSMENT RATES FOR ESTABLISHED SMALL BANKS

Financial measures
• Leverage Ratio.
• Net Income before Taxes/Total Assets.
• Nonperforming Loans and Leases/Gross Assets.
• Other Real Estate Owned/Gross Assets.
• Brokered Deposit Ratio.
• One Year Asset Growth.
• Loan Mix Index.

One of the measures, the Leverage Ratio, is defined as tier 1 capital divided by adjusted average assets (herein referred to as the tier 1 leverage ratio), and is the same calculation as the tier 1 leverage ratio under the generally applicable capital rule. The numerator and denominator of the Leverage Ratio are both based on the definitions for the relevant PCA measure.[32]

C. CBLR Assessments Notice of Proposed Rulemaking

On February 21, 2019, the FDIC published in the **Federal Register** a notice of proposed rulemaking that would amend the deposit insurance assessment regulations to apply the proposed CBLR framework to the deposit insurance assessment system (CBLR Assessments NPR).[33] Under the CBLR Assessments NPR, the FDIC would assess all banks that elect to use the CBLR framework as small banks. Further, because the use of the CBLR or tangible equity as proposed in the CBLR NPR could have resulted in a higher assessment rate or a larger assessment base for a minority of small banks, the FDIC proposed to allow banks that elect to use the CBLR framework the option to use either tangible equity or tier 1 capital for their assessment base calculation, and to have the option to report the tier 1 leverage ratio in addition to the CBLR, with the FDIC applying the value that would result in the lower assessment rate.

The CBLR Assessments NPR also clarified that: (1) A bank that elects to use the CBLR framework and also meets the definition of a custodial bank under the FDIC's assessment regulations would have no change to its custodial bank deduction or reporting items required to calculate the deduction; and (2) the assessment regulations would continue to reference the PCA regulations for the definition of capital categories used in the deposit insurance assessment system, with technical amendments to align with the CBLR NPR.

The FDIC sought comment on every aspect of the CBLR Assessments NPR, including alternatives. The FDIC received one comment from a trade group that generally supported the FDIC's objective of maintaining fair and appropriate pricing of deposit insurance for institutions that elect to use the CBLR framework.

III. The Final Rule

A. Summary

The CBLR Assessments final rule applies the CBLR framework, as adopted by the Federal banking agencies, to the deposit insurance assessment system in a way that, to the fullest extent practicable, reduces regulatory reporting burden consistent with the objective of EGRRCPA.[34] As discussed more fully

[18] For purposes of the CBLR framework, a bank that elects to use the CBLR framework is not required to calculate tier 2 capital and therefore would not be required to make any deductions that would be taken from tier 2 capital or potentially tier 1 capital due to insufficient tier 2 capital. In the CBLR final rule, the Federal banking agencies noted that they do not believe this is a common occurrence and observed that as of March 31, 2019, very few community banking organizations made a deduction from tier 2 capital. *See* 84 FR 61783.

[19] *See* FR 61782–83.

[20] *See* FR 61782–83.

[21] *See* FR 61786.

[22] *See* FR 61786.

[23] *See* FR 61786.

[24] 12 U.S.C. 1817(b)(1)(D).

[25] Under the assessment regulations, a ''small institution'' generally is an institution with less than $10 billion in total assets, and a ''large institution'' generally is an institution with $10 billion or more in total assets. *See* 12 CFR 327.8(e) and (f). A separate system for highly complex institutions (a subset of large institutions) has been in place since 2011. *See* 12 CFR 326.16(b)(2).

[26] 12 CFR 327.3(b)(1).

[27] 12 CFR 327.5(a).

[28] 12 CFR 327.5(a)(2).

[29] *See* 12 CFR 327.5(c). Generally, a custodial bank is defined as an IDI with previous calendar year-end trust assets (that is, fiduciary and custody and safekeeping assets, as reported on Schedule RC–T of the Call Report) of at least $50 billion or those insured depository institutions that derived more than 50 percent of their revenue (interest income plus non-interest income) from trust activity over the previous calendar year. *See* 12 CFR 327.5(c)(1).

[30] Generally, an established institution is one that has been federally insured for at least five years. *See* 12 CFR 327.8(v).

[31] *See* 12 CFR 327.16(a)(1).

[32] *See* 12 CFR 327.16(a)(1)(ii).

[33] *See* 84 FR 5380 (February 21, 2019).

[34] The changes adopted in this final rule do not apply to insured branches of foreign banks. These institutions file the FFIEC 002, which does not include many of the items, including capital

Continued

below, the rule amends the FDIC's assessment regulations to: (1) Price all banks that elect to use the CBLR framework as small banks; (2) make technical amendments to ensure that the assessment regulations continue to reference the PCA regulations for the definitions of capital categories used in the deposit insurance assessment system; and (3) clarify that a bank that elects to use the CBLR framework and also meets the definition of a custodial bank will have no change to its custodial bank deduction or reporting items required to calculate the deduction. The final rule does not make any changes to the FDIC's assessment methodology for small or large institutions. This final rule will only result in a change to assessments in the limited circumstance where a bank that would have otherwise been assessed as a large institution under current assessment regulations elects to use the CBLR framework.

B. Pricing Banks That Elect To Use the CBLR Framework as Small Institutions

Under this CBLR Assessments final rule, the FDIC amends the definition of ''small institution'' to include, as proposed, all banks that elect to use the CBLR framework, even if such a bank would otherwise be classified as a ''large institution'' under the assessment regulations.[35] This modification is necessary because otherwise, the different thresholds used to define a small bank in assessment regulations and a qualifying community banking organization under the CBLR framework could result in a bank that elects to use the framework being assessed as a large bank.[36] In addition, the FDIC also clarifies, as proposed, that a bank with assets of between $5 billion and $10 billion that elects to use the CBLR framework cannot request to be treated as a large bank.[37] The FDIC continues to believe that pricing a bank that uses the CBLR framework as a large bank would not meet the policy objective of maximizing the regulatory relief because the pricing methodology for large banks uses measures that are not reported by small banks. In the absence of this change, a bank that elected to use the CBLR framework and would otherwise be priced as a large institution would be required to report these additional items on their Call Report. Further, the methodology used to price the risk of large institutions is intended for banks with more complex operations and organizational structures, which, in the FDIC's view, is inconsistent with a qualifying community banking organization under the CBLR framework.[38]

C. Technical Changes in Regulations

Under this final rule, the FDIC makes technical amendments to ensure that the assessment regulations will continue to reference the PCA regulations for the definitions of capital categories used in the deposit insurance assessment system. Capital categories for deposit insurance assessment purposes are defined by reference to the agencies' regulatory capital rules that are being amended by the CBLR final rule.[39] As such, changes made by the CBLR final rule, as discussed above, will be automatically incorporated into the assessment regulations; however, technical amendments to the FDIC's assessment regulations are necessary to align with changes to regulatory citations in the CBLR final rule.

D. Clarifications Regarding Custodial Bank Deduction

Through this CBLR Assessments final rule, the FDIC clarifies that any bank that elects to use the CBLR framework and also meets the definition of a custodial bank will experience no change in the reporting that is necessary to calculate and receive the custodial bank deduction under the assessment regulations. The final rule does not change the custodial bank deduction. As mentioned above, in calculating the assessment base for custodial banks, the FDIC excludes a certain amount of low-risk assets, which are reported in Schedule RC–R of the Call Report, subject to the deduction limit.[40] Under the CBLR framework, these line items would not be reported by banks that elect to use the CBLR framework.[41] The FDIC is clarifying that it would not require such a bank to separately report these items in order to continue utilizing the custodial bank deduction. A custodial bank will continue to report the numerical value of its custodial bank deduction and custodial bank deduction limit in Schedule RC–O of the Call Report. Also, the FDIC will require custodial banks to continue to maintain the proper documentation of their calculation for the custodial bank adjustment, and to make that documentation available upon request.[42]

E. Proposed Changes Not Adopted in the CBLR Assessments Final Rule

The FDIC is not adopting several changes to the deposit insurance assessment regulations that were proposed in the CBLR Assessments NPR because the CBLR framework, as adopted in the CBLR final rule, have made them unnecessary. For example, proposed amendments to the FDIC's assessment regulations that were related to the Federal banking agencies' definition of ''tangible equity'' and ''community bank leverage ratio'' in the CBLR NPR were not adopted, rendering proposed conforming changes in the assessment regulations unnecessary.

The FDIC received one comment noting that the flexibility proposed by the FDIC in the CBLR Assessments NPR to banks that elect to use the CBLR framework would be unnecessary if the CBLR and tier 1 leverage ratio are calculated in the same manner. The FDIC agrees.

IV. Expected Effects

The FDIC does not expect that changes to its assessment regulations under this final rule would have a material impact on aggregate assessment revenue or on rates paid by individual institutions. Based on Call Report data as of March 31, 2019, 5,221 out of 5,371 IDIs had less than $10 billion in total

measures, found in the Call Report schedules filed by other IDIs.

[35] A bank that elects to use the CBLR framework and that meets the definition of an established institution under 12 CFR 327.8(v) would be assessed as an established small bank. A bank that elects to use the CBLR framework and that has been federally insured for less than five years would be assessed as a new small bank. *See* 12 CFR 327.8(w).

[36] Under the current assessment regulations, a large bank is reclassified as small once it has reported less than $10 billion in total assets for four consecutive quarters, and a small bank is reclassified as large once it has reported $10 billion or more in total assets for four consecutive quarters. *See* 12 CFR 327.8(e) and (f). Under the CBLR final rule, a qualifying community banking organization is defined generally as a depository institution or depository institution holding company with less than $10 billion in total consolidated assets at the end of the most recent quarter and that meet certain qualifying criteria. *See* 84 FR 61779–82.

[37] Under current regulations, a bank with between $5 billion and $10 billion may request treatment as a large bank for deposit insurance assessments. *See* 12 CFR 327.8(f).

[38] For example, the FDIC uses data on Schedule RC–O regarding higher-risk assets to calculate financial ratios used to determine a large or highly complex institution's assessment rate, and small institutions are not required to report such information.

[39] *See* 12 CFR 327.8(z).

[40] *See* 12 CFR 327.5(c)(2) (the FDIC will exclude from a custodial bank's assessment base the daily or weekly average (depending on how the bank reports its average consolidated total assets) of all asset types described in the instructions to lines 1, 2, and 3 of Schedule RC of the Call Report with a standardized approach risk weight of 0 percent, regardless of maturity, plus 50 percent of those asset types described in the instructions to lines 1, 2, and 3 of Schedule RC of the Call Report, with a standardized approach risk-weight greater than 0 and up to and including 20 percent, regardless of maturity).

[41] *See* 84 FR 3073.

[42] *See* 12 U.S.C. 1817(b)(4).

consolidated assets. In the CBLR final rule, the Federal banking agencies estimate that approximately 85 percent of IDIs with less than $10 billion in total assets would meet the qualifying criteria and thus be eligible to use the CBLR framework under the CBLR final rule.[43] Included in this total are four custodial banks that would meet the definition of a ''qualifying community banking organization'' under the CBLR final rule.

As mentioned above, because the Federal banking agencies incorporate and refer to the generally applicable capital rule's leverage ratio as the CBLR, the CBLR final rule results in no change to the ratio that is utilized in the FDIC's pricing methodology, and therefore no changes are being made to the assessment methodology. Additionally, a custodial bank that elects to use the CBLR framework will be able to continue to report the custodial bank deduction for its assessment base, even though it will not separately report risk-weighted assets used in the calculation of the deduction, and will see no change to its assessment amount.

Finally, the FDIC does not believe that the final rule would affect a significant number of IDIs. As previously stated, the change to the definition of ''small institution'' for assessment purposes will only result in a change to assessments for a bank that elects to use the CBLR framework and would have otherwise been assessed as a large institution under current assessment regulations. Based on Call Report data as of March 31, 2019, only one bank that was assessed as a large institution also met the qualifying criteria to be eligible to opt into the CBLR framework. The annual insurance assessments paid by the institution as a result of the final rule is expected to decline by less than $4 million, or less than one percent of that institution's interest income earned in the prior year.

V. Alternatives Considered

The FDIC solicited comments on several alternatives, including options to offset the impact that any differences in reporting under the CBLR framework and under the Federal banking agencies' generally applicable capital rule could have on the assessment amount of a bank that elects to use the CBLR framework. The FDIC received no comments on the alternatives presented and believes that the changes adopted in this final rule meet its stated policy objectives in the most appropriate and straightforward manner.

VI. Effective Date

This rule will become effective on January 1, 2020.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the proposed rule on small entities.[44] However, a regulatory flexibility analysis is not required if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[45] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. Certain types of rules, such as rules of particular applicability relating to rates, corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA. Because the rule relates directly to the rates imposed on IDIs for deposit insurance and to the deposit insurance assessment system that measures risk and determines each bank's assessment rate, the rule is not subject to the RFA. Nonetheless, the FDIC is voluntarily presenting information in this RFA section.

As of March 31, 2019, the FDIC insured 5,371 institutions, of which 4,004 are considered small entities for the purposes of RFA.[46] Of the 4,004 small entities, 3,433 entities qualify for the CBLR framework.

As discussed in Section III, the final rule amends the FDIC's assessment regulations to price all banks that elect to adopt the CBLR framework as small banks. The assessment regulations have previously defined and will continue to define a small bank as generally having less than $10 billion in total assets. Small banking organizations, as defined by the SBA, must have less than $600 million in total assets. Thus, for purposes of the RFA, all small banking organizations are already priced as small banks under the assessment regulations. Electing to adopt the community bank leverage ratio framework will have no effect on the pricing of a small banking organization.

VIII. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995,[47] the FDIC 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 FDIC's OMB control numbers for its assessment regulations are 3064–0057, 3064–0151, and 3064–0179. The final rule does not revise any of these existing assessment information collections pursuant to the PRA and consequently, no submissions in connection with these OMB control numbers will be made to the OMB for review. However, the final rule will require changes to the instructions for the Call Reports (FFIEC 031, FFIEC 041, and FFIEC 051 (OMB No. 3064–0052 (FDIC), 7100–0036 (Federal Reserve System) and 1557–0081 (Office of the Comptroller of the Currency)), which will be coordinated by the Federal Financial Institutions Examination Council and addressed in a separate **Federal Register** notice.

IX. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[48] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such

[43] *See* 84 FR 61784.

[44] 5 U.S.C. 601 *et seq.*

[45] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[46] Consolidated Reports of Condition and Income for the quarter ending March 31, 2019.

[47] 44 U.S.C. 3501 *et seq.*

[48] 12 U.S.C. 4802(a).

regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[49]

The amendments to the FDIC's deposit insurance assessment regulations under this final rule do not impose additional reporting, disclosures, or other new requirements. Nonetheless, the FDIC considered the requirements of RCDRIA when finalizing this rule with an effective date of January 1, 2020.

X. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[50] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language.

XI. The Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[51] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[52]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[53] The OMB has determined that the final rule is not a major rule for purposes of the Congressional Review Act. The FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

[49] 12 U.S.C. 4802(b).

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

[51] 5 U.S.C. 801 *et seq.*

[52] 5 U.S.C. 801(a)(3).

[53] 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 327

Bank deposit insurance, Banks, Banking, Savings associations.

Authority and Issuance

For the reasons set forth above, the FDIC amends part 327 of title 12 of the Code of Federal Regulations as follows:

PART 327—ASSESSMENTS

■ 1. The authority for 12 CFR part 327 continues to read as follows:

Authority: 12 U.S.C. 1441, 1813, 1815, 1817–19, 1821.

■ 2. Revise § 327.8(e) and (z) to read as follows:

§ 327.8 Definitions.

* * * * *

(e) *Small institution.* (1) An insured depository institution with assets of less than $10 billion as of December 31, 2006, and an insured branch of a foreign institution shall be classified as a small institution.

(2) Except as provided in paragraph (e)(3) of this section, if, after December 31, 2006, an institution classified as large under paragraph (f) of this section (other than an institution classified as large for purposes of §§ 327.9(e) and 327.16(f)) reports assets of less than $10 billion in its quarterly reports of condition for four consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter.

(3) An insured depository institution that elects to use the community bank leverage ratio framework under 12 CFR 3.12(a)(3), 12 CFR 217.12(a)(3), or 12 CFR 324.12(a)(3), shall be classified as a small institution, even if that institution otherwise would be classified as a large institution under paragraph (f) of this section.

* * * * *

(z) *Well capitalized, adequately capitalized, and undercapitalized.* For any insured depository institution other than an insured branch of a foreign bank, Well Capitalized, Adequately Capitalized, and Undercapitalized have the same meaning as in: 12 CFR 6.4 (for national banks and Federal savings associations), as either may be amended from time to time, except that 12 CFR 6.4(b)(1)(i)(E) and (e), as they may be amended from time to time, shall not apply; 12 CFR 208.43 (for state member institutions), as either may be amended from time to time, except that 12 CFR 208.43(b)(1)(i)(E) and (c), as they may be amended from time to time, shall not apply; and 12 CFR 324.403 (for state nonmember institutions and state savings associations), as either may be amended from time to time, except that 12 CFR 324.403(b)(1)(i)(E) and (d), as they may be amended from time to time, shall not apply.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on September 17, 2019.

Annmarie H. Boyd,

Assistant Executive Secretary.

[FR Doc. 2019–25897 Filed 12–5–19; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1105; Product Identifier 2017–SW–023–AD; Amendment 39–19803; AD 2019–23–09]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Limited Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Bell Helicopter Textron Canada Limited (BHTC) Model 427 helicopters. This AD requires inspecting the inboard skin of the vertical fin around the four tailboom attachment points. This AD was prompted by reports of cracked vertical fin skins that resulted from metal fatigue. The actions of this AD are intended to prevent an unsafe condition on these products.

DATES: This AD is effective January 10, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain document listed in this AD as of January 10, 2020.

ADDRESSES: For service information identified in this final rule, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone 450–437–2862 or 800–363–8023; fax 450–433–0272; or at *https://www.bellcustomer.com.* You may review 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 *https://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1105.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1105; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the Transport Canada AD, any service information that is incorporated by reference, the economic 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: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On June 1, 2018, at 83 FR 25408, the **Federal Register** published the FAA's notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to BHTC Model 427 helicopters with a vertical fin part number (P/N) 427–035–840–105 or P/N 427–035–840–109 installed. The NPRM proposed to require inspecting the inboard skin of the vertical fin around the four tailboom attachment points. The proposed requirements were intended to detect a crack on the vertical fin skin. This condition could lead to structural failure of the fin, separation of the skin from the helicopter, damage to the main or tail rotor blades and loss of helicopter control.

The NPRM was prompted by Canadian AD No. CF–2017–03, dated January 31, 2017 (Transport Canada AD CF–2017–03), issued by Transport Canada, which is the aviation authority for Canada, to correct an unsafe condition for BHTC Model 427 helicopters with vertical fin P/N 427–035–840–105 or P/N 427–035–840–109 installed. Transport Canada advises of three reports of cracked vertical fin skins that resulted from metal fatigue. If not detected, the crack may grow to a critical length, causing the fin to fail, separate from the helicopter, and damage the main or tail rotor blades, leading to their in-flight failure. Loss of the fin may also adversely affect the helicopter's directional stability, leading to loss of directional control, Transport Canada advises.

Transport Canada consequently requires repetitively inspecting the vertical fins for a crack, and if a crack is detected, replacing the fin before further flight.

Comments

After the NPRM was published, the FAA received comments from one commenter. However, the comment addressed neither the proposed actions nor the determination of the cost to the public. Therefore, the FAA has made no changes to this AD.

FAA's Determination

These helicopters have been approved by the aviation authority of Canada and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with Canada, Transport Canada, its technical representative, has notified the FAA about the unsafe condition described in the Transport Canada AD. The FAA is issuing this AD after evaluating all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Bell Helicopter Alert Service Bulletin 427–15–38, Revision A, dated November 14, 2016, which specifies repetitive inspections of the vertical fins every 100 hours time-in-service (TIS) once the vertical fin has accumulated 1,500 hours TIS. This inspection also was incorporated in Chapter 4 of the maintenance manual. This service information also specifies serial numbers are to be assigned to vertical fins that do not have a serial number.

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

Costs of Compliance

The FAA estimates that this AD affects 27 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.

- Performing the visual inspection requires about 2.25 work-hours for an estimated cost of $191 per helicopter and $5,157 for the U.S. fleet.
- Replacing the fin requires about 4 work-hours, and parts cost about $10,000, for an estimated cost of $10,340 per helicopter.
- Assigning a serial number to the fin takes about 0.5 work-hours for an estimated cost of $43 per helicopter.

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 helicopters identified in this rulemaking action.

Regulatory Findings

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

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

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

(2) 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.

The FAA prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2019–23–09 Bell Helicopter Textron Canada Limited: Amendment 39–19803; Docket No. FAA–2017–1105; Product Identifier 2017–SW–023–AD.

(a) Applicability

This AD applies to Bell Helicopter Textron Canada Limited Model 427 helicopters with a vertical fin part number (P/N) 427–035–840–105 or P/N 427–035–840–109 installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a crack on the vertical fin skin. This condition could lead to structural failure of the fin, separation of the skin from the helicopter, damage to the main or tail rotor blades and loss of helicopter control.

(c) Effective Date

This AD becomes effective January 10, 2020.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 25 hours time-in-service (TIS) or before the helicopter has accumulated 1,500 hours TIS, whichever occurs later, and thereafter at intervals not to exceed 100 hours TIS:

(1) Remove the vertical fin and clean the vertical fin attachment area with a soap solution to remove all traces of dirt, stains, exhaust residue, and oil. Rinse the area with water and let dry.

(i) Using a 10X power magnifying glass, visually inspect the inboard skin of the vertical fin for a crack around the four tailboom attachment points as depicted in Figure 1 of Bell Helicopter Alert Service Bulletin 427–15–38, Revision A, dated November 14, 2016. Pay particular attention to the upper aft attachment point.

(ii) If there is a crack, replace the vertical fin before further flight.

(2) If the vertical fin does not have a serial number, assign a serial number using the helicopter serial number, and permanently mark the new serial number on the vertical fin data plate. Create a component history card or equivalent record and annotate the serial number.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Section, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

The subject of this AD is addressed in Transport Canada AD No. CF–2017–03, dated January 31, 2017. You may view the Transport Canada AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2017–1105.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 55, Empennage Structure.

(i) Material Incorporated by Reference

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

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

(i) Bell Helicopter Alert Service Bulletin 427–15–38, Revision A, dated November 14, 2016.

(ii) [Reserved]

(3) For Bell Helicopter Textron Canada Limited service information identified in this AD, contact Bell Helicopter Textron Canada Limited, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4; telephone 450–437–2862 or 800–363–8023; fax 450–433–0272; or at *https://www.bellcustomer.com.*

(4) 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.

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

Issued in Fort Worth, Texas, on November 19, 2019.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2019–26298 Filed 12–5–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 191105–0076]

RIN 0694–AH85

Addition of Entities to the Entity List, Revision of an Entry on the Entity List, and Removal of Entities From the Entity List

Correction

In rule document 2019–24635 beginning on page 61538 in the issue of Wednesday, November 13, 2019, make the following corrections:

Supplement No. 4 to Part 744—Entity List

■ 1. On page 61543, in the table, in the fourth row under PAKISTAN, in the rightmost column,

84 FR [INSERT FR PAGE NUMBER], November 13, 2019.

should read

83 FR 12479, 3/22/18.

84 FR [INSERT FR PAGE NUMBER], November 13, 2019.

■ 2. On the same page, in the table, in the sixth row under PAKISTAN, in the rightmost column,

84 FR [INSERT FR PAGE NUMBER], November 13, 2019. Presumption of denial.

should read

84 FR [INSERT FR PAGE NUMBER], November 13, 2019.

■ 3. On page 61545, in the table, in the fifth row under UNITED ARAB EMIRATES, in the rightmost column,

84 FR [INSERT FR PAGE NUMBER].

should read

84 FR [INSERT FR PAGE NUMBER], November 13, 2019.

[FR Doc. C1–2019–24635 Filed 12–5–19; 8:45 am]

BILLING CODE 1301–00–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0926]

RIN 1625–AA00

Safety Zone; Electrical Cable Installation, Menominee River, Menominee, MI and Marinette, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within 100 yards of a work site pulling new overhead electrical cables along a line crossing the Menominee River in Menominee, MI. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the installation of overhead electrical cables across the river. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Lake Michigan (COTP).

DATES: This rule is effective from 7 a.m. on December 12, 2019, through 10 p.m. on December 21, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0926 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Petty Officer Kyle Weitzell, Sector Lake Michigan Waterways Management Division, U.S. Coast Guard; telephone 414–747–7148, email *Kyle.W.Weitzell@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the COTP was made aware of this project to install new overhead electrical cables on November 19, 2019 and immediate action is needed to mitigate potential safety hazards associated with the process of pulling the new cables across the Menominee River. It is impracticable to publish an NPRM because we must establish this safety zone by December 12, 2019.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to mitigate potential safety hazards associated with the process of pulling the new cables across the Menominee River.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that potential safety hazards associated with process of pulling the new cables across the Menominee River scheduled to take place on one day from December 12, 2019 through December 21, 2019, will be a safety concern for anyone within 100 yards from a work site involving the installation of new overhead electrical cables across the Menominee River between Menominee, MI and Marinette, WI. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while lines and electrical cables are being pulled across the river.

IV. Discussion of the Rule

This rule establishes a safety zone from 7 a.m. on December 12, 2019 through 10 p.m. on December 21, 2019. The safety zone will cover all navigable waters of the Menominee River within 100 yards of a work site pulling new overhead electrical cables along a line crossing the river from coordinates 45.096326° N, 087.602092° W to 45.097197° N, 087.600601° W. This safety zone is intended to be enforced on one day during the aforementioned timeframe, dependent on weather conditions. The date and time of the enforcement period will be announced by the COTP by Broadcast Notice to Mariners. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while lines and electrical cables are being pulled across the river. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the COTP or a designated on-scene representative. The COTP or a designated on-scene representative may be contacted via VHF Channel 16.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the characteristics of the safety zone. The safety zone created by this rule will be relatively small and is designed to minimize its impact on navigable waters. This rule will prohibit entry into certain navigable waters of the Menominee River at Menominee, MI and Marinette, WI and is not anticipated to exceed twelve hours in duration. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the COTP.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone not anticipated to last more than twelve hours that will prohibit entry within 100 yards of a work site crossing the Menominee River for the pulling of new overhead electrical cables across the river. It is categorically excluded from further review under paragraph L60(a) in Table 3–1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A Record of Environmental Consideration supporting this determination will be available in the docket where indicated under **ADDRESSES** once it has been completed.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1

■ 2. Add § 165.T09–0926 to read as follows:

§ 165.T09–0926 Safety Zone; Electrical Cable Installation, Menominee River, Menominee, MI and Marinette, WI.

(a) *Location.* All navigable waters of the Menominee River within 100 yards of a line crossing the river from coordinates 45.096326° N, 087.602092° W to 45.097197° N, 087.600601° W.

(b) *Enforcement period.* The regulated area described in paragraph (a) is effective from 7 a.m. on December 12, 2019 through 10 p.m. on December 21, 2019 while lines and cables are being pulled across the river. The Captain of the Port Lake Michigan (COTP) will announce specific enforcement periods for this safety zone by Broadcast Notice to Mariners.

(c) *Regulations.* (1) In accordance with the general regulations in section § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or a designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated on-scene representative.

(3) The ''on-scene representative'' of the COTP is any Coast Guard commissioned, warrant or petty officer who has been designated by the COTP to act on his or her behalf.

(4) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or an on-scene representative to obtain permission to do so. The COTP or an on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or an on-scene representative.

Dated: December 2, 2019.

T.J. Stuhlreyer,

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

[FR Doc. 2019–26301 Filed 12–5–19; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 19–333; FCC 19–113; FRS 16276]

Closure of FCC Lockbox 979096 Used To Collect Payment of Charges for Certain International Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopts an Order that closes Lockbox 979096 and removes the relevant rule relating to the collection of payment for charges for certain international telecommunications services.

DATES: Effective January 6, 2020.

FOR FURTHER INFORMATION CONTACT: Warren Firschein, Office of Managing Director at (202) 418–2653 or Roland Helvajian, Office of Managing Director at (202) 418–0444.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, FCC 19–113, MD Docket No. 19–333, adopted on November 7, 2019 and released on November 12, 2019. The full text of this document is available for public inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW, Washington, DC 20554, or by downloading the text from the Commission's website at *https://www.fcc.gov/document/closure-lockbox-used-international-telecommunications-services.*

I. Administrative Matters

A. Final Regulatory Flexibility Analysis

1. Section 603 of the Regulatory Flexibility Act, as amended, requires a regulatory flexibility analysis in notice and comment rulemaking proceedings. See 5 U.S.C. 603(a). As we are adopting these rules without notice and comment, no regulatory flexibility analysis is required.

B. Final Paperwork Reduction Act of 1995 Analysis

2. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

3. The Commission will not send a copy of the Order pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of agency organization, procedure, or practice that do not "substantially affect the rights or obligations of non-agency parties. See 5 U.S.C. 804(3)(C).

II. Introduction

4. In the Order, we reduce expenditures by the Commission and modernize procedures by removing § 1.1108 of our rules, 47 CFR 1.1108, which sets forth the charges for applications and other filings for international telecommunications services. The rule amendment reflects the closure of the P.O. Box [1] used to collect payment of charges for certain international telecommunications services, along with a fee for processing such transactions. Our action here stems from our recent decision, described below, to no longer function as an accounting authority of last resort and to accordingly cease collection of such charges.

5. The FCC has historically performed the function of an accounting authority for international maritime mobile communications for those customers in the maritime mobile and maritime mobile-satellite radio services that had not otherwise designated any such accounting authority. This default function is referred to as the "accounting authority of last resort." Essentially, this involves presenting telecommunications bills to U.S.-registered ships that have utilized telecommunications services from a foreign coast station or satellite, accepting payment, and remitting collected funds to the telecommunications provider. The Commission used P.O. Box 979096 to collect such payments.

6. On December 21, 2018, the Commission released a Second Report and Order in which it adopted its proposal to transition the functions and duties performed by the FCC as an accounting authority of last resort (84 FR 8994 (March 13, 2019)). The Commission also directed the staff to finalize details of the transition and publish the detailed transition and outreach plan. The detailed plan was released on April 22, 2019 in a Public Notice. The Public Notice indicated that the Commission would terminate its performance of the functions of an accounting authority at the close of business on April 22, 2020. The Public Notice also explained that no later than that date, users who have relied on the Commission as an accounting authority must affirmatively select an accounting authority, contract with such entity as their new accounting authority, and reactivate/recommission their terminal(s) to the new accounting authority's identification code (AAIC).

7. In the Order, we announce that we will close P.O. Box 979096, effective July 15, 2020, at which time the Commission will no longer handle such transactions, and parties will be expected to utilize other accounting authorities as provided in the Second Report and Order and the Public Notice. While we do not anticipate receiving payments after April 22, 2020, delaying the closure of the P.O. Box until after the Commission ceases to function as an accounting authority will allow us to coordinate with parties whose payments have been delayed and assist them in utilizing another accounting authority.

8. Closure of P.O. Box 979096 will reduce the agency's expenditures (including eliminating the annual fee for the bank's services). Because the Commission will no longer serve as an accounting authority, it will also provide no inconvenience to the Commission's regulatees, applicants, and the public. We amend our rules to reflect this change as indicated in the Appendix. We make this change without notice and comment because it is a rule of agency organization, procedure, or practice exempt from the general notice-and-comment requirements of the Administrative Procedure Act.

III. Ordering Clauses

9. *Accordingly, it is ordered,* that pursuant to sections 4(i), 4(j), 158, 208, and 224 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 158, 208, and 224, the Order is hereby *adopted* and the rules set forth in the Appendix of the Order are hereby *amended* effective January 6, 2020.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

[1] A P.O. Box used for the collection of fees is referred to as a "lockbox" in our rules and other Commission documents. The FCC collects application processing fees using a series of P.O. Boxes located at U.S. Bank in St. Louis, Missouri. *See* 47 CFR 1.1101–1.1109 (setting forth the fee schedule for each type of application remittable to the Commission along with the correct lockbox).

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note, unless otherwise noted.

§ 1.1108 [Removed and Reserved]

■ 2. Remove and reserve § 1.1108.

[FR Doc. 2019–26304 Filed 12–5–19; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 84, No. 235

Friday, December 6, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 331

RIN 3064–AF21

Federal Interest Rate Authority

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is seeking comment on proposed regulations clarifying the law that governs the interest rates State-chartered banks and insured branches of foreign banks (collectively, State banks) may charge. The proposed regulations would provide that State banks are authorized to charge interest at the rate permitted by the State in which the State bank is located, or one percent in excess of the ninety-day commercial paper rate, whichever is greater. The proposed regulations also would provide that whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act would be determined at the time the loan is made, and interest on a loan permissible under section 27 would not be affected by subsequent events, such as a change in State law, a change in the relevant commercial paper rate, or the sale, assignment, or other transfer of the loan.

DATES: Comments will be accepted until February 4, 2020.

ADDRESSES: You may submit comments on the notice of proposed rulemaking using any of the following methods:

- *Agency website: https://www.fdic.gov/regulations/laws/federal.* Follow the instructions for submitting comments on the agency website.
- *Email: comments@fdic.gov.* Include RIN 3064–AF21 on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.
- *Public Inspection:* All comments received, including any personal information provided, will be posted generally without change to *https://www.fdic.gov/regulations/laws/federal.*

FOR FURTHER INFORMATION CONTACT: James Watts, Counsel, Legal Division, (202) 898–6678, *jwatts@fdic.gov;* Catherine Topping, Counsel, Legal Division, (202) 898–3975, *ctopping@fdic.gov;* or Romulus Johnson, Counsel, Legal Division, (202) 898–3820, *romjohnson@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

Federal law authorizes State banks to charge interest at the maximum rate permitted to any State-chartered or licensed lending institution in the State where the bank is located, or one percent in excess of the ninety-day commercial paper rate, whichever is greater. A bank's power to make loans implicitly carries with it the power to assign loans, and thus, a State bank's statutory authority to make loans at this rate necessarily includes the power to assign loans at the same rate. The ability of an assignee to enforce a loan's interest-rate terms is also consistent with fundamental principles of contract law.

Despite these clear authorities, recent developments have created uncertainty about the ongoing validity of interest-rate terms after a State bank sells, assigns, or otherwise transfers a loan. The decision of the U.S. Court of Appeals for the Second Circuit in *Madden* v. *Midland Funding, LLC* [1] has called into question the enforceability of the interest rate terms of loan agreements following a bank's assignment of a loan to a non-bank. The court concluded that 12 U.S.C. 85 (section 85)—which authorizes national banks to charge interest at the rate permitted by the law of the State in which the national bank is located, regardless of interest rate restrictions by other States—does not apply to non-bank assignees of loans. While *Madden* concerned the assignment of a loan by a national bank, the Federal statutory provision governing State banks' authority with respect to interest rates is patterned after and interpreted in the same manner as section 85. Therefore, *Madden* also has created uncertainty regarding the enforceability of loans originated and sold by State banks. Moreover, the decision continues to cause ripples with pending litigation challenging longstanding market practices.

Section 27 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831d) provides State banks the authority to charge interest at the rate allowed by the law of the State where the bank is located, or one percent more than the rate on ninety-day commercial paper, whichever is greater. The legal ambiguity generated by *Madden* has led the FDIC to consider issuing regulations implementing the relevant statutory provisions.[2] Uncertainty regarding the enforceability of interest rate terms may hinder or frustrate loan sales, which are crucial to the safety and soundness of State banks' operations for a number of reasons. Loan sales enable State banks to increase their liquidity in a crisis, to meet unusual deposit withdrawal demands, or to pay unexpected debts. Loan sales also enable banks to make additional loans and meet increased credit demand. Banks also may need to sell loans to address excessive concentrations in particular asset classes. In addition, banks may need to sell non-performing loans in circumstances where it would be costly or inconvenient to pursue collection strategies. There may be additional valid business reasons for State banks to sell loans.

Accordingly, the FDIC is proposing regulations that would implement section 27 of the FDI Act. The proposed regulations would implement the statutory provisions that authorize State banks to charge interest of up to the greater of: One percent more than the rate on 90-day commercial paper; or the rate permitted by the State in which the bank is located. The proposed

[1] 786 F.3d 246 (2d. Cir. 2015).

[2] The Secretary of the Treasury also recommended, in a July 2018 report to the President, that the Federal banking regulators should "use their available authorities to address challenges posed by *Madden.*" *See* "A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation," July 31, 2018, at p. 93 (available at: *https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf*).

regulations also would provide that whether interest on a loan is permissible under section 27 would be determined at the time the loan is made, and would not be affected by subsequent events, such as a change in State law, a change in the relevant commercial paper rate, or the sale, assignment, or other transfer of the loan. The regulations also implement section 24(j) of the FDI Act [3] to provide that the laws of a State in which a State bank is not chartered in but in which it maintains a branch (host State), shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. The regulations do not address the question of whether a State bank or insured branch of a foreign bank is a real party in interest with respect to a loan or has an economic interest in the loan under state law, *e.g.,* which entity is the ''true lender.'' Moreover, the FDIC supports the position that it will view unfavorably entities that partner with a State bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing State(s).

II. Background: Current Regulatory Approach and Market Environment

A. National Banks' Interest Rate Authority

The statutory provisions that would be implemented by the proposed rule are patterned after, and have been interpreted consistently with, section 85 to provide competitive equality among federally-chartered and State-chartered depository institutions. While the proposed rule would implement the FDI Act, rather than section 85, the following background information is intended to frame the discussion of the proposed rule.

Section 30 of the National Bank Act was enacted in 1864 to protect national banks from discriminatory State usury legislation. The statute provided alternative interest rates that national banks were permitted to charge their customers pursuant to Federal law. Section 30 was later divided and renumbered, with the interest rate provisions becoming current sections 85 and 86. Under section 85, a national bank may:

> Take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes.[4]

Soon after the statute was enacted, the Supreme Court's decision in *Tiffany* v. *National Bank of Missouri* interpreted the statute as providing a ''most favored lender'' protection.[5] In *Tiffany,* the Supreme Court construed section 85 to allow a national bank to charge interest at a rate exceeding that permitted for State banks if State law permitted nonbank lenders to charge such a rate. By allowing national banks to charge interest at the highest rate permitted for any competing State lender by the laws of the State in which the national bank is located, section 85's language providing national banks ''most favored lender'' status protects national banks from State laws that could place them at a competitive disadvantage vis-à-vis State lenders.[6]

Subsequently, the Supreme Court interpreted section 85 to allow national banks to ''export'' the interest rates of their home States to borrowers residing in other States. In *Marquette National Bank* v. *First of Omaha Service Corporation,*[7] the Court held that because the State designated on the national bank's organizational certificate was traditionally understood to be the State where the bank was ''located'' for purposes of applying section 85, a national bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State. Since *Marquette* was decided, national banks have been allowed to charge interest rates authorized by the State where the national bank is located on loans to out-of-State borrowers, even though those rates may be prohibited by the State laws where the borrowers reside.[8]

B. Interest Rate Authority of State Banks

In the late 1970s, monetary policy was geared towards combating inflation and interest rates soared.[9] State-chartered lenders, however, were constrained in the interest they could charge by State usury laws, which often made loans economically unfeasible. National banks did not share this restriction because section 85 permitted them to charge interest at higher rates set by reference to the then-higher Federal discount rates.

To promote competitive equality in the nation's banking system and reaffirm the principle that institutions offering similar products should be subject to similar rules, Congress incorporated language from section 85 into the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) [10] and granted all federally-insured financial institutions—State banks, savings associations, and credit unions—similar interest rate authority to that provided to national banks.[11] The incorporation was not mere happenstance. Congress made a conscious choice to incorporate section 85's standard.[12] More specifically, section 521 of DIDMCA added a new section 27 to the FDI Act, which provides:

> (a) INTEREST RATES.—In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed by this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.[13]

As stated above, section 27(a) of the FDI Act was patterned after section 85.[14] Because section 27 was patterned after section 85 and uses similar language, courts and the FDIC have consistently

[3] 12 U.S.C. 1831a(j).

[4] 12 U.S.C. 85.

[5] 85 U.S. 409 (1873).

[6] *See Fisher* v. *First National Bank,* 548 F.2d 255, 259 (8th Cir. 1977); *Northway Lanes* v. *Hackley Union National Bank & Trust Co.,* 464 F.2d 855, 864 (6th Cir. 1972).

[7] 439 U.S. 299 (1978).

[8] *See Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996).

[9] *See United State* v. *Ven-Fuel, Inc.,* 758 F.2d 741, 764 n.20 (1st Cir. 1985) (discussing fluctuations in the prime rate from 1975 to 1983).

[10] Public Law 96–221, 94 Stat. 132, 164–168 (1980).

[11] *See* Statement of Senator Bumpers, 126 Cong. Rec. 6,907 (Mar. 27, 1980).

[12] *See Greenwood Trust Co.* v. *Massachusetts,* 971 F.2d 818, 827 (1st Cir. 1992); 126 Cong. Rec. 6,907 (1980) (statement of Senator Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Senator Pryor).

[13] 12 U.S.C. 1831d(a).

[14] Interest charges for savings associations are governed by section 4(g) of the Home Owners' Loan Act (12 U.S.C. 1463(g)), which is also patterned after section 85. *See* DIDMCA, Public Law 96–221.

construed section 27 *in pari materia* with section 85.[15] Section 27 has been construed to permit a State bank to export to out-of-State borrowers the interest rate permitted by the State in which the State bank is located, and to preempt the contrary laws of such borrowers' States.[16]

Pursuant to section 525 of DIDCMA,[17] States may opt out of the coverage of section 27. This opt-out authority is exercised by adopting a law, or certifying that the voters of the State have voted in favor of a provision which states explicitly that the State does not want section 27 to apply with respect to loans made in such State. Iowa and Puerto Rico have opted out of the coverage of section 27 in this manner.[18]

C. Interstate Branching Statutes

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal I) generally established a Federal framework for interstate branching for both State banks and national banks.[19] Among other things, Riegle-Neal I addressed the appropriate law to be applied to out-of-State branches of interstate banks. With respect to national banks, the statute amended 12 U.S.C. 36 to provide for the inapplicability of specific host State laws to branches of out-of-State national banks, under specified circumstances, including where Federal law preempted such State laws with respect to a national bank.[20] The statute also provided for preemption where the Comptroller of the Currency determines that State law discriminates between an interstate national bank and an interstate State bank.[21] Riegle-Neal I, however, did not include similar provisions to exempt interstate State banks from the application of host State laws. The statute instead provided that the laws of host States applied to branches of interstate State banks in the host State to the same extent such State laws applied to branches of banks chartered by the host State.[22] This left State banks at a competitive disadvantage when compared with national banks, which benefited from preemption of certain State laws.

Congress provided interstate State banks parity with interstate national banks three years later, through the Riegle-Neal Amendments Act of 1997 (Riegle-Neal II).[23] Riegle-Neal II amended the language of section 24(j)(1) to read as it does today:

(j) ACTIVITIES OF BRANCHES OF OUT-OF-STATE BANKS—

(1) APPLICATION OF HOST STATE LAW—The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of State national bank. To the extent host State law is inapplicable to a branch of an out-of- State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.[24]

Under section 24(j), the laws of a host State apply to branches of interstate State banks to the same extent such State laws apply to a branch of an interstate national bank. If laws of the host State are inapplicable to a branch of an interstate national bank, they are equally inapplicable to a branch of an interstate State bank.

D. Agencies' Interpretations of the Statutes

The FDIC has not issued regulations implementing sections 24(j) and 27 of the FDI Act, but these provisions have been interpreted in two published opinions of the FDIC's General Counsel. General Counsel's Opinion No. 10, published in April 1998, clarified that for purposes of section 27, the term ''interest'' includes those charges that a national bank is authorized to charge under section 85.[25] [26]

The question of where banks are ''located'' for purposes of sections 27 and 85 has been the subject of interpretation by both the OCC and FDIC. Following the enactment of Riegle-Neal I and Riegle-Neal II, the OCC has concluded that while ''the mere presence of a host state branch does not defeat the ability of a national bank to apply its home state rates to loans made to borrowers who reside in that host state, if a branch or branches in a particular host state approves the loan, extends the credit, and disburses the proceeds to a customer, Congress contemplated application of the usury laws of that state regardless of the state of residence of the borrower.''[27] Alternatively, where a loan cannot be said to be made in a host State, the OCC concluded that ''the law of the home state could always be chosen to apply to the loans.''[28]

FDIC General Counsel's Opinion No. 11, published in May 1998, was intended to address questions regarding the appropriate State law, for purposes of section 27, that should govern the interest charges on loans made to customers of a State bank that is chartered in one State (its home State) but has a branch or branches in another State (its host State).[29] Consistent with the OCC's interpretations regarding section 85, the FDIC's General Counsel concluded that the determination of which State's interest rate laws apply to a loan made by such a bank depends on the location where three non-ministerial functions involved in making the loan occur—loan approval, disbursal of the loan proceeds, and communication of the decision to lend. If all three non-ministerial functions involved in making the loan are performed by a branch or branches located in the host State, the host State's interest provisions would apply to the loan; otherwise, the law of the home State would apply. Where the three non-ministerial functions occur in different States or banking offices, host State rates may be applied if the loan has a clear nexus to the host State.

The effect of FDIC General Counsel's Opinions No. 10 and No. 11 was to promote parity between State banks and national banks with respect to interest charges. Importantly, in the context of interstate banking, the opinions confirm that section 27 of the FDI Act permits

[15] *See, e.g., Greenwood Trust Co.,* 971 F.2d at 827; FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate State Banks,* 63 FR 27282 (May 18, 1998).

[16] *Greenwood Trust Co.,* 971 F.2d at 827.

[17] 12 U.S.C. 1831d note.

[18] *See* 1980 Iowa Acts 1156 § 32; P.R. Laws Ann. tit. 10 § 998*1.* Some other States have previously opted out for a number of years, but either rescinded their respective opt-out statutes or allowed them to expire.

[19] Public Law 103–328, 108 Stat. 2338 (Sept. 29, 1994).

[20] 12 U.S.C. 36(f)(1)(A), reads, in relevant part:

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except—

(i) when Federal law preempts the application of such State laws to a national bank.

[21] 12 U.S.C. 36(f)(1)(A)(ii).

[22] Public Law 103–328, sec. 102(a).

[23] Public Law 105–24, 111 Stat. 238 (July 3, 1997).

[24] 12 U.S.C. 1831a(j)(1).

[25] FDIC General Counsel's Opinion No. 10, *Interest Charged Under Section 27 of the Federal Deposit Insurance Act,* 63 FR 19258 (Apr. 17, 1998).

[26] The primary OCC regulation implementing section 85 is 12 CFR 7.4001. Section 7.4001(a) defines ''interest'' for purposes of section 85 to include the numerical percentage rate assigned to a loan and also late payment fees, overlimit fees, and other similar charges. Section 7.4001(b) defines the parameters of the ''most favored lender'' and ''exportation'' doctrines for national banks. The OCC rule implementing section 4(g) of the Home Owners' Loan Act for both Federal and State savings associations, 12 CFR 160.110, adopts the same regulatory definition of ''interest'' provided by section 7.4001(a).

[27] Interpretive Letter No. 822 at 9 (citing statement of Senator Roth).

[28] Interpretive Letter No. 822 at 10.

[29] FDIC General Counsel's Opinion No. 11, *Interest Charges by Interstate State Banks,* 63 FR 27282 (May 18, 1998).

State banks to export interest charges allowed by the State where the bank is located to out-of-State borrowers, even if the bank maintains a branch in the State where the borrower resides.

E. Assignees' Right To Enforce Interest Rate Terms

Banks' power to make loans implicitly carries with it the power to assign loans,[30] and thus, a State bank's statutory authority under section 27 to make loans at particular rates necessarily includes the power to assign the loans at those rates. Denying an assignee the right to enforce a loan's terms would effectively prohibit assignment and render the power to make the loan at the rate provided by the statute illusory.

The inherent authority of State banks to assign loans that they make is consistent with State banking laws, which typically grant State banks the power to sell or transfer loans, and more generally, to engage in banking activities similar to those listed in the National Bank Act and activities that are ''incidental to banking.''[31] The National Bank Act specifically authorizes national banks to sell or transfer loan contracts by allowing them to ''negotiate[]'' (*i.e.,* transfer) ''promissory notes, drafts, bills of exchange, and other evidences of debt.''[32]

The ability of a nonbank assignee to enforce interest-rate terms is also consistent with fundamental principles of contract law. It is well settled that an assignee succeeds to all the assignor's rights in a contract, standing in the shoes of the assignor.[33] This includes the right to receive the consideration agreed upon in the contract, which for a loan, includes the interest agreed upon by the parties.[34] Under this ''stand-in-the-shoes'' rule, the non-usurious character of a loan would not change when the loan changes hands, because the assignee is merely enforcing the rights of the assignor and stands in the assignor's shoes.

Section 27 does not state at what point in time the permissibility of interest should be determined in order to assess whether a State bank is taking or receiving interest in compliance with section 27. Situations may arise when the usury laws of the State where the bank is located change after a loan is made (but before the loan has been paid in full), and a loan's rate may be non-usurious under the old law but usurious under the new law. Similar issues arise where a loan is made in reliance on the Federal commercial paper rate, and that rate changes before the loan is paid in full. To fill this statutory gap and carry out the purpose of section 27, the FDIC concludes that the permissibility of interest under section 27 must be determined when the loan is made, not when a particular interest payment is ''taken'' or ''received.'' This interpretation protects the parties' expectations and reliance interests at the time when a loan is made, and provides a logical and fair rule that is easy to apply. Under the proposed regulation, the permissibility of interest is determined when a loan is made, and is not affected by later events such as a change in State law or the sale, assignment, or other transfer of the loan. The FDIC's interpretation of section 27 is based on the need for a workable rule to determine the timing of compliance with that section. This interpretation is not based on the common law ''valid when made'' rule, although it is consistent with it. That rule provides that usury must exist at the inception of the loan for a loan to be deemed usurious; as a corollary, if the loan was not usurious at inception, the loan cannot become usurious at a later time, such as upon assignment, and the assignee may lawfully charge interest at the rate contained in the transferred loan.[35]

The ability of an assignee to rely on the enforceability and collectability in full of a loan that is validly made is also central to the stability and liquidity of the domestic loan markets. Restrictions on assignees' abilities to enforce interest rate terms would result in extremely distressed market values for many loans, frustrating the purpose of the FDI Act.

F. Need for Rulemaking and Rulemaking Authority

The FDIC has previously proposed to issue regulations implementing sections 24(j) and 27 of the FDI Act. In December 2004, a petition for rulemaking was filed with the FDIC seeking the issuance of regulations implementing sections 24(j) and 27 of the FDI Act, codifying the two longstanding opinions of the FDIC's General Counsel discussed above, and clarifying the interest rates that interstate State banks may charge. The petitioners were concerned, in particular, with restoring parity between State banks and national banks following the issuance of regulations by the OCC that preempted certain State laws with respect to national banks.[36]

The FDIC held a public hearing on the petition on May 24, 2005, and a number of interested parties presented their views at the hearing or in writing. Following this hearing, the FDIC issued a notice of proposed rulemaking for regulations that would implement

[30] *See Planters' Bank of Miss.* v. *Sharp,* 47 U.S. 301, 322–23 (1848).

[31] States' ''wild card'' or parity statutes typically grant State banks competitive equality with national banks under applicable Federal statutory or regulatory authority. Such authority is provided either: (1) Through state legislation or regulation; or (2) by authorization of the state banking supervisor. *See, e.g.,* N.Y Banking Law § 961(1) (granting New York-chartered banks the power to ''discount, purchase and negotiate promissory notes, drafts, bills of exchange, other evidences of debt, and obligations in writing to pay in installments or otherwise all or part of the price of personal property or that of the performance of services; purchase accounts receivable . . .; lend money on real or personal security; borrow money and secure such borrowings by pledging assets; buy and sell exchange, coin and bullion; and receive deposits of moneys, securities or other personal property upon such terms as the bank or trust company shall prescribe; and exercise all such incidental powers as shall be necessary to carry on the business of banking'').

[32] 12 U.S.C. 24(Seventh); *see also* 12 CFR 7.4008 (''A national bank may make, sell, purchase, participate in, or otherwise deal in loans . . . subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.''). The OCC has interpreted national banks' authority to sell loans under 12 U.S.C. 24 to reinforce the understanding that national banks' power to charge interest at the rate provided by section 85 includes the authority to convey the ability to continue to charge interest at that rate. As the OCC has explained, application of State usury law in such circumstances would be preempted under the standard set forth in *Barnett Bank of Marion County, N.A.* v. *Nelson,* 517 U.S. 25 (1996). *See* Brief for United States as amicus curiae, *Midland Funding, LLC* v. *Madden* (No. 15–610), at 11.

[33] *See Dean Witter Reynolds Inc.* v. *Variable Annuity Life Ins. Co.,* 373 F.3d 1100, 1110 (10th Cir. 2004); *see also Tivoli Ventures, Inc.* v. *Bumann,* 870 P.2d 1244, 1248 (Colo. 1994) (''As a general principle of contract law, an assignee stands in the shoes of the assignor.''); *Gould* v. *Jackson,* 42 NW2d 489, 490 (Wis. 1950) (assignee ''stands exactly in the shoes of [the] assignor,'' and ''succeeds to all of his rights and privileges'').

[34] *See Olvera* v. *Blitt & Gaines, P.C.,* 431 F.3d 285, 286–88 (7th Cir. 2005) (assignee of a debt is free to charge the same interest rate that the assignor charged the debtor, even if, unlike the assignor, the assignee does not have a license that expressly permits the charging of a higher rate). As the *Olvera* court noted, ''the common law puts the assignee in the assignor's shoes, whatever the shoe size.'' 431 F.3d at 289.

[35] See *Nichols* v. *Fearson,* 32 U.S. (7. Pet.) 103, 109 (1833) (''a contract, which in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction''); *see also Gaither* v. *Farmers & Merchants Bank of Georgetown,* 26 U.S. 37, 43 (1828) (''[T]he rule cannot be doubted, that if the note free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury.''); *FDIC* v. *Lattimore Land Corp.,* 656 F.2d 139 (5th Cir. 1981) (bank, as the assignee of the original lender, could enforce a note that was not usurious when made by the original lender even if the bank itself was not permitted to make loans at those interest rates); *FDIC* v. *Tito Castro Constr. Co.,* 548 F. Supp. 1224, 1226 (D. P.R. 1982) (''One of the cardinal rules in the doctrine of usury is that a contract which in its inception is unaffected by usury cannot be invalidated as usurious by subsequent events.'').

[36] *See* 70 FR 13413 (Mar. 21, 2005) (notice of hearing and petition).

sections 24(j) and 27, and solicited public comment on this proposal. The FDIC never finalized the proposed rule; however, subsequent changes to the statutory and regulatory framework governing the preemption of State laws may have addressed the petitioners' concerns.[37]

In proposing regulations that would implement sections 24(j) and 27, the FDIC is now seeking to address a different concern. As discussed above, a recent court decision has created uncertainty as to the ability of assignees to enforce interest-rate provisions of loans originated by banks. This court held that, under the facts presented in that case, nonbank debt collectors who purchase debt[38] from national banks are subject to usury laws of the debtor's State[39] and do not benefit from the interest-rate provisions of section 85 because State usury laws do not ''significantly interfere with a national bank's ability to exercise its power under the [National Bank Act].''[40] The court's decision created uncertainty and a lack of uniformity in secondary credit markets. While *Madden* interpreted section 85, rather than the FDI Act, section 27 is patterned after section 85 and receives the same interpretation as section 85. Thus, *Madden* also creates uncertainty with respect to State banks' authorities. Through the proposed regulations implementing section 27, the FDIC would reaffirm the enforceability of a loan's interest rate by an assignee of a State bank and reaffirm its position that the preemptive power of section 27 extends to such transactions.

The FDIC also seeks to maintain parity between national banks and State banks with respect to interest rate authority. The OCC has taken the position that national banks' authority to charge interest at the rate established by section 85 includes the authority to assign the loan to another party at the contractual interest rate.[41] To the extent assignees of national banks' loans may enforce the contractual interest-rate terms of such loans, the FDIC seeks to reaffirm similar authority for State banks' assignees.

Finally, the regulations also implement section 24(j) (12 U.S.C. 1831a(j)) to provide that the laws of a State in which a State bank is not chartered in but in which it maintains a branch (host State), shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank.

The FDIC has the authority to issue rules generally to carry out the provisions of the FDI Act.[42] In addition, section 10(g) of the FDI Act, 12 U.S.C. 1820(g), provides the FDIC authority to prescribe regulations carrying out the FDI Act, and to define terms as necessary to carry out the FDI Act, except to the extent such authority is conferred on another Federal banking agency. No other agency has been granted the authority to issue rules to restate, implement, clarify, or otherwise carry out, either section 24(j) or section 27 of the FDI Act.

III. Description of the Proposed Rule

A. Application of Host State Law

Section 331.3 of the proposed rule implements section 24(j)(1) of the FDI Act, which establishes parity between State banks and national banks regarding the application of State law to interstate branches. If a State bank maintains a branch in a State other than its *home State,* the bank is an *out-of-State State bank* with respect to that State, which is designated the *host State.* A State bank's *home State* is defined as the State that chartered the Bank, and a *host State* is another State in which that bank maintains a branch. These definitions correspond with statutory definitions of these terms used by section 24(j).[43] Consistent with section 24(j)(1), the proposed rule provides that the laws of a host State apply to a branch of an out-of-State State bank only to the extent such laws apply to a branch of an out-of-State national bank in the host State. Thus, to the extent that host State law is preempted for out-of-State national banks, it is also preempted with respect to out-of-State State banks.

B. Interest Rate Authority

Section 331.4 of the proposed rule implements section 27 of the FDI Act, which provides parity between State banks and national banks regarding the applicability of State law interest-rate restrictions. Paragraph (a) corresponds with section 27(a) of the statute, and provides that a State bank or insured branch of a foreign bank may charge interest of up to the greater of: 1 percent more than the rate on ninety-day commercial paper; or the rate allowed by the law of the State where the bank is located. Where a State constitutional provision or statute prohibits a State bank or insured branch of a foreign bank from charging interest at the greater of these two rates, the State constitutional provision or statute is expressly preempted by section 27.

In some instances, State law may provide different interest-rate restrictions for specific classes of institutions and loans. Paragraph (b) clarifies the applicability of such restrictions to State banks and insured branches of foreign banks. State banks and insured branches of foreign banks located in a State are permitted to charge interest at the maximum rate permitted to any State-chartered or licensed lending institution by the law of that State. Further, a State bank or insured branch of a foreign bank is subject only to the provisions of State law relating to the class of loans that are material to the determination of the permitted interest rate. For example, assume that a State's laws allow small State-chartered loan companies to charge interest at specific rates, and impose size limitations on such loans. State banks or insured branches of foreign banks located in that State could charge interest at the rate permitted for small State-chartered loan companies without being so licensed. However, in making loans for which that interest rate is permitted, State banks and insured branches of foreign banks would be subject to loan size limitations applicable to small State-chartered loan companies under that State's law. This provision of the proposed rule is intended to maintain parity between State banks and national banks, and corresponds with the authority provided

[37] The Dodd-Frank Act amended the National Bank Act by codifying a preemption standard in 12 U.S.C. 25b. In July 2011, the OCC implemented a final rule revising its preemption regulations to incorporate this standard. *See* 12 CFR 7.4007, 7.4008, 34.4. Under this standard, a ''state consumer financial law'' is generally preempted if it would have a ''discriminatory effect'' on national banks or in accordance with the legal standard in the Supreme Court's decision in *Barnett Bank.* However, section 25b preserved interest rate preemption.

[38] In *Madden,* the relevant debt was a consumer debt (credit card) account.

[39] A violation of New York's usury laws also subjected the debt collector to potential liability imposed under the Fair Debt Collection Practices Act, 15 U.S.C. 1692e, 1692f.

[40] *Madden,* 786 F.3d at 251 (*citing Barnett Bank of Marion City, N.A.* v. *Nelson,* 517 U.S. 25, 33 (1996); *Pac. Capital Bank, N.A.* v. *Connecticut,* 542 F.3d 341, 353 (2d. Cir. 2008)).

[41] *See* Brief for United States as amicus curiae, *Midland Funding, LLC* v. *Madden* (No. 15–610), at 6.

[42] ''[T]he Corporation . . . shall have power . . . . To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).'' 12 U.S.C. 1819(a)(Tenth).

[43] Section 24(j)(4) references definitions in section 44(f) of the FDI Act; however, the Gramm-Leach-Bliley Act redesignated section 44(f) as section 44(g) without updating this reference. The relevant definitions are currently found in section 44(g), 12 U.S.C. 1831u(g).

to national banks under the OCC's regulations at 12 CFR 7.4001(b).

Paragraph (c) of section 331.4 clarifies the effect of the proposed rule's definition of the term *interest* for purposes of State law. Importantly, the proposed rule's definition of *interest* would not change how interest is defined by the State or how the State's definition of interest is used solely for purposes of State law. For example, if late fees are not interest under State law where a State bank is located but State law permits its most favored lender to charge late fees, then a State bank located in that State may charge late fees to its intrastate customers. The State bank also may charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under State law where the State bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with State usury limitations because State law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations. This provision of the proposed rule corresponds to a similar provision in the OCC's regulations, 12 CFR 7.4001(c).

Paragraph (d) of proposed section 331.4 clarifies the authority of State banks and insured branches of foreign banks to charge interest to corporate borrowers. If the law of the State in which the State bank or insured branch of a foreign bank is located denies the defense of usury to corporate borrowers, then the State bank or insured branch would be permitted to charge any rate of interest agreed upon by a corporate borrower. This provision is also intended to maintain parity between State banks and national banks, and corresponds to authority provided to national banks under the OCC's regulations, at 12 CFR 7.4001(d).

Paragraph (e) clarifies that the determination of whether interest on a loan is permissible under section 27 of the FDI Act is made at the time the loan is made. This paragraph further clarifies that the permissibility under section 27 of interest on a loan shall not be affected by subsequent events, such as a change in State law, a change in the relevant commercial paper rate, or the sale, assignment, or other transfer of the loan. An assignee can enforce the loan's interest-rate terms to the same extent as the assignor. Paragraph (e) is not intended to affect the application of State law in determining whether a State bank or insured branch of a foreign bank is a real party in interest with respect to a loan or has an economic interest in a loan. The FDIC views unfavorably a State bank's partnership with a non-bank entity for the sole purpose of evading a lower interest rate established under the law of the entity's licensing State(s).

IV. Expected Effects

The proposed rule is intended to address uncertainty regarding the applicability of State law interest rate restrictions to State banks and other market participants. The proposed rule would reaffirm the ability of State banks to sell and securitize loans they originate. Therefore, as described in more detail below, the proposed rule should mitigate the potential for future disruption to the markets for loan sales and securitizations and a resulting contraction in availability of consumer credit.

The FDIC is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision. Thus, to the extent the proposed rule contributes to a return to the pre-*Madden* status quo regarding market participants' understanding of the applicability of State usury laws, immediate widespread effects on credit availability would not be expected. Beneficial effects on availability of consumer credit and securitization markets would fall into two categories. First, the rule would mitigate the possibility that State banks' ability to sell loans might be impaired in the future. Second, the rule could have immediate effects on certain types of loans and business models in the Second Circuit that may have been directly affected by the *Madden* decision.

With regard to these two types of benefits, the *Madden* decision created significant uncertainty in the minds of market participants about banks' future ability to sell loans. For example, one commentator stated, "[T]he impact on depository institutions will be significant even if the application of the *Madden* decision is limited to third parties that purchase charged off debts. Depository institutions will likely see a reduction in their ability to sell loans originated in the Second Circuit due to significant pricing adjustments in the secondary market." [44] Such uncertainty has the potential to chill State banks' willingness to make the types of loans affected by the proposed rule. By reducing such uncertainty, the proposed rule should mitigate the potential for future reductions in the availability of credit.

More specifically, some researchers have focused attention on the impact of the decision on so-called marketplace lenders. Since marketplace lending frequently involves a partnership in which a bank originates and immediately sells loans to a nonbank partner, any question about the nonbank's ability to enforce the contractual interest rate could adversely affect the viability of that business model. Thus, for example, regarding the Supreme Court's decision not to hear the appeal of the *Madden* decision, Moody's wrote: "The denial of the appeal is generally credit negative for marketplace loans and related asset-backed securities (ABS), because it will extend the uncertainty over whether state usury laws apply to consumer loans facilitated by lending platforms that use a partner bank origination model." [45] In a related vein, some researchers have stated that marketplace lenders in the affected States did not grow their loans as fast in these states as they did in other States, and that there were pronounced reductions of credit to higher risk borrowers.[46]

Particularly in jurisdictions affected by *Madden,* to the extent the proposed rule results in the preemption of State usury laws, some consumers may benefit from the improved availability of credit from State banks. For these consumers, this additional credit may be offered at a higher interest rate than otherwise provided by relevant State law. However, in the absence of the proposed rule, these consumers might be unable to obtain credit from State banks and might instead borrow at higher interest rates from less-regulated lenders.

The FDIC also believes that an important benefit of the proposed rule is to uphold longstanding principles regarding the ability of banks to sell loans, an ability that has important safety-and-soundness benefits. By reaffirming the ability of State banks to assign loans at the contractual interest rate, the proposed rule should make State banks' loans more marketable, enhancing State banks' ability to

[44] "*Madden* v. *Midland Funding:* A Sea Change in Secondary Lending Markets," Robert Savoie, McGlinchey Stafford PLLC, p. 3.

[45] Moody's Investors Service, "Uncertainty Lingers as Supreme Court Declines to Hear *Madden* Case" (Jun. 29, 2016).

[46] See Colleen Honigsberg, Robert Jackson and Richard Squire, "How Does Legal Enforceability Affect Consumer lending? Evidence from a Natural Experiment," *Journal of Law and Economics,* vol. 60 (November 2017); and Piotr Danisewicz and Ilaf Elard, "The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy" (July 5, 2018). Available at *http://ssrn.com/abstract=3209808* or *http://dx.doi.org/10.2139/ssrn.3208908*.

maintain adequate capital and liquidity levels. Avoiding disruption in the market for loans is a safety and soundness issue, as affected State banks would maintain the ability to sell loans they originate in order to properly maintain liquidity. Additionally, securitizing or selling loans gives State banks flexibility to comply with risk-based capital requirements.

Similarly, the proposed rule is expected to preserve State banks' ability to manage their liquidity. This is important for a number of reasons. For example, the ability to sell loans allows State banks to increase their liquidity in a crisis, to meet unusual deposit withdrawal demands, or to pay unexpected debts. The practice is useful for many State banks, including those that prefer to hold loans to maturity. Any State bank could be faced with an unexpected need to pay large debts or deposit withdrawals, and the ability to sell or securitize loans is a useful tool in such circumstances.

Finally, the proposed rule would support State banks' ability to use loan sales and securitization to diversify their funding sources and address interest-rate risk. The market for loan sales and securitization is a lower-cost source of funding for State banks, and the proposed rule would support State banks' access to this market.

V. Request for Comment

The FDIC is inviting comment on all aspects of the proposed rule.

VI. Regulatory Analysis

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[47] However, an initial regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[48] The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million.[49]

Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. The FDIC has considered the potential impact of the proposed rule on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the FDIC believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, the FDIC is presenting and inviting comment on this initial regulatory flexibility analysis.

Reasons Why This Action Is Being Considered

The Second Circuit's decision in *Madden* v. *Midland Funding* has created uncertainty as to the ability of an assignee to enforce the interest rate provisions of a loan originated by a bank. *Madden* held that, under the facts presented in that case, nonbank debt collectors who purchase debt[50] from national banks are subject to usury laws of the debtor's State[51] and do not inherit the preemption protection vested in the assignor national bank because such State usury laws do not ''significantly interfere with a national bank's ability to exercise its power under the [National Bank Act].''[52] The court's decision created uncertainty and a lack of uniformity in secondary credit markets. For additional discussion of the reasons why this rulemaking is being proposed please refer to **SUPPLEMENTARY INFORMATION** Section II.F in this **Federal Register** Notice entitled ''Need for Rulemaking and Rulemaking Authority.''

Objectives and Legal Basis

The policy objective of the proposed rule is to eliminate uncertainty regarding the enforceability of loans originated and sold by State banks. The FDIC is proposing regulations that would implement sections 24(j) and 27 of the FDI Act. For additional discussion of the objectives and legal basis of the proposed rule please refer to the **SUPPLEMENTARY INFORMATION** sections I and II entitled ''Policy Objectives'' and ''Background: Current Regulatory Approach and Market Environment,'' respectively.

Number of Small Entities Affected

As of June 30, 2019, there were 4,206 State-chartered FDIC-insured depository institutions, of which 3,171 have been identified as ''small entities'' in accordance with the RFA.[53] All 3,171 small State-chartered FDIC-insured depository institutions are covered by the proposed rule and therefore, could be affected. However, only 48 small State-chartered FDIC-insured depository institutions are chartered in States within the Second Circuit (New York, Connecticut and Vermont) and therefore, may have been directly affected by ambiguities about the practical implications of the *Madden* decision. Moreover, only institutions actively engaged in, or considering making loans for which the contractual interest rates could exceed State usury limits, would be affected by the proposed rule. Small State-chartered FDIC-insured depository institutions that are chartered in States outside the Second Circuit, but that have made loans to borrowers who reside in New York, Connecticut and Vermont also may be directly affected, but only to the extent they are engaged in or considering making loans for which contractual interest rates could exceed State usury limits. It is difficult to estimate the number of small entities that have been directly affected by ambiguity resulting from *Madden* and would be affected by the proposed rule without complete and up-to-date information on the contractual terms of loans and leases held by small State-chartered FDIC-insured depository institutions, as well as present and future plans to sell or transfer assets. The FDIC does not have this information.

Expected Effects

The proposed rule clarifies that the determination of whether interest on a loan is permissible under section 27 of the FDI Act is made when the loan is made, and that the permissibility of interest under section 27 is not affected by subsequent events such as changes in State law or assignment of the loan. As described below, this would be expected to increase some small State

[47] 5 U.S.C. 601 *et seq.*

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

[49] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended, effective August 19, 2019). In its determination, the SBA ''counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[50] In *Madden,* the relevant debt was a consumer debt (credit card) account.

[51] A violation of New York's usury laws also subjected the debt collector to potential liability imposed under the Fair Debt Collection Practices Act, 15 U.S.C. 1692e, 1692f.

[52] *Madden,* 786 F.3d at 251 (*referencing Barnett Bank of Marion City, N.A.* v. *Nelson,* 517 U.S. 25, 33 (1996); *Pac. Capital Bank,* 542 F.3d at 533).

[53] FDIC Call Report Data, June 30th, 2019.

banks' willingness to make loans with contractual interest rates that could exceed limits prescribed by State usury laws, either at inception or contingent on loan performance.

The FDIC is not aware of any broad effects on credit availability having occurred as a result of *Madden*. Thus, to the extent the proposed rule contributes to a return to the pre-*Madden* status quo, broad effects on credit availability are not expected. It is plausible, however, that *Madden* could have discouraged the origination and sale of loan products whose contractual interest rates could potentially exceed State usury limits by small State-chartered institutions in the Second Circuit. The proposed rule could increase the availability of such loans from State banks, but the FDIC believes the number of institutions materially engaged in making loans of this type to be small.

The small State-chartered institutions that are affected would benefit from the ability to sell such loans while assigning to the buyer the right to enforce the contractual loan interest rate. Without the ability to assign the right to enforce the contractual interest rate, the sale value of such loans would be substantially diminished. The proposed rule is unlikely to pose any new reporting, recordkeeping, or other compliance requirements for small, FDIC-supervised institutions.

Duplicative, Overlapping, or Conflicting Federal Regulations

The FDIC has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed revisions.

Discussion of Significant Alternatives

The FDIC believes the proposed amendments will not have a significant economic impact on a substantial number of small FDIC-supervised banking entities and therefore believes that there are no significant alternatives to the proposal that would reduce the economic impact on small FDIC-supervised banking entities.

The FDIC invites comments on all aspects of the supporting information provided in this section, and in particular, whether the proposed rule would have any significant effects on small entities that the FDIC has not identified.

B. Riegle Community Development and Regulatory Improvement Act

Section 302 of the Riegle Community Development and Regulatory Improvement Act (RCDRIA) requires that the Federal banking agencies, including the FDIC, in determining the effective date and administrative compliance requirements of new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[54] Subject to certain exceptions, new regulations and amendments to regulations prescribed by a Federal banking agency which impose additional reporting, disclosures, or other new requirements on insured depository institutions shall take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form.[55]

The proposed rule would not impose additional reporting or disclosure requirements on insured depository institutions, including small depository institutions, or on the customers of depository institutions. Accordingly, section 302 of RCDRIA does not apply. Nevertheless, the requirements of RCDRIA will be considered as part of the overall rulemaking process, and the FDIC invites comments that will further inform its consideration of RCDRIA.

C. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3521, the FDIC 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 proposed rule would not require any information collections for purposes of the PRA, and therefore, no submission to OMB is required.

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999.[56]

[54] 12 U.S.C. 4802(a).

[55] 12 U.S.C. 4802(b).

[56] Public Law 105–277, 112 Stat. 2681.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[57] requires the Federal banking agencies to use plain language in all proposed and final rulemakings published in the **Federal Register** after January 1, 2000. The FDIC invites your comments on how to make this proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could the material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be stated more clearly?
- Does the proposed regulation contain language or jargon that is unclear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand?

List of Subjects in 12 CFR Part 331

Banks, Banking, Deposits, Foreign banking, Interest rates.

Authority and Issuance

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend title 12 of the Code of Federal Regulations by adding part 331 to read as follows:

PART 331—FEDERAL INTEREST RATE AUTHORITY

Sec.
331.1 Authority, purpose, and scope.
331.2 Definitions.
331.3 Application of host state law.
331.4 Interest rate authority.

Authority: 12 U.S.C. 1819(a)(Tenth), 1820(g), 1831d.

§ 331.1 Authority, purpose, and scope.

(a) *Authority.* The regulations in this part are issued by the FDIC under sections 9(a)(Tenth) and 10(g) of the Federal Deposit Insurance Act (''FDI Act''), 12 U.S.C. 1819(a)(Tenth), 1820(g), to implement sections 24(j) and 27 of the FDI Act, 12 U.S.C. 1831a(j), 1831d, and related provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 132 (1980).

(b) *Purpose.* Section 24(j) of the FDI Act, as amended by the Riegle-Neal Amendments Act of 1997, Public Law 105–24, 111 Stat. 238 (1997), was enacted to maintain parity between State banks and national banks regarding the application of a host

[57] Public Law 106–102, 113 Stat. 1338, 1471.

State's laws to branches of out-of-State banks. Section 27 of the FDI Act was enacted to provide State banks with interest rate authority similar to that provided to national banks under the National Bank Act, 12 U.S.C. 85. The regulations in this part clarify that State-chartered banks and insured branches of foreign banks have regulatory authority in these areas parallel to the authority of national banks under regulations issued by the Office of the Comptroller of the Currency, and address other issues the FDIC considers appropriate to implement these statutes.

(c) *Scope.* The regulations in this part apply to State-chartered banks and insured branches of foreign banks.

§ 331.2 Definitions.

For purposes of this part—

Home state means, with respect to a State bank, the State by which the bank is chartered.

Host state means a State, other than the home State of a State bank, in which the State bank maintains a branch.

Insured branch has the same meaning as that term in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

Interest means any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. Interest includes, among other things, the following fees connected with credit extension or availability: Numerical periodic rates; late fees; creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds; overlimit fees; annual fees; cash advance fees; and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

Out-of-state state bank means, with respect to any State, a State bank whose home State is another State.

Rate on ninety-day commercial paper means the rate quoted by the Federal Reserve Board of Governors for ninety-day A2/P2 nonfinancial commercial paper.

State bank has the same meaning as that term in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

§ 331.3 Application of host state law.

The laws of a host State shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch.

§ 331.4 Interest rate authority.

(a) *Interest rates.* In order to prevent discrimination against State-chartered depository institutions, including insured savings banks, or insured branches of foreign banks, if the applicable rate prescribed in this section exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this paragraph, such State bank or insured branch of a foreign bank may, notwithstanding any State constitution or statute which is preempted by section 27 of the Federal Deposit Insurance Act, 12 U.S.C. 1831d, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 percent in excess of the rate on ninety-day commercial paper or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) *Classes of institutions and loans.* A State bank or insured branch of a foreign bank located in a State may charge interest at the maximum rate permitted to any State-chartered or licensed lending institution by the law of that State. If State law permits different interest charges on specified classes of loans, a State bank or insured branch of a foreign bank making such loans is subject only to the provisions of State law relating to that class of loans that are material to the determination of the permitted interest. For example, a State bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company, without being so licensed, but subject to State law limitations on the size of loans made by small loan companies.

(c) *Effect on state law definitions of interest.* The definition of the term *interest* in this part does not change how interest is defined by the individual States or how the State definition of interest is used solely for purposes of State law. For example, if late fees are not *interest* under the State law of the State where a State bank is located but State law permits its most favored lender to charge late fees, then a State bank located in that State may charge late fees to its intrastate customers. The State bank also may charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under the State law of the State where the bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with State usury limitations because State law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) *Corporate borrowers.* A State bank or insured branch of a foreign bank located in a State whose State law denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by the corporate borrower.

(e) *Determination of interest permissible under section 27.* Whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined as of the date the loan was made. The permissibility under section 27 of the Federal Deposit Insurance Act of interest on a loan shall not be affected by any subsequent events, including a change in State law, a change in the relevant commercial paper rate after the loan was made, or the sale, assignment, or other transfer of the loan.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on November 19, 2019.

Annmarie H. Boyd,

Assistant Executive Secretary.

[FR Doc. 2019–25689 Filed 12–5–19; 8:45 am]

BILLING CODE 6714–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2019–0662; FRL–10002–66–Region 7]

Air Plan Approval; Missouri; Restriction of Emissions From Batch-Type Charcoal Kilns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Missouri State Implementation Plan (SIP) received on March 7, 2019. The submission revises a Missouri regulation that establishes emission limits for batch-type charcoal kilns based on operational parameters to reduce emissions of particulate matter (PM_{10}), volatile organic compounds (VOCs) and carbon monoxide (CO).

Specifically, the revisions to the rule add definitions specific to the rule, update references to test methods, remove the unnecessary use of restrictive words, remove an obsolete requirement which applied only during the phase-in period of the rule that ended December 31, 2005, clarify a provision for an alternative operating temperature, and make other minor edits. These revisions are administrative in nature and do not impact the stringency of the SIP or air quality. Approval of these revisions will ensure consistency between state and federally-approved rules.

DATES: Comments must be received on or before January 6, 2020.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2019–0662 to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tracey Casburn, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number (913) 551–7016; email address *casburn.tracey@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to the EPA.

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I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2019–0662, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. What is being addressed in this document?

The state revised title 10, division 10 of the code of state regulations, 10 CSR 10–6.330 ''Restriction of Emissions from Batch-Type Charcoal Kilns'', which establishes emission limits for batch-type charcoal kilns based on operational parameters to reduce emissions of PM_{10}, VOCs and CO. 10 CSR 10–6.330 is SIP approved in the Code of Federal Regulations at 40 CFR 52.1320(c). The State submitted its revisions to 10 CSR 10–6.330 to the EPA as a SIP revision on March 7, 2019. In this action, the EPA is proposing to approve revisions to the Missouri SIP received on March 7, 2019.

The revisions are administrative in nature and do not impact air quality. The EPA's analysis of the revisions can be found in the technical support document (TSD) included in this docket.

III. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The state provided public notice of the revisions from August 1, 2018, to October 4, 2018, and held a public hearing on September 27, 2018. The state received and addressed four comments. As explained in more detail in the TSD which is part of this docket, the SIP revision submission meets the substantive requirements of the CAA, including section 110 and implementing regulations.

IV. What action is EPA taking?

The EPA is proposing to amend the Missouri SIP by approving the State's request to revise 10 CSR 10–6.330,''Restriction of Emissions From Batch-Type Charcoal Kilns.'' Approval of these revisions will ensure consistency between state and federally-approved rules. The EPA has determined that these changes will not adversely impact air quality.

The EPA is processing this as a proposed action because we are soliciting comments on the action. Final rulemaking will occur after consideration of any comments.

V. Incorporation by Reference

In this document, the EPA is proposing to include regulatory text in an EPA final rule that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the Missouri State Implementation Plan and Supplemental modeling analyses described in the proposed amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the Clean Air Act (CAA), 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, if 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 the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; 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).

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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Particulate matter, Volatile organic compounds.

Dated: December 2, 2019.

James Gulliford,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 52 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 AA—Missouri

■ 2. In § 52.1320, the table in paragraph (c) is amended by revising the entry ''10–6.330'' to read as follows:

§ 52.1320 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
* * * * * * *				
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
* * * * * * *				
10–6.330	Restriction of Emissions From Batch-type Charcoal Kilns.	3/30/2019	[Date of publication of the final rule in the **Federal Register**], [**Federal Register** citation of the final rule].	
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[FR Doc. 2019–26280 Filed 12–5–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[EPA–HQ–OPPT–2019–0530; FRL–10001–48]

RIN 2070–AB27

Significant New Use Rules on Certain Chemical Substances (19–5.F)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for certain chemical substances that were the subject of premanufacture notices (PMNs). They are either the subject of Orders issued by EPA under TSCA or have received a ''not likely to present an unreasonable risk'' determination pursuant to TSCA. This action would require persons who intend to manufacture (defined by statute to include import) or process any of these chemical substances for an activity that is proposed as a significant new use to notify EPA at least 90 days before commencing that activity. The required notification initiates EPA's evaluation of the use, under the conditions of use for that chemical substance, within the applicable review period. Persons may not commence manufacture or processing for the significant new use until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken such actions as are required by that determination.

DATES: Comments must be received on or before January 6, 2020.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0530, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Kenneth Moss, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–9232; email address: *moss.kenneth@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, process, or use the chemical substances contained in this proposed rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers or processors of one or more subject chemical substances (NAICS codes 325 and 324110), *e.g.,* chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127 and 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to final SNURs must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after January 6, 2020 are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Background

A. What action is the Agency taking?

EPA is proposing these SNURs under TSCA section 5(a)(2) for chemical substances that were the subject of PMNs. These proposed SNURs would require persons to notify EPA at least 90 days before commencing the manufacture or processing of a chemical substance for any activity proposed as a significant new use. Receipt of such notices would allow EPA to assess risks and, if appropriate, to regulate the significant new use before it may occur. Additional background regarding SNURs is more fully set out in the preamble to EPA's first direct final SNUR published in the **Federal Register** issue of April 24, 1990 (55 FR 17376). Consult that preamble for further general information on the objectives, rationale, and procedures for SNURs and on the basis for significant new use designations, including provisions for developing test data.

B. What is the Agency's authority for taking this action?

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the four bulleted TSCA section 5(a)(2) factors listed in Unit III.

C. Applicability of General Provisions

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the proposed rule, recordkeeping requirements, and exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. Pursuant to 40 CFR 721.1(c), persons subject to SNURs must comply with the same SNUN requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A) (15 U.S.C. 2604(a)(1)(A)). In particular, these requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1) (15 U.S.C. 2604(b) and 2604(d)(1)), the exemptions authorized by TSCA sections 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA must either determine that the use is not likely to present an unreasonable risk of injury under the conditions of use for the chemical substance or take such regulatory action as is associated with an alternative determination before the manufacture or processing for the significant new use can commence. In the case of a determination other than not likely to present unreasonable risk, the applicable review period must also expire before manufacturing or processing for the new use may commence. If EPA determines that the use is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

III. Significant New Use Determination

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In determining significant new uses for the chemical substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances and potential human exposures and environmental releases that may be associated with the substances, in addition to the factors in TSCA section 5(a)(2). Consistent with TSCA section 5(f)(4), for those chemical substances subject to an Order issued under TSCA section 5(e), EPA is proposing to identify any use not conforming to the restrictions of the order as a significant new use. For those chemical substances that EPA has determined ''not likely'' to present an unreasonable risk under the conditions of use, EPA is proposing to identify other circumstances that, while not reasonably foreseen, would warrant further EPA review before manufacture or processing for such a use is commenced.

IV. Substances Subject to This Proposed Rule

EPA is proposing significant new use and recordkeeping requirements for certain chemical substances with additions to 40 CFR part 721, subpart E. In this unit, EPA provides the following information for each chemical substance:

- PMN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Basis for the SNUR or basis for the TSCA 5(e) Order.
- Potentially Useful Information. This is information identified by EPA that would help characterize the potential health and/or environmental effects of the chemical substance in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use designated by the SNUR.
- CFR citation assigned in the regulatory text section of the proposed rule. The regulatory text section of each proposed rule specifies the activities that would be designated as significant new uses. Certain new uses, including exceedance of production volume limits (*i.e.,* limits on manufacture volume) and other uses designated in this proposed rule, may be claimed as CBI.

These proposed rules include 19 PMN substances that are subject to Orders issued under TSCA section 5(e)(1)(A), as required by the determinations made under section 5(a)(3)(B). Those Orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk. The proposed SNURs would identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the restrictions imposed by the underlying Orders, consistent with TSCA section 5(f)(4).

These proposed rules also include 8 PMN substances that received ''not likely to present an unreasonable risk'' determination in TSCA section 5(a)(3)(c). However, during the course of these reviews, EPA identified concerns for certain health and/or environmental risks if the chemicals were not used following the limitations identified by the submitters in the notices. EPA did not deem such uses as reasonably foreseen the TSCA section 5(a)(3)(C) determinations. The proposed SNURs would identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to those same limitations.

The chemicals subject to these proposed SNURs are as follows:

PMN Number: P–16–541

Chemical Name: Soybean meal, reaction products with phosphoric trichloride.

CAS Number: 1962913–92–3.

Basis for action: The PMN states that the use of the PMN substance will be as a resin for adhesives used to bond wood-based particle/chip/fiberboard products. Based on estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and analysis of analogous inorganic phosphates, EPA has identified concerns for aquatic toxicity at surface water concentrations exceeding 22 parts per billion (ppb) if the chemical substance is not used following the limitation noted. The condition of use of the PMN substance as described in the PMN includes the following protective measure:

- No release of the PMN substance to surface waters that exceed 22 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity testing would help characterize the potential environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11420.

PMN Number: P–17–299

Chemical Name: 2-Propenoic acid, alkyl, polymers with alkyl acrylate and polyethylene glycol methacrylate alkyl ether (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a paint additive. Based on estimated physical/chemical properties of the PMN substance and the comparison to structurally analogous chemical substances, EPA has identified concerns for developmental effects, blood clotting, and irritation if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

1. No domestic manufacture of the PMN substance;
2. No use of the PMN substance other than as a thickener in paint;
3. No use of the PMN substance in concentrations greater than 1% in formulated product; and,
4. No manufacturing, processing, or use of the PMN substance that generates a dust, mist, or aerosol.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of acute inhalation toxicity and developmental toxicity testing would help characterize the potential health effects of the PMN substance.

CFR Citation: 40 CFR 721.11421.

PMN Number: P–17–393

Chemical name: Alkanediamine, dialkyl-, polymer with .alpha.-hydro-.omega.-[(1-oxo-2-propen-1-yl)oxy]poly(oxy-1,2-ethanediyl) ether with substituted alkyl-substitutedalkanediol, reaction products with alkyl-alkanamine (generic).

CAS number: Not available.

Effective date of TSCA section 5(e) Order: August 22, 2019.

Basis for TSCA section 5(e) Order: The PMN states that the generic (non-confidential) use of the substance will be as a UV curable coating resin. Based on the physical/chemical properties of the PMN substance and comparison to structurally analogous chemical substances, EPA has identified concerns for lung effects, skin and eye irritation, and respiratory and dermal sensitization. Based on Structural Activity Relationships (SAR) analysis on analogous substances, EPA predicts toxicity to aquatic organisms may occur at concentrations that exceed 1 ppb. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substance may present an unreasonable risk of injury to human health and the environment. To protect against these risks, the Order requires:

1. No manufacture the PMN substance with an average molecular weight less than 1,000 Daltons and with no more than 10% below 500 Daltons;

2. Use of the PMN substance only for the confidential use specified in the Order;

3. Use of National Institute for Occupational Safety and Health (NIOSH)-certified respirator with an Applied Protection Factor (APF) of at least 1,000 where there is potential for inhalation exposure or compliance with a NCEL of 0.039 mg/m^3 as an 8-hour time-weighted average (TWA) to prevent inhalation exposure;

4. Establishment of a hazard communication program, including human health precautionary statements on each label and in the SDS; and

5. No release of the PMN substance into surface waters of the United States in concentrations that exceed 1 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of these protective measures.

Potentially Useful Information: EPA has determined that certain information may be potentially useful to characterize the health and environmental effects of the PMN substance in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this SNUR. EPA has determined that the results of aquatic toxicity, pulmonary toxicity, and sensitization testing would help EPA determine the potential human and environmental effects of the PMN substance. Although the Order does not require this information, the Order's restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

CFR citation: 40 CFR 721.11422.

PMN Number: P–18–172

Chemical Name: Calcium, carbonate 2-ethylhexanoate neodecanoate propionate complexes.

CAS Number: Not available.

Basis for action: The PMN states that the use of the PMN substance will be as an auxiliary drier for architectural pains, industrial coatings and stains. Based on estimated physical/chemical properties of the PMN substance, analysis of available data on an analogue of a component of the new chemical substance, and analysis of analogous chemicals, EPA has identified concerns for liver and developmental effects and irritation if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

1. Use of the PMN substance only for the use specified in the PMN; and

2. No use of the PMN substance in a consumer product.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of solution pH, specific target organ toxicity, skin irritation, eye irritation, and developmental/reproductive toxicity testing would help characterize the potential health effects of the PMN substance.

CFR Citation: 40 CFR 721.11423.

PMN Numbers: P–18–387 and P–18–388

Chemical Names: Alkanal, reaction products with alkanediyl bis[alkyl-tris(alkyl-heterocycle)-1,3,5-triazine-2,4,6-triamine and hydrogen peroxide (generic) (P–18–387) and 1,3,5-Triazine-2,4,6-triamine, alkanediyl bis[alkyl-tris(alkyl-heterocycle)-, allyl derivs., oxidized, hydrogenated (generic) (P–18–388).

CAS Numbers: Not available.

Basis for action: The PMNs state that the generic (non-confidential) use of the PMN substances will be as plastic additives. Based on the estimated physical/chemical properties of the PMN substances, available data on the new chemical substances, and comparison with structurally analogous chemical substances, EPA has identified concerns for lung effects if the chemical substances are not used following the limitation noted. The conditions of use of the PMN substances as described in the PMNs includes the following protective measure:

- Use of a NIOSH-certified respirator with an APF of at least 50 where there is a potential for inhalation exposure.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the health effects of the PMN substances if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of pulmonary effects testing would help characterize the potential health effects of the PMN substances.

CFR Citations: 40 CFR 721.11424 (P–18–387) and 40 CFR 721.11425 (P–18–388).

PMN Numbers: P–19–86, P–19–87, P–19–89, P–19–90, P–19–91, P–19–92, P–19–93, P–19–97, P–19–100, P–19–101, P–19–102, P–19–103, P–19–104, P–19–105, P–19–106, P–19–107, P–19–108, P–19–110

PMN No.	Chemical name	CAS No.
P–19–86	Halogenated sodium benzene alkyl carboxylate (generic)	Not available.
P–19–87	Halogenated sodium benzene alkyl carboxylate (generic)	Not available.
P–19–89	Halogenated sodium benzene alkyl carboxylate (generic)	Not available.
P–19–90	Halogenated sodium benzoate (generic)	Not available.
P–19–91	Halogenated benzene alkylcarboxylic acid (generic)	Not available.
P–19–92	Halogenated benzene alkylcarboxylic acid (generic)	Not available.
P–19–93	Halogenated benzoic acid (generic)	Not available.
P–19–97	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–100	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–101	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–102	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–103	Halogenated benzoic acid, ethyl ester (generic)	Not available.

PMN No.	Chemical name	CAS No.
P–19–104	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–105	Halogenated benzoic acid, ethyl ester (generic)	Not available.
P–19–106	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–107	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–108	Halogenated alkylbenzoic acid, ethyl ester (generic)	Not available.
P–19–110	Halogenated benzoic acid, ethyl ester (generic)	Not available.

Effective Date of TSCA section 5(e) Order: August 21, 2019.

Basis for action: The PMNs state that the generic (non-confidential) use of the PMN substances will be: To monitor oil and gas well performance (P–19–86, P–19–87, P–19–89 and P–19–90), as well performance tracers (P–19–91 through P–19–93), and as well performance monitors (P–19–97, P–19–100 through P–19–108 and P–19–110). Based on the estimated physical/chemical properties of the PMN substances and comparison with structurally analogous chemical substances, EPA has identified concerns for neurotoxicity, irritation to skin, eyes, lungs, and mucous membranes, developmental toxicity, kidney toxicity (P–19–86, P–19–87, P–19–89, P–19–91 and P–19–92) and aquatic toxicity at concentrations that exceed 14 ppb (P–19–97, P–19–100 through P–19–108 and P–19–110) if the chemical substances are not used following the limitation noted. The Order was issued under TSCA sections 5(a)(3)(B)(ii)(I) and 5(e)(1)(A)(ii)(I), based on a finding that in the absence of sufficient information to permit a reasoned evaluation, the substances may present an unreasonable risk of injury to human health or the environment. To protect against these risks, the Order requires:

1. No manufacture of the PMN substances without including engineering controls processes as described in the PMNs;
2. Refrain from manufacturing (including import), processing or using the PMN substances other than as identified in the Order;
3. No manufacture beyond the confidential annual manufacture volume identified in the Order (P–19–91 through P–19–93);
4. Submission to EPA of certain toxicity testing before exceeding the confidential manufacture volumes identified in the Order (P–19–86, P–19–87, P–19–89 through P–19–93, P–19–97, P–19–100 through P–19–108 and P–19–110);
5. Use of personal protective equipment for workers where there is a potential for dermal exposure for the PMN substances specified in the Order (P–19–91 through P–19–93);
6. Use of NIOSH-certified respirators for workers where there is a potential for inhalation exposure for the PMN substances specified in the Order or compliance with a NCEL of 0.0273 mg/m³ as an 8-hour time-weighted average to prevent inhalation exposure (P–19–91 through P–19–93);
7. Establishment and use of a hazard communication program, including human health precautionary statements on each label and in the SDS;
8. No manufacture or use of the PMN substances other than in liquid formulations (P–86, P–19–87, P–19–89 and P–19–90); and
9. No release of the PMN substances resulting in a combined concentration of 14 parts per billion (ppb) (P–19–97, P–19–100 through P–19–108 and P–19–110).

The proposed SNUR would designate as a ‘‘significant new use’’ the absence protective measures.

Potentially useful information: EPA has determined that certain information about the environmental and health effects of the PMN substances may be potentially useful in support of a request by the PMN submitter to modify the Order, or if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this SNUR. The submitter has agreed not to exceed certain production volume limits without performing specific reproduction/developmental, inhalation, and aquatic toxicity testing. EPA has also determined that the results of specific aquatic toxicity, skin irritation, eye damage, neurotoxicity, and reproductive/developmental toxicity testing may be potentially useful to characterize the environmental and human health effects of the PMN substances. Although the Order does not require these tests, the Order's restrictions remain in effect until the Order is modified or revoked by EPA based on submission of this or other relevant information.

CFR Citations: 40 CFR 721.11426 (P–19–86); 40 CFR 721.11427 (P–19–87); 40 CFR 721.11428 (P–19–89); 40 CFR 721.11429 (P–19–90); 40 CFR 721.11430 (P–19–91); 40 CFR 721.11431 (P–19–92); 40 CFR 721.11432 (P–19–93); 40 CFR 721.11433 (P–19–97); 40 CFR 721.11434 (P–19–100); 40 CFR 721.11435 (P–19–101); 40 CFR 721.11436 (P–19–102); 40 CFR 721.114237 (P–19–103); 40 CFR 721.11438 (P–19–104); 40 CFR 721.11439 (P–19–105); 40 CFR 721.11440 (P–19–106); 40 CFR 721.11441 (P–19–107); 40 CFR 721.11442 (P–19–108); and 40 CFR 721.11443 (P–19–110).

PMN Number: P–19–99

Chemical Name: Propanoic acid, 3-hydroxy-2-(hydroxymethyl)-2-methyl-, polymer with dimethyl carbonate, 1,2-ethanediamine, 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 1,6-hexanediol and 1,1'-methylenebis[4-isocyanatocyclohexane], compd. with N,N-diethylethanamine.

CAS Number: 1178511–46–0.

Basis for action: The PMN states that the use of the PMN substance will be as a clear coat for wood. Based on estimated physical/chemical properties of the PMN substance and analysis of analogous chemicals, EPA has identified concerns for irritation and corrosion and developmental toxicity if the chemical substance is not used following the limitations noted. The conditions of use of the PMN substance as described in the PMN include the following protective measures:

1. Use of the PMN substance only for the use specified in the PMN; and
2. No use of the PMN substance in a consumer product.

The proposed SNUR would designate as a ‘‘significant new use’’ the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of specific target organ toxicity, skin irritation, eye damage, and pulmonary effects testing would help characterize the potential health effects of the PMN substance.

CFR Citation: 40 CFR 721.11444.

PMN Number: P–19–118

Chemical Name: Substituted polyalkylenepoly, reaction products with alkene polymer (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a component of lubricant. Based on estimated physical/chemical properties of the PMN substance, test data on the new chemical substance, and analysis of analogous polycationic polymers, EPA has identified concerns for skin and eye irritation and lung toxicity if the chemical substance is not used following the limitation noted. The condition of use of the PMN substance as described in the PMN includes the following protective measure:

- No manufacture, processing, or use of the PMN substance that results in inhalation exposures.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the health effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of skin irritation, eye damage, and pulmonary effects testing would help characterize the potential health effects of the PMN substance.

CFR Citation: 40 CFR 721.11445.

PMN Number: P–19–120

Chemical Name: Alkenoic acid, polymer with alkanediyl bis substituted alkylene bis heteromonocycle, substituted carbomonocycle and (alkylalkenyl) carbomonocycle, alkali metal salt (generic).

CAS Number: Not available.

Basis for action: The PMN states that the generic (non-confidential) use of the PMN substance will be as a component of ink. Based on estimated physical/chemical properties of the PMN substance, comparison to structurally analogous chemical substances, and analysis of analogous polyanionic polymers, EPA has identified concerns for aquatic toxicity at surface water concentrations exceeding 78 parts per billion (ppb) if the chemical substance is not used following the limitation noted. The condition of use of the PMN substance as described in the PMN includes the following protective measure:

- No release of the PMN substance to surface waters that exceed 78 ppb.

The proposed SNUR would designate as a ''significant new use'' the absence of this protective measure.

Potentially useful information: EPA has determined that certain information may be potentially useful to characterize the environmental effects of the PMN substance if a manufacturer or processor is considering submitting a SNUN for a significant new use that would be designated by this proposed SNUR. EPA has determined that the results of aquatic toxicity would help characterize the potential environmental effects of the PMN substance.

CFR Citation: 40 CFR 721.11446.

V. Rationale and Objectives of the Proposed Rule

A. Rationale

During review of the PMNs submitted for the chemical substances that are subject to these proposed SNURs, EPA concluded that for 19 chemical substances regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of the chemical substances. The basis for such findings is outlined in Unit IV. Based on these findings, TSCA section 5(e) Orders requiring the use of appropriate exposure controls were negotiated with the PMN submitters. As a general matter, EPA believes it is necessary to follow TSCA section 5(e) Orders with a SNUR that identifies the absence of those protective measures as Significant New Uses to ensure that all manufacturers and processors—not just the original submitter—are held to the same standard.

During review of the other eight chemical substances that are the subject of these SNURs and as further discussed in Unit IV, EPA identified certain circumstances that raised potential risk concerns. EPA determined that deviations from the limitations identified in the submissions could result in changes in the type or form of exposure to the chemical substances and/or increased exposures to the chemical substances and/or changes in the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of the chemical substances, and therefore warranted SNURs. The SNURs would identify as significant new uses any manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the certain limitations in the submission.

B. Objectives

EPA is proposing these SNURs for specific chemical substances which have undergone premanufacture review because the Agency wants to achieve the following objectives with respect to the significant new uses that would be designated in this proposed rule:

- EPA would receive notice of any person's intent to manufacture or process a listed chemical substance for the described significant new use before that activity begins.
- EPA would be required to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing a listed chemical substance for the described significant new use.
- EPA would be required to either determine that the prospective manufacture or processing is not likely to present an unreasonable risk, or to take necessary regulatory action associated with any other determination, before the described significant new use of the chemical substance occurs.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Chemical Substance Inventory (TSCA Inventory). Guidance on how to determine if a chemical substance is on the TSCA Inventory is available on the internet at *http://www.epa.gov/opptintr/existingchemicals/pubs/tscainventory/index.html.*

VI. Applicability of the Proposed Significant New Use Designation

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this proposed rule have undergone premanufacture review. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no person may commence such activities without first submitting a PMN. Therefore, for chemical substances for which an NOC has not been submitted EPA concludes that the designated significant new uses are not ongoing.

When chemical substances identified in this proposed rule are added to the TSCA Inventory, EPA recognizes that, before the rule is effective, other persons might engage in a use that has been identified as a significant new use. However, TSCA section 5(e) Orders have been issued for 19 of the 27 chemical substances, and the PMN submitters are prohibited by the TSCA section 5(e) Orders from undertaking activities which would be designated as significant new uses. The identities of 24 of the 27 chemical substances subject to this proposed rule have been claimed as confidential (per 40 CFR 720.85) for a chemical substance covered by this action. Based on this, the Agency believes that it is highly unlikely that any of the significant new uses described in the regulatory text of this proposed rule are ongoing.

Therefore, EPA designates December 6, 2019 as the cutoff date for determining whether the new use is ongoing. The objective of EPA's approach is to ensure that a person cannot defeat a SNUR by initiating a significant new use before the effective date of the final rule.

Persons who begin commercial manufacture or processing of the chemical substances for a significant new use identified as of that date would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and wait until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken such actions as are required with that determination.

VII. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require developing any particular new information (*e.g.,* generating test data) before submission of a SNUN. There is an exception: Development of test data is required where the chemical substance subject to the SNUR is also subject to a rule, order or consent agreement under TSCA section 4 (see TSCA section 5(b)(1)).

In the absence of a TSCA section 4 test rule covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known to or reasonably ascertainable by them (see 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. Unit IV. lists potentially useful information identified by EPA that would help characterize the potential health and/or environmental effects of the PMN/SNUN substance for all of the listed SNURs. EPA recognizes that the 2016 Lautenberg Amendments have led to modifications in our approach to testing requirements, including an increased consideration of alternatives to vertebrate testing. Descriptions of tests/information needs are provided for informational purposes only and EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol selection. Pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the potentially useful information. EPA encourages dialogue with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h). To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.'' The Organisation for Economic Co-operation and Development test guidelines are available from the OECD Bookshop at *http://www.oecdbookshop.org* or SourceOECD at *http://www.sourceoecd.org.*

The potentially useful information listed in Unit IV. may not be the only means of addressing the potential risks of the chemical substance. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substances.

VIII. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40 and 721.25. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

IX. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers and processors of the chemical substances subject to this proposed rule. EPA's complete economic analysis is available in the docket under docket ID number EPA–HQ–OPPT–2019–0530.

X. Statutory and Executive Order Reviews

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

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

This proposed rule would establish SNURs for several new chemical substances that were the subject of PMNs and TSCA section 5(e) Orders. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act (PRA)

According to the PRA (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection activities in this proposed rule have already been approved by OMB pursuant to the PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Regulatory Support Division, Office of Mission Support (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act (RFA)

Pursuant to RFA section 605(b) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this proposed SNUR would not have a significant adverse economic impact on a substantial number of small entities.

The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices per year. For example, the number of SNUNs received was seven in Federal fiscal year (FY) 2013, 13 in FY2014, six in FY2015, 10 in FY2016, 14 in FY2017, and 18 in FY2018 and only a fraction of these were from small businesses. In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from $16,000 to $2,800. This lower fee reduces the total reporting and recordkeeping of cost of submitting a SNUN to about $10,116 for qualifying small firms. Therefore, the potential economic impacts of complying with this proposed SNUR are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this action. As such, EPA has determined that this proposed rule would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1501 *et seq.*).

E. Executive Order 11632: Federalism

This proposed rule would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

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

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175 (65 FR 67249, November 9, 2000), do not apply to this action.

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

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this proposed rule is not expected to affect energy supply, distribution, or use and because this proposed rule is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Since this proposed rule would not involve any technical standards, NTTAA section 12(d) (15 U.S.C. 272 note) does not apply to this action.

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

This proposed rule does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: November 21, 2019.

Tala Henry,

Deputy Director, Office of Pollution Prevention and Toxics.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 721—[AMENDED]

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, 2613, and 2625(c).

■ 2. Add §§ 721.11420 through 721.11446 to subpart E to read as follows:

Subpart E—Significant New Uses for Specific Chemical Substances

Sec.

* * * * *

721.11438 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–104)
721.11439 Halogenated benzoic acid, ethyl ester (generic) (P–19–105)
721.11440 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–106)
721.11441 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–107)
721.11442 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–108)
721.11443 Halogenated benzoic acid, ethyl ester (generic) (P–19–110)
721.11444 Propanoic acid, 3-hydroxy-2-(hydroxymethyl)-2-methyl-, polymer with dimethyl carbonate, 1,2-ethanediamine, 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 1,6-hexanediol and 1,1'-methylenebis[4-isocyanatocyclohexane], compd. with N,N-diethylethanamine
721.11445 Substituted polyalkylenepoly, reaction products with alkene polymer (generic)
721.11446 Alkenoic acid, polymer with alkanediyl bis substituted alkylene bis heteromonocycle, substituted carbomonocycle and (alkylalkenyl) carbomonocycle, alkali metal salt (generic)

* * * * *

§ 721.11420 Soybean meal, reaction products with phosphoric trichloride.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as soybean meal, reaction products with phosphoric trichloride (PMN P–16–541, CAS No. 1962913–92–3) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=22.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11421 2-Propenoic acid, alkyl, polymers with alkyl acrylate and polyethylene glycol methacrylate alkyl ether (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 2-propenoic acid, alkyl, polymers with alkyl acrylate and polyethylene glycol methacrylate alkyl ether (PMN P–17–299) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f). It is a significant new use to use the PMN substance other than as a thickener in paint. It is a significant new use to use the PMN substance in concentrations greater than 1% in formulated products. It is a significant new use to manufacture, process, or use the PMN substance in a manner that generates a dust, mist, or aerosol.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11422 Alkanediamine, dialkyl-, polymer with .alpha.-hydro-.omega.-[(1-oxo-2-propen-1-yl)oxy]poly(oxy-1,2-ethanediyl) ether with substituted alkyl-substitutedalkanediol, reaction products with alkyl-alkanamine (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkanediamine, dialkyl-, polymer with .alpha.-hydro-.omega.-[(1-oxo-2-propen-1-yl)oxy]poly(oxy-1,2-ethanediyl) ether with substituted alkyl-substitutedalkanediol, reaction products with alkyl-alkanamine (PMN P–17–393) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this section do not apply to quantities of the PMN substance after they have been completely reacted (cured).

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(4). (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor of at least 1000), (6) (particulate), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(A) As an alternative to the respirator requirements in paragraph (a)(2)(i) of this section, a manufacturer or processor may choose to follow the new chemical exposure limit (NCEL) provision listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.039 mg/m³ as an 8-hour time-weighted average. Persons who wish to pursue NCELs as an alternative to § 721.63 respirator requirements may request to do so under § 721.30. Persons who § 721.30 requests to use the NCELs approach are approved by EPA will be required to follow NCELs provisions comparable to those contained in the corresponding TSCA section 5(e) consent order.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (f), (g)(1)(i) and (ii) ((eye irritation), (skin sensitization)), (2)(i) through (iv) (use respiratory protection or maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 0.039 mg/m³) and (v), (3)(ii) (hazardous to the aquatic environment), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k). It is a significant new use to manufacture the PMN substance with an average molecular weight less than 1000 Daltons and with more than 10% less than 500 Daltons.

(iv) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=1.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (d), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(iii) of this section.

§ 721.11423 Calcium, carbonate 2-ethylhexanoate neodecanoate propionate complexes.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as calcium, carbonate 2-ethylhexanoate neodecanoate propionate complexes (PMN P–18–172) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to use the substance other than as an auxiliary drier for architectural paints, industrial coatings and stains.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11424 Alkanal, reaction products with alkanediyl bis[alkyl-tris(alkyl-heterocycle)-1,3,5-triazine-2,4,6-triamine and hydrogen peroxide (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkanal, reaction products with alkanediyl bis[alkyl-tris(alkyl-heterocycle)-1,3,5-triazine-2,4,6-triamine and hydrogen peroxide (PMN P–18–387) is subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(4), (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor of at least 50), and (6) (particulate. When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (d) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11425 1,3,5-Triazine-2,4,6-triamine, alkanediyl bis[alkyl-tris(alkyl-heterocycle)-, allyl derivs., oxidized, hydrogenated (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as 1,3,5-triazine-2,4,6-triamine, alkanediyl bis[alkyl-tris(alkyl-heterocycle)-, allyl derivs., oxidized, hydrogenated (PMN P–18–388) is subject to reporting under this section for the significant new use described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(4), (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor of at least 50), and (6) (particulate). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (d) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11426 Halogenated sodium benzene alkyl carboxylate (generic) (P–19–86).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated sodium benzene alkyl carboxylate (PMN P–19–86) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture, process, or use the substance other than in a liquid formulation. It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (f) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11427 Halogenated sodium benzene alkyl carboxylate (generic) (P–19–87).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated sodium benzene alkyl carboxylate (PMN P–19–87) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture, process, or use the substance other than in a liquid formulation. It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (f) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11428 Halogenated sodium benzene alkyl carboxylate (generic) (P–19–89).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated sodium benzene alkyl carboxylate (PMN P–19–89) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture, process, or use the substance other than in a liquid formulation. It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (f) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11429 Halogenated sodium benzoate (generic) (P–19–90).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated sodium benzoate (PMN P–19–90) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture, process, or use the substance other than in a liquid formulation. It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (f) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11430 Halogenated benzene alkylcarboxylic acid (generic) (P–19–91).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzene alkylcarboxylic acid (PMN P–19–91) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i), (iii) and (iv), (3), (4), (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor as described in the Order), (6)((particulate), (gas/vapor), (combination gas/vapor and particulate)), (b)(concentration set at 1.0%), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(A) As an alternative to the respirator requirements in paragraph (a)(2)(i) of this section, a manufacturer or processor may choose to follow the new chemical exposure limit (NCEL) provision listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.0273 mg/m^3 as an 8-hour time weighted average. Persons who wish to pursue NCELs as an alternative to § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will be required to follow NCELs provisions comparable to those contained in the corresponding TSCA section 5(e) consent order.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (iv) (use respiratory protection of maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 0.0273 mg/m^3) and (v), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k), (q) and (t). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(iii) of this section.

§ 721.11431 Halogenated benzene alkylcarboxylic acid (generic) (P–19–92).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzene alkylcarboxylic acid (PMN P–19–92) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i), (iii) and (iv), (3), (4), (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor as described in the Order), (6) ((particulate), (gas/vapor), (combination gas/vapor and particulate)), (b)(concentration set at 1.0%), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(A) As an alternative to the respirator requirements in paragraph (a)(2)(i) of this section, a manufacturer or processor may choose to follow the new chemical exposure limit (NCEL) provision listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.0273 mg/m^3 as an 8-hour time weighted average. Persons who wish to pursue NCELs as an alternative to § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will be required to follow NCELs provisions comparable to those contained in the corresponding TSCA section 5(e) consent order.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (iv) (use respiratory protection of maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 0.0273 mg/m^3) and (v), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k), (q) and (t). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(iii) of this section.

§ 721.11432 Halogenated benzoic acid (generic) (P–19–93).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzoic acid (PMN P–19–93) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (2)(i), (iii) and (iv), (3), (4), (5) (respirators must provide a National Institute for Occupational Safety and Health assigned protection factor as described in the Order), (6) ((particulate), (gas/vapor), (combination gas/vapor and particulate)), (b) (concentration set at 1.0%), and (c). When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(1) and (a)(4), engineering control measures (*e.g.,* enclosure or confinement of the operation, general and local ventilation) or administrative control measures (*e.g.,* workplace policies and procedures) shall be considered and implemented to prevent exposure, where feasible.

(A) As an alternative to the respirator requirements in paragraph (a)(2)(i) of this section, a manufacturer or processor may choose to follow the new chemical exposure limit (NCEL) provision listed in the TSCA section 5(e) consent order for this substance. The NCEL is 0.0273 mg/m^3 as an 8-hour time weighted average. Persons who wish to pursue NCELs as an alternative to § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will be required to follow NCELs provisions comparable to those contained in the corresponding TSCA section 5(e) consent order.

(ii) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (iv) (use respiratory protection of maintain workplace airborne concentrations at or below an 8-hour time-weighted average of 0.0273 mg/m^3) and (v), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(iii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k), (q) and (t). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(iii) of this section.

§ 721.11433 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–97).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–97) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11434 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–100).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–100) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11435 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–101).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–101) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11436 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–102).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–102) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q), It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11437 Halogenated benzoic acid, ethyl ester (generic) (P–19–103).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzoic acid, ethyl ester (PMN P–19–103) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The

provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11438 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–104).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–104) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11439 Halogenated benzoic acid, ethyl ester (generic) (P–19–105).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzoic acid, ethyl ester (PMN P–19–105) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11440 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–106).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–106) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11441 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–107).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–107) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11442 Halogenated alkylbenzoic acid, ethyl ester (generic) (P–19–108).

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as halogenated alkylbenzoic acid, ethyl ester (PMN P–19–108) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11443 Halogenated benzoic acid, ethyl ester (generic) (P–19–110).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as halogenated benzoic acid, ethyl ester (PMN P–19–110) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Hazard communication.* Requirements as specified in § 721.72(a) through (d), (e) (concentration set at 1.0%), (f), (g)(1)(i) through (iv), (vi), (ix) (eye irritation), (2)(i) through (iii), (3)(i) and (ii), and (5). Alternative hazard and warning statements that meet the criteria of the Globally Harmonized System and OSHA Hazard Communication Standard may be used.

(ii) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(k) and (q). It is a significant new use to manufacture or process the substance without including the engineering controls/processes described in the premanufacture notice.

(iii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=14.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (f) through (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(ii) of this section.

§ 721.11444 Propanoic acid, 3-hydroxy-2-(hydroxymethyl)-2-methyl-, polymer with dimethyl carbonate, 1,2-ethanediamine, 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 1,6-hexanediol and 1,1′-methylenebis[4-isocyanatocyclohexane], compd. with N,N-diethylethanamine.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as propanoic acid, 3-hydroxy-2-(hydroxymethyl)-2-methyl-, polymer with dimethyl carbonate, 1,2-ethanediamine, 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 1,6-hexanediol and 1,1′-methylenebis[4-isocyanatocyclohexane], compd. with N,N-diethylethanamine (PMN P–19–99, CAS No. 1178511–46–0) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(o). It is a significant new use to use the substance other than as a clear coat for wood.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11445 Substituted polyalkylenepoly, reaction products with alkene polymer (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as substituted polyalkylenepoly, reaction products with alkene polymer (PMN P–19–118) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner resulting in inhalation exposures.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

§ 721.11446 Alkenoic acid, polymer with alkanediyl bis substituted alkylene bis heteromonocycle, substituted carbomonocycle and (alkylalkenyl) carbomonocycle, alkali metal salt (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as alkenoic acid, polymer with alkanediyl bis substituted alkylene bis heteromonocycle, substituted carbomonocycle and (alkylalkenyl) carbomonocycle, alkali metal salt (PMN P–19–120) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4) where N=78.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 2019–26226 Filed 12–5–19; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 84, No. 235
Friday, December 6, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS–CN–19–0085]

Tobacco Inspection and Grading Services: Notice of Request for an Extension 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) intention to request approval from the Office of Management and Budget, for an extension to the currently approved information collection in support of the Fair and Equitable Tobacco Reform Act of 2004, the Rural Development, Food and Drug Administrative, and Related Agencies Appropriations Act for 2002 (Appropriations Act), and the Tobacco Inspection Act and Regulations Governing the Tobacco Standards.

DATES: Comments received by February 4, 2020 will be considered.

ADDRESSES: Written comments may be submitted to the addresses specified below. All comments will be made available to the public. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publically disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines. Comments may be submitted anonymously.

Comments, identified by AMS–CN–19–0085, may be submitted electronically through the *Federal eRulemaking Portal at http://www.regulations.gov.* Please follow the instructions for submitting comments. In addition, comments may be submitted by *mail or hand delivery to* Cotton Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. Comments should be submitted in triplicate. All comments received will be made available for public inspection at Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. A copy of this document may be found at: *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Reporting and Recording Requirements for 7 CFR part 29.

OMB Number: 0581–0056.

Expiration Date of Approval: April 30, 2020.

Type of Request: Extension of a currently approved information collection.

Abstract: The Tobacco Inspection Act (7 U.S.C. 511–511s) requires that all tobacco sold at designated auction markets in the U.S. be inspected and graded. The Appropriations Act (7 U.S.C. 511s note) requires that all tobacco eligible for price support in the U.S. be inspected and graded. The Fair and Equitable Tobacco Reform Act of 2004 (7 U.S.C. 518–519a) eliminated price supports and marketing quotas for all tobacco beginning with the 2005 crop year. Mandatory inspection and grading of domestic and imported tobacco was eliminated as well as the mandatory pesticide testing of imported tobacco and the tobacco market news program. The Tobacco Inspection Act also provides for interested parties to request inspection, pesticide testing, and grading services on a permissive basis. The information collection requirements authorized for the programs under the Tobacco Inspection Act and the Appropriations Act include: Application for inspection of tobacco, application and other information used in the approval of new auction markets or the extension of services to designated tobacco markets, and the information required to be provided in connection with auction and nonauction sales.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.60 hours per response.

Respondents: Primarily tobacco companies, tobacco manufacturers, import inspectors, and small businesses or organizations.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 48.

Estimated Number of Responses: 2,415.

Estimated Total Annual Burden on Respondents: 3,651.

Comments are invited 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, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@usda.gov.* All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 2, 2019.

Bruce Summers,

Administrator.

[FR Doc. 2019–26303 Filed 12–5–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 3, 2019.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 6, 2020 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW, Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Modernization of Swine Slaughter Inspection.

OMB Control Number: 0583–0171.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*). This statute mandates that FSIS protect the public by verifying that meat products are safe, wholesome, unadulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS will collect information to ensure that all establishments operating under the New Swine Slaughter Inspection System (NSIS) monitor their systems through microbial testing and recordkeeping. Establishments operating under NSIS are required to (1) identify animals or carcasses that establishment personnel have sorted and removed for disposal before FSIS inspection with a unique tag, tattoo, or similar device, (2) maintain records to document the total number of animals and carcasses sorted and removed per day and the reasons for their removal, and (3) maintain records documenting that products resulting from their slaughter operations meet the new definition of RTC pork product.

Furthermore, FSIS will collection information to ensure that each establishment operating under the NSIS submit on an annual basis an attestation to the management member of the local FSIS circuit safety committee stating that it maintains a program to monitor and document any work-related conditions of establishment workers.

Description of Respondents: Business or other for-profit.

Number of Respondents: 84.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 4,348.

Kimble Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2019–26322 Filed 12–5–19; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket Number FSIS–2019–0027]

2020 Rate Changes for the Basetime, Overtime, Holiday, and Laboratory Services Rates

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the 2020 rates it will charge meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services. The 2020 basetime, overtime, holiday, and laboratory services rates will be applied on January 5, 2020.

DATES: FSIS will charge the rates announced in this notice beginning January 5, 2020.

FOR FURTHER INFORMATION CONTACT: For further information contact Michael Toner, Director, Budget Division, Office of the Chief Financial Officer, FSIS, U.S. Department of Agriculture, Room 2159, South Building, 1400 Independence Avenue SW, Washington, DC 20250–3700; Telephone: (202) 690–8398, Fax: (202) 690–4155.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 2011, FSIS published a final rule amending its regulations to establish formulas for calculating the rates it charges meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services (76 FR 20220).

In the final rule, FSIS stated that it would use the formulas to calculate the annual rates, publish the rates in **Federal Register** notices prior to the start of each calendar year, and apply the rates on the first FSIS pay period at the beginning of the calendar year.

This notice provides the 2020 rates, which will be applied starting on January 5, 2020.

2020 Rates and Calculations

The following table lists the 2020 Rates per hour, per employee, by type of service:

Service	2020 rate (estimates rounded to reflect billable quarters)
Basetime	$64.84
Overtime	79.88
Holiday	94.88
Laboratory	82.32

The regulations state that FSIS will calculate the rates using formulas that include the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay and regular hours (9 CFR 391.2, 391.3, 391.4, 590.126, 590.128, 592.510, 592.520, and 592.530). In 2013, an Agency reorganization eliminated the Office of International Affairs program office and transferred all of its inspection program personnel to OFO. Therefore, inspection program personnel's pay and hours are identified in the calculations as ''OFO inspection program personnel's'' pay and hours.

FSIS determined the 2020 rates using the following calculations:

Basetime Rate = The quotient of dividing the OFO inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2020 basetime rate per hour per program employee is:

[FY 2019 OFO Regular Direct Pay divided by the previous fiscal year's Regular Hours ($431,891,249/14,748,261)] = $29.28 + ($29.28 * 2.6% (calendar year 2020 Cost of Living Increase)) = $30.05 + $10.38 (benefits rate) + $2.49 (travel and operating rate) + $21.92 (overhead rate) + $0.02 (bad debt allowance rate) = $64.84, which is already divisible by 4.

Overtime Rate = The quotient of dividing the OFO inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 1.5 (for overtime), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2020 overtime rate per hour per program employee is:

[FY 2019 OFO Regular Direct Pay divided by previous fiscal year's Regular Hours ($431,891,249/14,748,261)] = $29.28 + ($29.28 * 2.6% (calendar year 2020 Cost of Living Increase)) = $30.05 * 1.5 = $45.07 + $10.38 (benefits rate) + $2.49 (travel and operating rate) + $21.92 (overhead rate) + $0.02 (bad debt allowance rate) = $79.86 rounded up to $79.88, so that it is divisible by 4.

Holiday Rate = The quotient of dividing the OFO inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 2 (for holiday pay), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2020 holiday rate per hour per program employee calculation is:

[FY 2019 OFO Regular Direct Pay divided by Regular Hours ($431,891,249/14,748,261)] = $29.28 + ($29.28 * 2.6% (calendar year 2019 Cost of Living Increase)) = $30.05 * 2 = $60.09 + $10.38 (benefits rate) + $2.49 (travel and operating rate) + $21.92 (overhead rate) + $0.02 (bad debt allowance rate) = $94.88, which is already divisible by 4.

Laboratory Services Rate = The quotient of dividing the Office of Public Health Science's (OPHS's) previous fiscal year's regular direct pay by the OPHS previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2020 laboratory services rate per hour per program employee is:

[FY 2019 OPHS Regular Direct Pay/OPHS Regular hours ($22,973,965/496,184)] = $46.30 + ($46.30 * 2.6% (calendar year 2020 Cost of Living Increase)) = $47.51 + $10.38 (benefits rate) + $2.49 (travel and operating rate) + $21.92 (overhead rate) + $0.02 (bad debt allowance rate) = $82.30, rounded up to 82.32, so that it is divisible by 4.

Calculations for the Benefits, Travel and Operating, Overhead, and Allowance for Bad Debt Rates

These rates are components of the basetime, overtime, holiday, and laboratory services rates formulas.

Benefits Rate: The quotient of dividing the previous fiscal year's direct benefits costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan basic and matching contributions.

The calculation for the 2020 benefits rate per hour per program employee is:

[FY 2019 Direct Benefits/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($184,242,174/18,205,950)] = $10.12 + ($10.12 * 2.6% (calendar year 2019 Cost of Living Increase)) = $10.38.

Travel and Operating Rate: The quotient of dividing the previous fiscal year's total direct travel and operating costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2020 travel and operating rate per hour per program employee is:

[FY 2019 Total Direct Travel and Operating Costs/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($44,335,973/18,205,950)] = $2.44 + ($2.44 * 2.3% (2020 Inflation) = $2.49.

Overhead Rate: The quotient of dividing the previous fiscal year's indirect costs plus the previous fiscal year's information technology (IT) costs in the Public Health Data Communication Infrastructure System Fund plus the provision for the operating balance less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection by the previous fiscal year's total hours (regular, overtime, and holiday) worked across all funds, plus the quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2020 overhead rate per hour per program employee is:

[FY 2019 Total Overhead/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($ 390,080,911/18,205,950)] = $21.43 + ($21.43 * 2.3% (2019 Inflation) = $21.92.

Allowance for Bad Debt Rate = Previous fiscal year's total allowance for bad debt (for example, debt owed that is not paid in full by plants and establishments that declare bankruptcy) divided by previous fiscal year's total hours (regular, overtime, and holiday) worked.

The 2020 calculation for bad debt rate per hour per program employee is:

[FY 2019 Total Bad Debt/(Total Regular hours + Total Overtime hours + Total Holiday hours) = ($317,344/18,205,950)] = $0.02.

Additional Public Notification

FSIS will make copies of this **Federal Register** publication available through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

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How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410, *Fax:* (202) 690–7442, *Email: program.intake@usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC.

Carmen Rottenberg,

Administrator.

[FR Doc. 2019–26326 Filed 12–5–19; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–74–2019]

Foreign-Trade Zone 32—Miami, Florida; Application for Reorganization (Expansion of Service Area) Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Greater Miami Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone 32, requesting authority to reorganize the zone to expand its service area under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on December 3, 2019.

FTZ 32 was approved by the FTZ Board on September 6, 1977 (Board Order 123, 42 FR 46568, September 16, 1977) and reorganized under the ASF on December 20, 2012 (Board Order 1876, 78 FR 1197–1198, January 8, 2013). The zone currently has a service area that includes a portion of Miami-Dade County, Florida.

The applicant is now requesting authority to expand the service area of the zone to include all of Miami-Dade County, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The application indicates that the proposed expanded service area is in or adjacent to the Miami U.S. Customs and Border Protection Port of Entry.

In accordance with the FTZ Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is February 4, 2020. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 19, 2020.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.* For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: December 3, 2019.

Elizabeth Whiteman,

Acting Executive Secretary.

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Renewing Order Temporarily Denying Export Privileges

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Bahar Safwa General Trading, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates

Sky Blue Bird Group a/k/a Sky Blue Bird Aviation a/k/a Sky Blue Bird Ltd a/k/a Sky Blue Bird FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates

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Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (2019) (''EAR'' or ''the Regulations''), I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order issued in this matter on June 5, 2019. I find that renewal of this order, as modified, is necessary in the public interest to prevent an imminent violation of the Regulations.[1]

I. Procedural History

On March 17, 2008, Darryl W. Jackson, the then-Assistant Secretary of Commerce for Export Enforcement (''Assistant Secretary''), signed an order denying Mahan Airways' export privileges for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order also named as denied persons Blue Airways, of Yerevan, Armenia (''Blue Airways of Armenia''), as well as the ''Balli Group Respondents,'' namely, Balli Group PLC, Balli Aviation, Balli Holdings, Vahid Alaghband, Hassan Alaghband, Blue Sky One Ltd., Blue Sky Two Ltd., Blue Sky Three Ltd., Blue Sky Four Ltd., Blue Sky Five Ltd., and Blue Sky Six Ltd., all of the United Kingdom. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations, and went into effect on March 21, 2008, the date it was published in the **Federal Register**.

This temporary denial order (''TDO'') was renewed in accordance with Section 766.24(d) of the Regulations.[2] Subsequent renewals also have issued pursuant to Section 766.24(d), including most recently on June 5, 2019.[3] Some of the renewal orders and the modification orders that have issued between renewals have added certain parties as respondents or as related persons, or effected the removal of certain parties.[4]

The September 11, 2009 renewal order continued the denial order as to Mahan Airways, but not as to the Balli Group Respondents or Blue Airways of Armenia.[5] As part of the February 25, 2011 renewal order, Pejman Mahmood Kosarayanifard (a/k/a Kosarian Fard), Mahmoud Amini, and Gatewick LLC (a/k/a Gatewick Freight and Cargo Services, a/k/a Gatewick Aviation Services) were added as related persons to prevent evasion of the TDO.[6] A modification order issued on July 1, 2011, adding Zarand Aviation as a respondent in order to prevent an imminent violation.[7]

As part of the August 24, 2011 renewal, Kerman Aviation, Sirjanco Trading LLC, and Ali Eslamian were added as related persons. Mahan Air General Trading LLC, Equipco (UK) Ltd., and Skyco (UK) Ltd. were added as related persons by a modification order issued on April 9, 2012. Mehdi Bahrami was added as a related person as part of the February 4, 2013 renewal order.

On May 21, 2015, a modification order issued adding Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. As detailed in that order and discussed further *infra,* these respondents were added to the TDO based upon evidence that they were acting together to, inter alia, obtain aircraft subject to the Regulations for export or reexport to Mahan in violation of the Regulations and the TDO. Sky Blue Bird Group and its chief executive officer, Issam Shammout, were added as related persons as part of the July 13, 2015 renewal order.[8] On November 16, 2017, a modification order issued to remove Ali Eslamian, Equipco (UK) Ltd., and Skyco (UK) Ltd. as related persons following a request by OEE for their removal.[9]

[1] The Regulations, currently codified at 15 CFR parts 730–774 (2019), originally issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by successive Presidential Notices, continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, Section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders.

[2] Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order. Renewal requests may include discussion of any additional or changed circumstances, and may seek appropriate modifications to the order, including the addition of parties as respondents or related persons, or the removal of parties previously added as respondents or related persons. BIS is not required to seek renewal as to all parties, and a removal of a party can be effected if, without more, BIS does not seek renewal as to that party. Any party included or added to a temporary denial order as a respondent may oppose a renewal request as set forth in Section 766.24(d). Parties included or added as related persons can at any time appeal their inclusion as a related person, but cannot challenge the underlying temporary denial order, either as initially issued or subsequently renewed, and cannot oppose a renewal request. *See also* note 4, *infra.*

[3] The June 5, 2019 renewal order was effective upon issuance and published in the **Federal Register** on June 12, 2019 (84 FR 27233). Prior renewal orders issued on September 17, 2008, March 16, 2009, September 11, 2009, March 9, 2010, September 3, 2010, February 25, 2011, August 24, 2011, February 15, 2012, August 9, 2012, February 4, 2013, July 31, 2013, January 24, 2014, July 22, 2014, January 16, 2015, July 13, 2015, January 7, 2016, July 7, 2016, December 30, 2016, June 27, 2017, December 20, 2017, June 14, 2018, and December 11, 2018, respectively. The August 24, 2011 renewal followed the issuance of a modification order that issued on July 1, 2011, to add Zarand Aviation as a respondent. The July 13, 2015 renewal followed a modification order that issued May 21, 2015, and added Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading as respondents. Each of the renewal orders and each of the modification orders referenced in this footnote or elsewhere in this order has been published in the **Federal Register**.

[4] Pursuant to Sections 766.23 and 766.24(c) of the Regulations, any person, firm, corporation, or business organization related to a denied person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may be added as a ''related person'' to a temporary denial order to prevent evasion of the order.

[5] Balli Group PLC and Balli Aviation settled proposed BIS administrative charges as part of a settlement agreement that was approved by a settlement order issued on February 5, 2010. The sanctions imposed pursuant to that settlement and order included, inter alia, a $15 million civil penalty and a requirement to conduct five external audits and submit related audit reports. The Balli Group Respondents also settled related charges with the Department of Justice and the Treasury Department's Office of Foreign Assets Control.

[6] *See* note 4, *supra,* concerning the addition of related persons to a temporary denial order. Kosarian Fard and Mahmoud Amini remain parties to the TDO. On August 13, 2014, BIS and Gatewick resolved administrative charges against Gatewick, including a charge for acting contrary to the terms of a BIS denial order (15 CFR 764.2(k)). In addition to the payment of a civil penalty, the settlement includes a seven-year denial order. The first two years of the denial period were active, with the remaining five years suspended conditioned upon Gatewick's full and timely payment of the civil penalty and its compliance with the Regulations during the seven-year denial order period. This denial order, in effect, superseded the TDO as to Gatewick, which was not included as part of the January 16, 2015 renewal order. The Gatewick LLC Final Order was published in the **Federal Register** on August 20, 2014. *See* 79 FR 49283 (Aug. 20, 2014).

[7] Zarand Aviation's export privileges remained denied until July 22, 2014, when it was not included as part of the renewal order issued on that date.

[8] The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') designated Sky Blue Bird and Issam Shammout as Specially Designated Global Terrorists (''SDGTs'') on May 21, 2015, pursuant to Executive Order 13224, for ''providing support to Iran's Mahan Air.'' See 80 FR 30762 (May 29, 2015).

[9] The November 16, 2017 modification was published in the **Federal Register** on December 4, 2017. *See* 82 FR 57203 (Dec. 4, 2017). On September 28, 2017, BIS and Ali Eslamian resolved an administrative charge for acting contrary to the terms of the denial order (15 CFR 764.2(k)) that was based upon Eslamian's violation of the TDO after his addition to the TDO on August 24, 2011. Equipco (UK) Ltd. and Skyco (UK) Ltd., two companies owned and operated by Eslamian, also were parties to settlement agreement and were added to the settlement order as related persons. In addition to other sanctions, the settlement provides that Eslamian, Equipco, and Skyco shall be subject to a conditionally-suspended denial order for a

The December 11, 2018 renewal order continued the denial of the export privileges of Mahan Airways, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Al Naser Airlines, Ali Abdullah Alhay, Bahar Safwa General Trading, Sky Blue Bird Group, and Issam Shammout.

On November 12, 2019, BIS, through OEE, submitted a written request for renewal of the TDO that issued on June 5, 2019. The written request was made more than 20 days before the TDO's scheduled expiration. Notice of the renewal request was provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received. Furthermore, no appeal of the related person determinations made as part of the September 3, 2010, February 25, 2011, August 24, 2011, April 9, 2012, February 4, 2013, and July 13, 2015 renewal or modification orders has been made by Kosarian Fard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, or Issam Shammout.[10]

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue or renew an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent [.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

B. The TDO and BIS's Request for Renewal

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, and the renewal and modification orders subsequently issued in this matter, including the May 21, 2015 modification order and the renewal order issued on June 5, 2019, and the evidence developed over the course of this investigation, which indicate a blatant disregard of U.S. export controls and the TDO. The initial TDO was issued as a result of evidence that showed that Mahan Airways and other parties engaged in conduct prohibited by the EAR by knowingly re-exporting to Iran three U.S.-origin aircraft, specifically Boeing 747s (''Aircraft 1–3''), items subject to the EAR and classified under Export Control Classification Number (''ECCN'') 9A991.b, without the required U.S. Government authorization. Further evidence submitted by BIS indicated that Mahan Airways was involved in the attempted re-export of three additional U.S.-origin Boeing 747s (''Aircraft 4–6'') to Iran.

As discussed in the September 17, 2008 renewal order, evidence presented by BIS indicated that Aircraft 1–3 continued to be flown on Mahan Airways' routes after issuance of the TDO, in violation of the Regulations and the TDO itself.[11] It also showed that Aircraft 1–3 had been flown in further violation of the Regulations and the TDO on the routes of Iran Air, an Iranian Government airline. Moreover, as discussed in the March 16, 2009, September 11, 2009 and March 9, 2010 renewal orders, Mahan Airways registered Aircraft 1–3 in Iran, obtained Iranian tail numbers for them (EP–MNA, EP–MNB, and EP–MNE, respectively), and continued to operate at least two of them in violation of the Regulations and the TDO,[12] while also committing an additional knowing and willful violation when it negotiated for and acquired an additional U.S.-origin aircraft. The additional acquired aircraft was an MD–82 aircraft, which subsequently was painted in Mahan Airways' livery and flown on multiple Mahan Airways' routes under tail number TC–TUA.

The March 9, 2010 renewal order also noted that a court in the United Kingdom (''U.K.'') had found Mahan Airways in contempt of court on February 1, 2010, for failing to comply with that court's December 21, 2009 and January 12, 2010 orders compelling Mahan Airways to remove the Boeing 747s from Iran and ground them in the Netherlands. Mahan Airways and the Balli Group Respondents had been litigating before the U.K. court concerning ownership and control of Aircraft 1–3. In a letter to the U.K. court dated January 12, 2010, Mahan Airways' Chairman indicated, *inter alia,* that Mahan Airways opposes U.S. Government actions against Iran, that it continued to operate the aircraft on its routes in and out of Tehran (and had 158,000 ''forward bookings'' for these aircraft), and that it wished to continue to do so and would pay damages if required by that court, rather than ground the aircraft.

The September 3, 2010 renewal order discussed the fact that Mahan Airways' violations of the TDO extended beyond operating U.S.-origin aircraft and attempting to acquire additional U.S.-origin aircraft. In February 2009, while subject to the TDO, Mahan Airways participated in the export of computer motherboards, items subject to the Regulations and designated as EAR99, from the United States to Iran, via the United Arab Emirates (''UAE''), in violation of both the TDO and the Regulations, by transporting and/or forwarding the computer motherboards from the UAE to Iran. Mahan Airways' violations were facilitated by Gatewick LLC, which not only participated in the transaction, but also has stated to BIS that it acted as Mahan Airways' sole booking agent for cargo and freight forwarding services in the UAE.

Moreover, in a January 24, 2011 filing in the U.K. court, Mahan Airways asserted that Aircraft 1–3 were not being used, but stated in pertinent part that the aircraft were being maintained in Iran especially ''in an airworthy condition'' and that, depending on the outcome of its U.K. court appeal, the aircraft ''could immediately go back into service . . . on international routes into and out of Iran.'' Mahan Airways' January 24, 2011 submission to U.K. Court of Appeal, at p. 25, ¶¶ 108, 110. This clearly stated intent, both on its own and in conjunction with Mahan Airways' prior misconduct and statements, demonstrated the need to renew the TDO in order to prevent imminent future violations. Two of these three 747s subsequently were

period of four years from the date of the settlement order.

[10] A party named or added as a related person may not oppose the issuance or renewal of the underlying temporary denial order, but may file an appeal of the related person determination in accordance with Section 766.23(c). See also note 2, *supra.*

[11] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

[12] The third Boeing 747 appeared to have undergone significant service maintenance and may not have been operational at the time of the March 9, 2010 renewal order.

removed from Iran and are no longer in Mahan Airways' possession. The third of these 747s remained in Iran under Mahan's control. Pursuant to Executive Order 13224, it was designated a Specially Designated Global Terrorist (''SDGT'') by the U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') on September 19, 2012.[13] Furthermore, as discussed in the February 4, 2013 Order, open source information indicated that this 747, painted in the livery and logo of Mahan Airways, had been flown between Iran and Syria, and was suspected of ferrying weapons and/or other equipment to the Syrian Government from Iran's Islamic Revolutionary Guard Corps.

In addition, as first detailed in the July 1, 2011 and August 24, 2011 orders, and discussed in subsequent renewal orders in this matter, Mahan Airways also continued to evade U.S. export control laws by operating two Airbus A310 aircraft, bearing Mahan Airways' livery and logo, on flights into and out of Iran.[14] At the time of the July 1, 2011 and August 24, 2011 orders, these Airbus A310s were registered in France, with tail numbers F–OJHH and F–OJHI, respectively.[15] The August 2012 renewal order also found that Mahan Airways had acquired another Airbus A310 aircraft subject to the Regulations, with MSN 499 and Iranian tail number EP–VIP, in violation of the Regulations.[16] On September 19, 2012, all three Airbus A310 aircraft (tail numbers F–OJHH, F–OJHI, and EP–VIP) were designated as SDGTs.[17]

The February 4, 2013 renewal order laid out further evidence of continued and additional efforts by Mahan Airways and other persons acting in concert with Mahan, including Kral Aviation and another Turkish company, to procure U.S.-origin engines—two GE CF6–50C2 engines, with MSNs 517621 and 517738, respectively—and other aircraft parts in violation of the TDO and the Regulations.[18] The February 4, 2013 order also added Mehdi Bahrami as a related person in accordance with Section 766.23 of the Regulations. Bahrami, a Mahan Vice-President and the head of Mahan's Istanbul Office, also was involved in Mahan's acquisition of the original three Boeing 747s (Aircraft 1–3) that resulted in the original TDO, and has had a business relationship with Mahan dating back to 1997.

The July 31, 2013 renewal order detailed additional evidence obtained by OEE showing efforts by Mahan Airways to obtain another GE CF6–50C2 aircraft engine (MSN 528350) from the United States via Turkey. Multiple Mahan employees, including Mehdi Bahrami, were involved in or aware of matters related to the engine's arrival in Turkey from the United States, plans to visually inspect the engine, and prepare it for shipment from Turkey.

Mahan Airways sought to obtain this U.S.-origin engine through Pioneer Logistics Havacilik Turizm Yonetim Danismanlik (''Pioneer Logistics''), an aircraft parts supplier located in Turkey, and its director/operator, Gulnihal Yegane, a Turkish national who previously had conducted Mahan related business with Mehdi Bahrami and Ali Eslamian. Moreover, as referenced in the July 31, 2013 renewal order, a sworn affidavit by Kosol Surinanda, also known as Kosol Surinandha, Managing Director of Mahan's General Sales Agent in Thailand, stated that the shares of Pioneer Logistics for which he was the listed owner were ''actually the property of and owned by Mahan.'' He further stated that he held ''legal title to the shares until otherwise required by Mahan'' but would ''exercise the rights granted to [him] exactly and only as instructed by Mahan and [his] vote and/or decisions [would] only and exclusively reflect the wills and demands of Mahan[.]'' [19]

The January 24, 2014 renewal order outlined OEE's continued investigation of Mahan Airways' activities and detailed an attempt by Mahan, which OEE thwarted, to obtain, via an Indonesian aircraft parts supplier, two U.S.-origin Honeywell ALF–502R–5 aircraft engines (MSNs LF5660 and LF5325), items subject to the Regulations, from a U.S. company located in Texas. An invoice of the Indonesian aircraft parts supplier dated March 27, 2013, listed Mahan Airways as the purchaser of the engines and included a Mahan ship-to address. OEE also obtained a Mahan air waybill dated March 12, 2013, listing numerous U.S.-origin aircraft parts subject to the Regulations—including, among other items, a vertical navigation gyroscope, a transmitter, and a power control unit—being transported by Mahan from Turkey to Iran in violation of the TDO.

The July 22, 2014 renewal order discussed open source evidence from the March–June 2014 time period regarding two BAE regional jets, items subject to the Regulations, that were painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MOI and EP–MOK, respectively.[20] In addition, aviation industry resources indicated that these aircraft were obtained by Mahan Airways in late November 2013 and June 2014, from Ukrainian Mediterranean Airline, a Ukrainian airline that was added to BIS's Entity List (Supplement No. 4 to Part 744 of the Regulations) on August 15, 2011, for acting contrary to the national security and foreign policy interests of the

[13] *See http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.*

[14] The Airbus A310s are powered with U.S.-origin engines. The engines are subject to the Regulations and classified under Export Control Classification (''ECCN'') 9A991.d. The Airbus A310s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the Regulations. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[15] OEE subsequently presented evidence that after the August 24, 2011 renewal, Mahan Airways worked along with Kerman Aviation and others to de-register the two Airbus A310 aircraft in France and to register both aircraft in Iran (with, respectively, Iranian tail numbers EP–MHH and EP–MHI). It was determined subsequent to the February 15, 2012 renewal order that the registration switch for these A310s was cancelled and that Mahan Airways then continued to fly the aircraft under the original French tail numbers (F–OJHH and F–OJHI, respectively). Both aircraft apparently remain in Mahan Airways' possession.

[16] See note 14, *supra.*

[17] *See http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20120919.aspx.* Mahan Airways was previously designated by OFAC as a SDGT on October 18, 2011. 77 FR 64427 (October 18, 2011).

[18] Kral Aviation was referenced in the February 4, 2013 renewal order as ''Turkish Company No. 1.'' Kral Aviation purchased a GE CF6–50C2 aircraft engine (MSN 517621) from the United States in July 2012, on behalf of Mahan Airways. OEE was able to prevent this engine from reaching Mahan by issuing a redelivery order to the freight forwarder in accordance with Section 758.8 of the Regulations. OEE also issued Kral Aviation a redelivery order for the second CF6–50C2 engine (MSN 517738) on July 30, 2012. The owner of the second engine subsequently cancelled the item's sale to Kral Aviation. In September 2012, OEE was alerted by a U.S. exporter that another Turkish company (''Turkish Company No. 2'') was attempting to purchase aircraft spare parts intended for re-export by Turkish Company No. 2 to Mahan Airways. *See* February 4, 2013 renewal order.

On December 31, 2013, Kral Aviation was added to BIS's Entity List, Supplement No. 4 to Part 744 of the Regulations. *See* 78 FR 75458 (Dec. 12, 2013). Companies and individuals are added to the Entity List for engaging in activities contrary to the national security or foreign policy interests of the United States. *See* 15 CFR 744.11.

[19] Pioneer Logistics, Gulnihal Yegane, and Kosol Surinanda also were added to the Entity List on December 12, 2013. *See* 78 FR 75458 (Dec. 12, 2013).

[20] The BAE regional jets are powered with U.S.-origin engines. The engines are subject to the EAR and classified under ECCN 9A991.d. These aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR. They are classified under ECCN 9A991.b. The export or reexport of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

United States.[21] Open source information indicated that at least EP–MOI remained active in Mahan's fleet, and that the aircraft was being operated on multiple flights in July 2014.

The January 16, 2015 renewal order detailed evidence of additional attempts by Mahan Airways to acquire items subject the Regulations in further violation of the TDO. Specifically, in March 2014, OEE became aware of an inertial reference unit bearing serial number 1231 (''the IRU'') that had been sent to the United States for repair. The IRU is a U.S.-origin item, subject to the Regulations, classified under ECCN 7A103, and controlled for missile technology reasons. Upon closer inspection, it was determined that IRU came from or had been installed on an Airbus A340 aircraft bearing MSN 056. Further investigation revealed that as of approximately February 2014, this aircraft was registered under Iranian tail number EP–MMB and had been painted in the livery and logo of Mahan Airways.

The January 16, 2015 renewal order also described related efforts by the Departments of Justice and Treasury to further thwart Mahan's illicit procurement efforts. Specifically, on August 14, 2014, the United States Attorney's Office for the District of Maryland filed a civil forfeiture complaint for the IRU pursuant to 22 U.S.C. 401(b) that resulted in the court issuing an Order of Forfeiture on December 2, 2014. EP–MMB remains listed as active in Mahan Airways' fleet and has been used on flights into and out of Iran as recently as December 19, 2017.

Additionally, on August 29, 2014, OFAC blocked the property and interests in property of Asian Aviation Logistics of Thailand, a Mahan Airways affiliate or front company, pursuant to Executive Order 13224. In doing so, OFAC described Mahan Airways' use of Asian Aviation Logistics to evade sanctions by making payments on behalf of Mahan for the purchase of engines and other equipment.[22]

The May 21, 2015 modification order detailed the acquisition of two aircraft, specifically an Airbus A340 bearing MSN 164 and an Airbus A321 bearing MSN 550, that were purchased by Al Naser Airlines in late 2014/early 2015 and were under the possession, control, and/or ownership of Mahan Airways.[23] The sales agreements for these two aircraft were signed by Ali Abdullah Alhay for Al Naser Airlines.[24] Payment information reveals that multiple electronic funds transfers (''EFT'') were made by Ali Abdullah Alhay and Bahar Safwa General Trading in order to acquire MSNs 164 and 550.

The May 21, 2015 modification order also laid out evidence showing the respondents' attempts to obtain other controlled aircraft, including aircraft physically located in the United States in similarly-patterned transactions during the same recent time period. Transactional documents involving two Airbus A320s bearing MSNs 82 and 99, respectively, again showed Ali Abdullah Alhay signing sales agreements for Al Naser Airlines.[25] A review of the payment information for these aircraft similarly revealed EFTs from Ali Abdullah Alhay and Bahar Safwa General Trading that follow the pattern described for MSNs 164 and 550, *supra.* MSNs 82 and 99 were detained by OEE Special Agents prior to their planned export from the United States.

The July 13, 2015 renewal order outlined evidence showing that Al Naser Airlines' attempts to acquire aircraft on behalf of Mahan Airways extended beyond MSNs 164 and 550 to include a total of nine aircraft.[26] Four of the aircraft, all of which are subject to the Regulations and were obtained by Mahan from Al Naser Airlines, had been issued the following Iranian tail numbers: EP–MMD (MSN 164), EP–MMG (MSN 383), EP–MMH (MSN 391) and EP–MMR (MSN 416), respectively.[27] Publicly available flight tracking information provided evidence that at the time of the July 13, 2015 renewal, both EP–MMH and EP–MMR were being actively flown on routes into and out of Iran in violation of the Regulations.[28]

The January 7, 2016 renewal order discussed evidence that Mahan Airways had begun actively flying EP–MMD on international routes into and out of Iran. Additionally, the January 7, 2016 order described publicly available aviation database and flight tracking information indicating that Mahan Airways continued efforts to acquire Iranian tail numbers and press into active service under Mahan's livery and logo at least two more of the Airbus A340 aircraft it had obtained from or through Al Naser Airlines: EP–MME (MSN 371) and EP–MMF (MSN 376), respectively.

[21] *See* 76 FR 50407 (Aug. 15, 2011). The July 22, 2014 renewal order also referenced two Airbus A320 aircraft painted in the livery and logo of Mahan Airways and operating under Iranian tail numbers EP–MMK and EP–MML, respectively. OEE's investigation also showed that Mahan obtained these aircraft in November 2013, from Khors Air Company, another Ukrainian airline that, like Ukrainian Mediterranean Airlines, was added to BIS's Entity List on August 15, 2011. Open source evidence indicates the two Airbus A320 aircraft may be been transferred by Mahan Airways to another Iranian airline in October 2014, and issued Iranian tail numbers EP–APE and EP–APF, respectively.

[22] See *http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx. See* 79 FR 55073 (Sep. 15, 2014). OFAC also blocked the property and property interests of Pioneer Logistics of Turkey on August 29, 2014. *Id.* Mahan Airways' use of Pioneer Logistics in an effort to evade the TDO and the Regulations was discussed in a prior renewal order, as summarized, *supra,* at 14. BIS added both Asian Aviation Logistics and Pioneer Logistics to the Entity List on December 12, 2013. *See* 78 FR 75458 (Dec. 12, 2013).

[23] Both of these aircraft are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. Both aircraft contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[24] The evidence obtained by OEE showed Ali Abdullah Alhay as a 25% owner of Al Naser Airlines.

[25] Both aircraft were physically located in the United States and therefore are subject to the Regulations pursuant to Section 734.3(a)(1). Moreover, these Airbus A320s are powered by U.S.-origin engines that are subject to the Regulations and classified under Export Control Classification Number ECCN 9A991.d. The Airbus A320s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[26] This evidence included a press release dated May 9, 2015, that appeared on Mahan Airways' website and stated that Mahan ''added 9 modern aircraft to its air fleet [,]'' and that the newly acquired aircraft included eight Airbus A340s and one Airbus A321. See *http://www.mahan.aero/en/mahan-air/press-room/44.* The press release was subsequently removed from Mahan Airways' website. Publicly available aviation databases similarly showed that Mahan had obtained nine additional aircraft from Al Naser Airlines in May 2015, including MSNs 164 and 550. As also discussed in the July 13, 2015 renewal order, Sky Blue Bird Group, via Issam Shammout, was actively involved in Al Naser Airlines' acquisition of MSNs 164 and 550, and the attempted acquisition of MSNs 82 and 99 (which were detained by OEE).

[27] The Airbus A340s are powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340s contain controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result are subject to the EAR regardless of their location. The aircraft are classified under ECCN 9A991.b. The export or re-export of these aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[28] There is some publicly available information indicating that the aircraft Mahan Airways is flying under Iranian tail number EP–MMR is now MSN 615, rather than MSN 416. Both aircraft are Airbus A340 aircraft that Mahan acquired from Al Naser Airlines in violation of the Regulations. Moreover, both aircraft were designated as SDGTs by OFAC on May 21, 2015, pursuant to Executive Order 13224. See 80 FR 30762 (May 29, 2015).

The July 7, 2016 renewal order described Mahan Airways' acquisition of a BAE Avro RJ–85 aircraft (MSN 2392) in violation of the Regulations and its subsequent registration under Iranian tail number EP–MOR.[29] This information was corroborated by publicly available information on the website of Iran's civil aviation authority. The July 7, 2016 order also outlined Mahan's continued operation of EP–MMF in violation of the Regulations on routes from Tehran, Iran to Beijing, China and Shanghai, China, respectively.

The December 30, 2016 renewal order outlined Mahan's continued operation of multiple Airbus aircraft, including EP–MMD (MSN 164), EP–MMF (MSN 376), and EP–MMH (MSN 391), which were acquired from or through Al Naser Airlines, as previously detailed in pertinent part in the July 13, 2015 and January 7, 2016 renewal orders. Publicly available flight tracking information showed that the aircraft were operated on flights into and out of Iran, including from/to Beijing, China, Kuala Lumpur, Malaysia, and Istanbul, Turkey.[30]

The June 27, 2017 renewal order included similar evidence regarding Mahan Airways' operation of multiple Airbus aircraft subject to the Regulations, including, but not limited to, aircraft procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Moscow, Russia, Shanghai, China and Kabul, Afghanistan. The June 27, 2017 order also detailed evidence concerning a suspected planned or attempted diversion to Mahan of an Airbus A340 subject to the Regulations that had first been mentioned in OEE's December 13, 2016 renewal request.

The December 20, 2017 renewal order presented evidence that a Mahan employee attempted to initiate negotiations with a U.S. company for the purchase of an aircraft subject to the Regulations and classified under ECCN 9A610. Moreover, the order highlighted Al Naser Airlines' acquisition, via lease, of at least possession and/or control of a Boeing 737 (MSN 25361), bearing tail number YR–SEB, and an Airbus A320 (MSN 357), bearing tail number YR–SEA, from a Romanian company in violation of the TDO and the Regulations.[31] Open source information indicates that after the December 20, 2017 renewal order publicly exposed Al Naser's acquisition of these two aircraft (MSNs 25361 and 357), the leases were subsequently cancelled and the aircraft returned to their owner.

The December 20, 2017 renewal order also included evidence indicating that Mahan Airways was continuing to operate a number of aircraft subject to the Regulations, including aircraft originally procured from or through Al Naser Airlines, on flights into and out of Iran, including from/to Lahore, Pakistan, Shanghai, China, Ankara, Turkey, Kabul, Afghanistan, and Baghdad, Iraq.

The June 14, 2018 renewal order outlined evidence that Mahan began actively operating EP–MMT, an Airbus A340 aircraft (MSN 292) acquired in 2017 and previously registered in Kazakhstan under tail number UP–A4003, on international flights into and out of Iran.[32] It also discussed evidence that Mahan continued to operate a number of aircraft subject to the Regulations, including, but not limited to, EP–MME, EP–MMF, and EP–MMH, on international flights into and out of Iran, including from/to Beijing, China.

The June 14, 2018 renewal order also noted OFAC's May 24, 2018 designation of Otik Aviation, a/k/a Otik Havacilik Sanayi Ve Ticaret Limited Sirketi, of Turkey, as an SDGT pursuant to Executive Order 13224, for providing material support to Mahan, as well as OFAC's designation as SDGTs of an additional twelve aircraft in which Mahan has an interest.[33] The June 14, 2018 order also cited the April 2018 arrest and arraignment of a U.S. citizen on a three-count criminal information filed in the United States District Court for the District of New Jersey involving the unlicensed exports of U.S.-origin aircraft parts valued at over $2 million to Iran, including to Mahan Airways.

The December 11, 2018 renewal order detailed publicly available information showing that Mahan Airways had continued operating a number of aircraft subject to the EAR, including, but not limited to, EP–MMB, EP–MME, EP–MMF, and EP–MMQ, on international flights into and out of Iran from/to Istanbul, Turkey, Guangzhou, China, Bangkok, Thailand, and Dubai, UAE.[34] It also discussed that OEE's continued investigation of Mahan Airways and its affiliates and agents had resulted in an October 2018 guilty plea by Arzu Sagsoz, a Turkish national, in the U.S. District Court for the District of Columbia, stemming from her involvement in a conspiracy to export a U.S.-origin aircraft engine, valued at approximately $810,000, to Mahan.

The December 11, 2018 order also noted OFAC's September 14, 2018 designation of Mahan-related entities as SDGTs pursuant to Executive Order 13224, namely, My Aviation Company Limited, of Thailand, and Mahan Travel and Tourism SDN BHD, a/k/a Mahan Travel a/k/a Mihan Travel & Tourism SDN BHD, of Malaysia.[35] As general sales agents for Mahan Airways, these

[29] The BAE Avro RJ–85 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The BAE Avro RJ–85 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the EAR regardless of its location. The aircraft is classified under ECCN 9A991.b, and its export or re-export to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[30] Specifically, on December 22, 2016, EP–MMD (MSN 164) flew from Dubai, UAE to Tehran, Iran. Between December 20 and December 22, 2016, EP–MMF (MSN 376) flew on routes from Tehran, Iran to Beijing, China and Istanbul, Turkey, respectively. Between December 26 and December 28, 2016, EP–MMH (MSN 391) flew on routes from Tehran, Iran to Kuala Lumpur, Malaysia.

[31] The Airbus A320 is powered with U.S.-origin engines, which are subject to the EAR and classified under Export Control Classification (''ECCN'') 9A991.d. The engines are valued at more than 10 percent of the total value of the aircraft, which consequently is subject to the EAR. The aircraft is classified under ECCN 9A991.b, and its export or reexport to Iran would require U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations.

[32] The Airbus A340 is powered by U.S.-origin engines that are subject to the Regulations and classified under ECCN 9A991.d. The Airbus A340 contains controlled U.S.-origin items valued at more than 10 percent of the total value of the aircraft and as a result is subject to the Regulations regardless of its location. The aircraft is classified under ECCN 9A991.b. The export or re-export of this aircraft to Iran requires U.S. Government authorization pursuant to Sections 742.8 and 746.7 of the Regulations. On June 4, 2018, EP–MMT (MSN 292) flew from Bangkok, Thailand to Tehran, Iran.

[33] *See* 83 FR 27828 (June 14, 2018). OFAC's related press release stated in part that ''[o]ver the last several years, Otik Aviation has procured and delivered millions of dollars in aviation-related spare and replacement parts for Mahan Air, some of which are procured from the United States and the European Union. As recently as 2017, Otik Aviation continued to provide Mahan Air with replacement parts worth well over $100,000 per shipment, such as aircraft brakes.'' The twelve additional Mahan-related aircraft that were designated are: EP–MMA (MSN 20), EP–MMB (MSN 56), EP–MMC (MSN 282), EP–MMJ (MSN 526), EP–MMV (MSN 2079), EP–MNF (MSN 547), EP–MOD (MSN 3162), EP–MOM (MSN 3165), EP–MOP (MSN 2257), EP–MOQ (MSN 2261), EP–MOR (MSN 2392), and EP–MOS (MSN 2347). *See https://home.treasury.gov/news/press-releases/sm0395. See also https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180524.aspx.*

[34] Flight tracking information showed that on December 10, 2018, EP–MMB (MSN 56) flew from Istanbul, Turkey to Tehran, Iran, and EP–MME (MSN 371) flew from Guangzhou, China to Tehran, Iran. Additionally, on December 6, 2018, EP–MMF (MSN 376) flew from Bangkok, Thailand to Tehran, Iran, and on December 9, 2018, EP–MMQ (MSN 449) flew on routes between Dubai, United Arab Emirates and Tehran, Iran.

[35] *See* 83 FR 34301 (July 19, 2018) (designation of Mahan Travel and Tourism SDN BHD on July 9, 2018), and 83 FR 53359 (Oct. 22, 2018) (designation of My Aviation Company Limited and updating of entry for Mahan Travel and Tourism SDN BHD on September 14, 2018).

companies sold cargo space aboard Mahan Airways' flights, including on flights to Iran, and provided other services to or for benefit of Mahan Airways and its operations.[36]

The June 5, 2019 renewal order highlighted Mahan's continued violation of the TDO and the Regulations. An end-use check conducted by BIS in Malaysia in March 2019, uncovered evidence that on approximately ten occasions, Mahan had caused, aided and/or abetted the unlicensed export of U.S.-origin items subject to the Regulations from the United States to Iran via Malaysia. The items included helicopter shafts, transmitters, and other aircraft parts, some of which are listed on the Commerce Control List and controlled on anti-terrorism grounds. The June 5, 2019 order also detailed publicly available flight tracking information showing that Mahan continues to unlawfully operate a number of aircraft subject to the EAR on flights into and out of Iran, including on routes to and from Damascus Syria.[37]

The June 5, 2019 order also described actions taken by both BIS and OFAC to thwart efforts by entities connected to or acting on behalf of Mahan Airways to violate U.S. export controls and sanctions related to Iran. On May 14, 2019, BIS added Manohar Nair, Basha Asmath Shaikh, and two co-located companies that they operate, Emirates Hermes General Trading and Presto Freight International, LLC, to the Entity List pursuant to Section 744.11 of the Regulations, including for engaging in activities to procure U.S.-origin items on Mahan's behalf.[38] On January 24, 2019, OFAC designated as SDGTs Flight Travel LLC, which is Mahan's general service agent in Yerevan, Armenia, and Qeshm Fars Air, an Iranian airline which operates two U.S.-origin Boeing 747s [39] and is owned or controlled by Mahan, and also linked to the Islamic Revolutionary Guard Corps-Qods Force (IRGC–QF).[40]

OEE's November 12, 2019 renewal request and on-going investigation demonstrate that Mahan Airways continues to take actions in violation of the TDO and the Regulations, both directly and through its widespread network of procurement agents, front companies, and intermediaries. In June 2019, OEE became aware that U.S.-origin passenger flight and database management software subject to the Regulations was provided to a company in Turkey that was subsequently used to facilitate and service Mahan Airways operations into and out of Turkey in further violation of the Regulations.

Additionally, open source information, including flight tracking data and news articles published in October 2019, shows that Mahan Airways is now operating a U.S.-origin Boeing 747 on routes between Iranian airports in Tehran, Kish Island, and Mashhad. This aircraft, bearing Iranian tail number EP–MNB, appears to be one of the three aircraft that Mahan illegally acquired via Blue Airways of Armenia and U.K.-based Balli Group that resulted in the issuance of the original TDO. *See supra* at 10–12.

Evidence also has been presented showing that as recently as on or about November 11, 2019, Mahan caused, aided and/or abetted the unlicensed export of a U.S.-origin atomic absorption spectrometer, an item subject to the Regulations, from the United States to Iran via the UAE. By transporting the item from the UAE to Iran, Mahan violated the plain language of the TDO, which specifically prohibits Mahan from, inter alia, transporting any item that is subject to the Regulations and has been exported from the United States.

Mahan Airways also continues to violate the TDO by operating a number of aircraft subject to the Regulations, including, but not limited to, EP–MME, EP–MMF, and EP–MMQ, aircraft originally acquired from Al Naser Airlines, on international flights into and out of Iran from/to Guangzhou, China, Istanbul, Turkey, and Kuala Lumpur, Malaysia. These flights have continued since the renewal request was submitted, including November 20–23, 2019. [41]

C. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that the denied persons have acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should continue to avoid dealing with Mahan Airways and Al Naser Airlines and the other denied persons, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

IV. Order

It is therefore ordered:

First, that MAHAN AIRWAYS, Mahan Tower, No. 21, Azadegan St., M.A. Jenah Exp. Way, Tehran, Iran; PEJMAN MAHMOOD KOSARAYANIFARD A/K/A KOSARIAN FARD, P.O. Box 52404, Dubai, United Arab Emirates; MAHMOUD AMINI, G#22 Dubai Airport Free Zone, P.O. Box 393754, Dubai, United Arab Emirates, and P.O. Box 52404, Dubai, United Arab Emirates, and Mohamed Abdulla Alqaz Building, Al Maktoum Street, Al Rigga, Dubai, United Arab Emirates; KERMAN AVIATION A/K/A GIE KERMAN AVIATION, 42 Avenue Montaigne 75008, Paris, France; SIRJANCO TRADING LLC, P.O. Box 8709, Dubai, United Arab Emirates; MAHAN AIR GENERAL TRADING LLC, 19th Floor Al Moosa Tower One, Sheik Zayed Road, Dubai 40594, United Arab Emirates; MEHDI BAHRAMI, Mahan Airways-Istanbul Office, Cumhuriye Cad. Sibil

[36] OFAC's press release concerning its designation of My Aviation Company Limited on September 14, 2018, states in part that ''[t]his Thailand-based company has disregarded numerous U.S. warnings, issued publicly and delivered bilaterally to the Thai government, to sever ties with Mahan Air.'' My Aviation provides cargo services to Mahan Airways, including freight booking, and works with local freight forwarding entities to ship cargo on regularly-scheduled Mahan Airways' flights to Tehran, Iran. My Aviation has also provided Mahan Airways with passenger booking services. *See https://home.treasury.gov/news/press-releases/sm484.*

[37] Specifically, on May 26, 2019, EP–MMJ (MSN 526) flew from Damascus, Syria to Tehran, Iran. In addition, on May 24, 2019, EP–MNF (MSN 547) flew on routes between Moscow, Russia and Tehran, and on May 23, 2019, EP–MMF (MSN 376) flew from Dubai, UAE to Tehran.

[38] *See* 84 FR 21233 (May 14, 2019).

[39] These 747s are registered in Iran with tail numbers EP–FAA and EP–FAB, respectively.

[40] OFAC's press release concerning these designations states that Qeshm Fars Air was being designated for ''being owned or controlled by Mahan Air, as well as for assisting in, sponsoring, or providing financial, material or technological support for, or financial or other services to or in support of, the IRGC–QF,'' and that Flight Travel LLC was being designated for ''acting for or on behalf of Mahan Air.'' It further states, inter alia, that ''Mahan Air employees fill Qeshm Fars Air management positions, and Mahan Air provides technical and operational support for Qeshm Fars Air, facilitating the airline's illicit operations.'' *See https://home.treasury.gov/news/press-releases/* sm590. *See also https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190124.aspx.*

[41] Publicly available flight tracking information shows that on November 23, 2019, EP–MME (MSN 371) flew from Guangzhou, China to Tehran, Iran, and on November 21, 2019, EP–MMF (MSN 376) flew on routes between Istanbul, Turkey and Tehran, Iran. Additionally, on November 20, 2019, EP–MMQ (MSN 449) flew from Kuala Lumpur, Malaysia, to Tehran, Iran.

Apt No: 101 D:6, 34374 Emadad, Sisli Istanbul, Turkey; AL NASER AIRLINES A/K/A AL-NASER AIRLINES A/K/A AL NASER WINGS AIRLINE A/K/A ALNASER AIRLINES AND AIR FREIGHT LTD., Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Al Amirat Street, Section 309, St. 3/H.20, Al Mansour, Baghdad, Iraq, and P.O. Box 28360, Dubai, United Arab Emirates, and P.O. Box 911399, Amman 11191, Jordan; ALI ABDULLAH ALHAY A/K/A ALI ALHAY A/K/A ALI ABDULLAH AHMED ALHAY, Home 46, Al-Karrada, Babil Region, District 929, St 21, Beside Al Jadirya Private Hospital, Baghdad, Iraq, and Anak Street, Qatif, Saudi Arabia 61177; BAHAR SAFWA GENERAL TRADING, P.O. Box 113212, Citadel Tower, Floor-5, Office #504, Business Bay, Dubai, United Arab Emirates, and P.O. Box 8709, Citadel Tower, Business Bay, Dubai, United Arab Emirates; SKY BLUE BIRD GROUP A/K/A SKY BLUE BIRD AVIATION A/K/A SKY BLUE BIRD LTD A/K/A SKY BLUE BIRD FZC, P.O. Box 16111, Ras Al Khaimah Trade Zone, United Arab Emirates; and ISSAM SHAMMOUT A/K/A MUHAMMAD ISAM MUHAMMAD ANWAR NUR SHAMMOUT A/K/A ISSAM ANWAR, Philips Building, 4th Floor, Al Fardous Street, Damascus, Syria, and Al Kolaa, Beirut, Lebanon 151515, and 17–18 Margaret Street, 4th Floor, London, W1W 8RP, United Kingdom, and Cumhuriyet Mah. Kavakli San St. Fulya, Cad. Hazar Sok. No.14/A Silivri, Istanbul, Turkey, and when acting for or on their behalf, any successors or assigns, agents, or employees (each a ''Denied Person'' and collectively the ''Denied Persons'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Export Administration Regulations (''EAR''), or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or engaging in any other activity subject to the EAR; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by ownership, control, position of responsibility, affiliation in the conduct of trade or business may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Sections 766.24(e) of the EAR, Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022. In accordance with the provisions of Sections 766.23(c)(2) and 766.24(e)(3) of the EAR, Pejman Mahmood Kosarayanifard, Mahmoud Amini, Kerman Aviation, Sirjanco Trading LLC, Mahan Air General Trading LLC, Mehdi Bahrami, Sky Blue Bird Group, and/or Issam Shammout may, at any time, appeal their inclusion as a related person by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and/or Bahar Safwa General Trading as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Mahan Airways, Al Naser Airlines, Ali Abdullah Alhay, and Bahar Safwa General Trading and each related person, and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Dated: December 2, 2019.

Douglas R. Hassebrock,

Acting Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2019–26379 Filed 12–5–19; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of a review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete a Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of a proceeding where Commerce considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

Opportunity to Request a Review: Not later than the last day of December 2019,[2] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in December for the following periods:

	Period of review
Antidumping Duty Proceedings	
BRAZIL: Carbon Steel Butt-Weld Pipe Fittings A–351–602	12/1/18–11/30/19
CHILE: Certain Preserved Mushrooms A–337–804	12/1/18–11/30/19
GERMANY: Non-Oriented Electrical Steel A–428–843	12/1/18–11/30/19
INDIA:	
Carbazole Violet Pigment 23 A–533–838	12/1/18–11/30/19
Certain Hot-Rolled Carbon Steel Flat Products A–533–820	12/1/18–11/30/19

[1] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[2] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when Commerce is closed.

	Period of review
Commodity Matchbooks A–533–848	12/1/18–11/30/19
Stainless Steel Wire Rod A–533–808	12/1/18–11/30/19
INDONESIA: Certain Hot-Rolled Carbon Steel Flat Products A–560–812	12/1/18–11/30/19
JAPAN:	
Prestressed Concrete Steel Wire Strand A–588–068	12/1/18–11/30/19
Non-Oriented Electrical Steel A–588–872	12/1/18–11/30/19
Welded Large Diameter Line Pipe A–588–857	12/1/18–11/30/19
OMAN: Circular Welded Carbon-Quality Steel Pipe A–523–812	12/1/18–11/30/19
PAKISTAN: Circular Welded Carbon-Quality Steel Pipe A–535–903	12/1/18–11/30/19
REPUBLIC OF KOREA:	
Non-Oriented Electrical Steel A–580–872	12/1/18–11/30/19
Welded Astm A–312 Stainless Steel Pipe A–580–810	12/1/18–11/30/19
Welded Line Pipe A–580–876	12/1/18–11/30/19
RUSSIA: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products A–821–809	12/1/18–11/30/19
SOCIALIST REPUBLIC OF VIETNAM: Uncovered Innerspring Units A–552–803	12/1/18–11/30/19
SOUTH AFRICA: Uncovered Innerspring Units A–791–821	12/1/18–11/30/19
SWEDEN: Non-Oriented Electrical Steel A–401–809	12/1/18–11/30/19
TAIWAN:	
Carbon Steel Butt-Weld Pipe Fittings A–583–605	12/1/18–11/30/19
Non-Oriented Electrical Steel A–583–851	12/1/18–11/30/19
Steel Wire Garment Hangers A–583–849	12/1/18–11/30/19
Welded Astm A–312 Stainless Steel Pipe A–583–815	12/1/18–11/30/19
THE PEOPLE'S REPUBLIC OF CHINA:	
Carbazole Violet Pigment 23 A–570–892	12/1/18–11/30/19
Cased Pencils A–570–827	12/1/18–11/30/19
Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules A–570–979	12/1/18–11/30/19
Hand Trucks and Certain Parts Thereof A–570–891	12/1/18–11/30/19
Honey A–570–863	12/1/18–11/30/19
Malleable Cast Iron Pipe Fittings A–570–881	12/1/18–11/30/19
Melamine A–570–020	12/1/18–11/30/19
Multilayered Wood Flooring A–570–970	12/1/18–11/30/19
Non-Oriented Electrical Steel A–570–996	12/1/18–11/30/19
Porcelain-On-Steel Cooking Ware A–570–506	12/1/18–11/30/19
Silicomanganese A–570–828	12/1/18–11/30/19
TURKEY: Welded Line Pipe A–489–822	12/1/18–11/30/19
UNITED ARAB EMIRATES: Circular Welded Carbon-Quality Steel Pipe A–520–807	12/1/18–11/30/19
Countervailing Duty Proceedings	
INDIA:	
Carbazole Violet Pigment 23 C–533–839	1/1/18–12/31/18
Certain Hot-Rolled Carbon Steel Flat Products C–533–821	1/1/18–12/31/18
Commodity Matchbooks C–533–849	1/1/18–12/31/18
INDONESIA: Certain Hot-Rolled Carbon Steel Flat Products C–560–813	1/1/18–12/31/18
TAIWAN: Non-Oriented Electrical Steel C–583–852	1/1/18–12/31/18
THAILAND: Certain Hot-Rolled Carbon Steel Flat Products C–549–818	1/1/18–12/31/18
THE PEOPLE'S REPUBLIC OF CHINA:	
Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules C–570–980	1/1/18–12/31/18
Melamine C–570–021	1/1/18–12/31/18
New Pneumatic Off-the-Road Tires [3] C–570–913	1/1/18–12/31/18
Non-Oriented Electrical Steel C–570–997	1/1/18–12/31/18
Multilayered Wood Flooring C–570–971	1/1/18–12/31/18
TURKEY: Welded Line Pipe C–489–823	1/1/18–12/31/18
Suspension Agreements	
MEXICO:	
Sugar A–201–845	12/1/18–11/30/19
Sugar C–201–846	1/1/18–12/31/18

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's

[3] On September 3, 2019 (84 FR 45949), this order was inadvertently omitted from the opportunity notice for September anniversary month cases. This order has been revoked effective February 4, 2019. *See* 84 FR 20616 (May 10, 2019).

location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[4]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[5] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[6] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS website at *http://access.trade.gov.*[7] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

Commerce will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of December 2019. If Commerce does not receive, by the last day of December 2019, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 2, 2019.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2019–26349 Filed 12–5–19; 8:45 am]

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[4] *See also* the Enforcement and Compliance website at *http://trade.gov/enforcement/.*

[5] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[6] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

[7] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–930, C–570–931]

Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China: Continuation of Antidumping Duty Order and Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order and countervailing duty (CVD) order on circular welded austenitic stainless pressure pipe (WSPP) from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order and the CVD order.

DATES: Applicable December 6, 2019.

FOR FURTHER INFORMATION CONTACT: Eric B. Greynolds, AD/CVD Operations, Office III, and Thomas Hanna, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6071 and (202) 482–0835, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 17, 2009, Commerce published in the **Federal Register** the AD order on WSSP from China.[1] On March 19, 2009, Commerce published in the **Federal Register** the CVD order on WSSP from China.[2] On June 4, 2019, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act), Commerce published the initiation of the second sunset reviews of the *Orders*[3] and the ITC instituted its review of the Orders.[4]

[1] *See Antidumping Duty Order: Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China,* 74 FR 11351 (March 17, 2009) (*AD Order*).

[2] *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Countervailing Duty Order,* 74 FR 11712 (March 19, 2009) (*CVD Order*).

[3] The *AD Order* and *CVD Order* are collectively referred to as the *Orders.*

[4] *See Initiation of Five-Year (Sunset) Reviews,* 84 FR 25741 (June 4, 2019); *see also Welded Stainless*

Continued

On June 13, 2019, Commerce received notices of intent to participate in the sunset reviews from Bristol Metals, LLC, Felker Brothers Corporation, and Webco Industries, Inc. within the deadline specified in 19 CFR 351.218(d)(1)(i).[5] On June 18, 2019, Commerce also received a notice of intent to participate in the AD and CVD sunset review from Primus Pipe.[6] The domestic interested parties and Primus Pipe claimed interested party status under section 771(9)(C) of the Act as manufacturers in the United States of the domestic like product.[7]

On June 28, 2019, Commerce received complete and adequate substantive responses from the domestic interested parties filed within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[8] On July 5, 2019, Primus Pipe expressed its support for the substantive response filed by the domestic interested parties and incorporated them by reference.[9] Commerce received no substantive response from respondent interested parties. Pursuant to section 751(c)(3)(B) of the Act, Commerce conducted expedited (120-day) sunset reviews of the *Orders.*[10] On September 6, 2019, the ITC determined to conduct an expedited five-year review of the *Orders.*[11]

As a result of its reviews, Commerce determined, pursuant to sections 751(c)(1) and 752(b) and (c) of the Act, that revocation of the *Orders* on WSSP from China would likely lead to continuation or recurrence of dumping or countervailable subsidies. Commerce, therefore, notified the ITC of the magnitude of the margins of dumping and net countervailable subsidy rates likely to prevail should these *Orders* be revoked, in accordance with sections 752(b)(3) and (c)(3) of the Act.[12]

On November 25, 2019, the ITC published its determination that revocation of the *Orders* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to sections 751(c) and 752(a) of the Act.[13]

Scope of the *Orders*

The merchandise covered by these orders is circular welded austenitic stainless pressure pipe not greater than 14 inches in outside diameter. This merchandise includes, but is not limited to, the American Society for Testing and Materials (ASTM) A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications. ASTM A–358 products are only included when they are produced to meet ASTM A–312 or ASTM A–778 specifications, or comparable domestic or foreign specifications.

Excluded from the scope are: (1) Welded stainless mechanical tubing, meeting ASTM A–554 or comparable domestic or foreign specifications; (2) boiler, heat exchanger, superheater, refining furnace, feedwater heater, and condenser tubing, meeting ASTM A–249, ASTM A–688 or comparable domestic or foreign specifications; and (3) specialized tubing, meeting ASTM A–269, ASTM A–270 or comparable domestic or foreign specifications.

The subject imports are normally classified in subheadings 7306.40.5005; 7306.40.5040, 7306.40.5062, 7306.40.5064, and 7306.40.5085 of the Harmonized Tariff Schedule of the United States (HTSUS). They may also enter under HTSUS subheadings 7306.40.1010; 7306.40.1015; 7306.40.5042, 7306.40.5044, 7306.40.5080, and 7306.40.5090. The HTSUS subheadings are provided for convenience and customs purposes only, the written description of the scope of these orders is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Orders* on WSSP from China. U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year (sunset) reviews of these *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to APO of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

These five-year sunset reviews and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: December 2, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019–26359 Filed 12–5–19; 8:45 am]

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Steel Pressure Pipe from China, Malaysia, Thailand, and Vietnam; Institution of Five-Year Reviews, 84 FR 25567 (June 3, 2019).

[5] *See* Domestic Interested Parties' Letters, ''Welded Stainless Steel Pressure Pipe from China: Notice of Intent to Participate,'' dated June 13, 2019 (AD Notice to Participate); and ''Welded Stainless Steel Pressure Pipe from China: Notice of Intent to Participate,'' dated June 13, 2019 (CVD Notice to Participate).

[6] *See* Primus Pipe's Letters, ''Circular Welded Austenitic, Stainless Pressure Pipe from China: Notice of Intent to Participate,'' dated June 18, 2019 (Primus Pipe's AD Notice to Participate); and ''Circular Welded Austenitic, Stainless Pressure Pipe from China: Notice of Intent to Participate,'' dated June 18, 2019 (Primus Pipe's CVD Notice to Participate).

[7] *See* AD Notice to Participate at 2; Primus Pipe's AD Notice to Participate at 2; CVD Notice to Participate at 2; and Primus Pipe's CVD Notice to Participate at 2.

[8] *See* Domestic Interested Parties' Letters, ''Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China, Second Review: Substantive Response to Notice of Initiation,'' dated June 28, 2019; and ''Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China, Second Review: Substantive Response to Notice of Initiation,'' dated June 28, 2019.

[9] *See* Primus Pipe's Letters, ''Welded Stainless Steel Pipe Sunset Review: 2nd Review for China AD/CVD; 1st Review for Vietnam, Thailand and Malaysia; Substantive Response to Notice of Initiation,'' dated July 5, 2019; and ''Welded Stainless Steel Pipe Sunset Review: 2nd Review for China AD/CVD; 1st Review for Vietnam, Thailand and Malaysia; Substantive Response to Notice of Initiation,'' dated July 5, 2019.

[10] *See* Letter from Erin Begnal, Director, AD/CVD Operations, Enforcement and Compliance, U.S. Department of Commerce, to Nannette Christ, Director, Office of Investigations, July 29, 2019.

[11] *See* Explanation of Commission Determinations on Adequacy, EDIS Doc. 691660 (September 6, 2019).

[12] *See Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China: Final Results of the Expedited Second Sunset Review of the Antidumping Duty Order,* 84 FR 52462 (October 2, 2019); *see also Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China: Final Results of the Expedited Second Sunset Review of the Countervailing Duty Order,* 84 FR 52460 (October 2, 2019).

[13] *See Welded Stainless Steel Pressure Pipe from China, Malaysia, Thailand, and Vietnam; Determination,* 84 FR 64922 (November 25, 2019); *see also* Welded Stainless Steel Pressure Pipe from China, Malaysia, Thailand, and Vietnam: Investigation Nos. 731–TA–1210–1212 and 701–TA–454 and 731–TA–1144 (Second Review) (November 2019).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XR071]

Endangered and Threatened Species; Initiation of a Status Review for Queen Conch Under the Endangered Species Act (ESA)

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

ACTION: Notice of initiation of a status review; request for information.

SUMMARY: We, NMFS, announce the initiation of a status review of queen conch (*Strombus gigas*) to determine whether listing the species as endangered or threatened under the Endangered Species Act (ESA) is warranted. A comprehensive status review must be based on the best scientific and commercial data available at the time of the review. Therefore, we are asking the public to provide information on the queen conch that will inform our status review.

DATES: We must receive your information no later than February 4, 2020.

ADDRESSES: You may submit information for us to use in our status review, identifying it as ''Queen Conch Status Review (0648–XR071),'' by either of the following methods:

Electronic Submission: Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0141,* click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.

Mail or Hand-Delivery: Submit written comments to Calusa Horn, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Information 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 information received is a part of the public record and will generally be posted for public viewing on *http://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. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Calusa Horn at the above address, by phone at 727–551–5782 or *Calusa.Horn@noaa.gov,* or Maggie Miller, 301–427–8457 or *Margaret.H.Miller@noaa.gov.*

SUPPLEMENTARY INFORMATION: This notice announces our status review of queen conch under the ESA. On February 27, 2012, we received a petition from WildEarth Guardians to list the queen conch as threatened or endangered throughout all or a significant portion of their range under the ESA. We determined that the petitioned action may be warranted and published a positive 90-day finding in the **Federal Register** (77 FR 51763; August 27, 2012). After conducting a status review, we determined that listing queen conch as threatened or endangered under the ESA was not warranted and published our determination in the **Federal Register** (79 FR 65628; November 5, 2014). In making that determination, we first concluded that the queen conch was not presently in danger of extinction, nor was it likely to become so in the foreseeable future. We also evaluated whether there was a portion of the queen conch's range that was ''significant,'' applying the definition of that term from the joint U.S. Fish and Wildlife Service/NMFS Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' (SPR Policy (79 FR 37580; July 1, 2014)), and concluded that available information did not indicate any ''portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.''

WildEarth Guardians and Friends of Animals (Plaintiffs) filed suit on July 27, 2016, in the U.S. District Court for the District of Columbia, challenging our decision not to list queen conch as threatened or endangered under the ESA. On August 26, 2019, the court vacated our determination that listing queen conch was not warranted and remanded the determination back to the NMFS, based on our reliance on the SPR Policy's definition of ''significant,'' which was vacated nationwide in 2018 (though the policy otherwise remains in effect) as a result of litigation involving an unrelated listing determination by the United States Fish and Wildlife Service, of the Department of the Interior. (*Desert Survivors* v. *U.S. Dep't of Interior,* 321 F. Supp. 3d 1011 (N.D. Cal. 2018)). In light of this ruling and considering the passage of time since the completion of the previous status review in 2014, we will conduct a new status review. This notice serves to solicit new and/or additional information for NMFS to consider in the new status review.

Determining if a Species Is Threatened or Endangered

Paragraph (a)(1) of section 4 of the ESA (16 U.S.C. 1533 *et seq.*) requires that we determine whether a species is endangered or threatened throughout all or a significant portion of its range 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. Paragraph (b) of ESA section 4 requires that our determination be made based on the best scientific and commercial data available after taking into account those efforts, if any, being made by any State or foreign nation to protect such species.

Public Solicitation of New Information

With this notice, we commence a status review of queen conch to determine whether listing the species as endangered or threatened under the ESA is warranted. To ensure that our review of queen conch is informed by the best available scientific and commercial information, we are opening a 60-day public comment period. For the status review to be complete and based on the best available scientific and commercial information, we request information on the species from governmental agencies, the scientific community, industry, and any other interested parties. We seek information on: (1) Species abundance; (2) historical and current population trends; (3) landings and trade data; (4) distribution and population spatial structure; (5) reproduction and population densities; (6) larval dispersal and population connectivity; (7) genetics; (8) disease and parasites; (9) habitat stressors; and (10) the adequacy of existing regulatory mechanisms.

Our consideration of conservation measures, regulatory mechanisms, and other protective efforts will be guided by the Services ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (PECE) (68 FR 15100; March 28, 2003). The PECE established criteria to ensure the consistent and adequate evaluation of conservation efforts when making listing decisions under the ESA. This policy may also guide the development of conservation efforts that sufficiently improve a species' status to make listing the species as threatened or endangered unnecessary. Under the PECE, the adequacy of conservation efforts is evaluated in terms of the certainty of their implementation and the certainty of their effectiveness. Criteria for evaluating the certainty of implementation include whether: The necessary resources are available; the necessary authority is in place; an agreement is formalized (*i.e.,* regulatory and procedural mechanisms are in place); there is a schedule for completion and evaluation; for voluntary measures, incentives to ensure necessary participation are in place; and there is agreement of all necessary parties to the measure or plan. Criteria for evaluating the certainty of effectiveness include whether the measure or plan: Includes a clear description of the factors for decline to be addressed and how they will be reduced; establishes specific conservation objectives; identifies necessary steps to reduce threats; includes quantifiable performance measures for monitoring compliance and effectiveness; employs principles of adaptive management; and is certain to improve the species' status at the time of listing determination. We request that any information submitted with respect to conservation measures, regulatory mechanisms, or other protective efforts that have yet to be implemented or show effectiveness explicitly address these criteria in the PECE.

If you wish to provide your information for this status review, please submit it as described in the **ADDRESSES** section above. 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.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16. U.S.C. 1531 *et seq.*).

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Oceanic and Atmospheric Administration.

[FR Doc. 2019–26310 Filed 12–5–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XV138]

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Citizen Science Operations Committee via webinar.

DATES: The Citizen Science Operations Committee meeting will be held via webinar on Friday, January 24, 2020, from 1 p.m. until 3 p.m.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd (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. There will be an opportunity for public comment at the beginning of the meeting.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julia Byrd, Citizen Science Program Manager, SAFMC; phone: (843) 302–8439 or toll free 866/SAFMC–10; fax: (843) 769–4520; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Citizen Science Operations Committee serves as advisors to the Council's Citizen Science Program. Committee members include representatives from the Council's Citizen Science Advisory Panel, Southeast Regional Office, Southeast Fisheries Science Center, and Science and Statistical Committee. Their responsibilities include developing programmatic recommendations, reviewing policies, providing program direction/multi-partner support, identifying citizen science research needs, and providing general advice.

Items to be addressed during this webinar meeting include:

1. Citizen Science Program & Projects Update
2. Discuss Citizen Science Program evaluation and provide recommendations as appropriate
3. Other Business

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 3, 2019.

Tracey L. Thompson,

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

[FR Doc. 2019–26360 Filed 12–5–19; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes products and a service from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date deleted from the Procurement List:* January 5, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 10/18/2019, 11/1/2019 and 11/8/2019, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the products and service listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities.

The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and service deleted from the Procurement List.

End of Certification

Accordingly, the following products and service are deleted from the Procurement List:

Products

NSN(s)—Product Name(s):
MR 10678—Berry Colander, Includes Shipper 20678
MR 10734—Socks, Halloween, Includes Shipper 20734
MR 10760—Activity Pack, Licensed, Pokemon, Includes Shipper 20760
MR 10761—Sticker Pack, Licensed, Pokemon, Includes Shipper 20760
MR 10762—Pen, Licensed, Pokemon, Includes Shipper 20762
MR 10763—Kid's Baking Tools, Licensed, Whisk and Spoon, Includes Shipper 20763
MR 10764—Kid's Baking Tools, Licensed, Turner and Spatula, Includes Shipper 20763
MR 10765—Kid's Baking Tools, Licensed, Rolling Pin and Cookie Cutters, Includes Shipper 20763
MR 10766—Kid's Baking Tools, Licensed, Decorating Set, Includes Shipper 20763
MR 10772—Tumblers, Striped, Includes Shipper 20772
MR 10773—Water Bottle, Includes Shipper 20773
MR 11101—Paper, Parchment, Includes Shipper 21101
MR 13112—Cookie Sheet, Small, 9'' x 13''
Mandatory Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Military Resale-Defense Commissary Agency
NSN(s)—Product Name(s):
1560–01–153–9682—Wear Strip, Cargo Door, Sikorsky Helicopter Models S–70I & UH–60M
Mandatory Source of Supply: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, WA
Contracting Activity: DLA AVIATION, RICHMOND, VA

Services

Service Type: Administrative Services
Mandatory for: GSA, Sacramento PBS: Sacramento Field Office, Sacramento, CA
Mandatory Source of Supply: Crossroads Building Services, Inc.—Deleted, Sacramento, CA
Contracting Activity: GENERAL SERVICES ADMINISTRATION, FPDS AGENCY COORDINATOR

Patricia Briscoe,
Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–26321 Filed 12–5–19; 8:45 am]
BILLING CODE 6353–01–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 services 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: January 5, 2020.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following services are proposed for deletion from the Procurement List:

Services

Service Type: Janitorial/Grounds Maintenance
Mandatory for: VA Outpatient Clinic, Rome, NY
Mandatory Source of Supply: The Arc, Oneida-Lewis Chapter-NYSARC, Inc., Utica, NY
Contracting Activity: VETERANS AFFAIRS, DEPARTMENT OF, NAC

Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building: 45 Bay Street, Staten Island, NY
Mandatory Source of Supply: Fedcap Rehabilitation Services, Inc., New York, NY
Contracting Activity: GENERAL SERVICES ADMINISTRATION, FPDS AGENCY COORDINATOR

Service Type: Janitorial/Custodial
Mandatory for: Auke Bay Station Post Office: 11899 Glacier Highway, Auke Bay, AK
Mandatory Source of Supply: REACH, Inc., Juneau, AK
Contracting Activity: U.S. Postal Service, Washington, DC

Service Type: Janitorial/Custodial Service
Mandatory for: DCMA Office, 366 Avenue D, Building 7216, Dyess AFB, TX
Mandatory Source of Supply: Training, Rehabilitation, & Development Institute, Inc., San Antonio, TX
Contracting Activity: DEFENSE CONTRACT MANAGEMENT AGENCY (DCMA), DEFENSE CONTRACT MANAGMENT OFFICE

Service Type: Janitorial/Custodial
Mandatory for: Veterans Affairs Building: 252 Seventh Avenue, New York, NY
Mandatory Source of Supply: Fedcap Rehabilitation Services, Inc., New York, NY
Contracting Activity: VETERANS AFFAIRS, DEPARTMENT OF, NAC

Service Type: Janitorial/Custodial
Mandatory for: Phillips Buildings Complex: 7900 and 7920 Norfolk Avenue, Bethesda, MD
Contracting Activity: NUCLEAR REGULATORY COMMISSION, OFFICE OF ADMINISTRATION

Service Type: Janitorial/Custodial
Mandatory for: Naval & Marine Corps Reserve Center: 30 Woodward Avenue, New Haven, CT
Mandatory Source of Supply: CW Resources, Inc., New Britain, CT
Contracting Activity: DEPT OF THE NAVY, U.S. FLEET FORCES COMMAND

Service Type: Grounds Maintenance
Mandatory for: Air National Guard Readiness Center, Andrews AFB, MD
Mandatory Source of Supply: Melwood Horticultural Training Center, Inc., Upper Marlboro, MD
Contracting Activity: DEPT OF DEFENSE, DOD/OFF OF SECRETARY OF DEF (EXC MIL DEPTS)

Patricia Briscoe,
Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2019–26319 Filed 12–5–19; 8:45 am]
BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m., Tuesday, December 10, 2019.

PLACE: CFTC Headquarters, Lobby-Level Hearing Room, Three Lafayette Centre, 1155 21st Street NW, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') will hold this meeting to consider the following matters:

• *Proposed Rule:* Capital Requirements for Swap Dealers and Major Swap Participants—Reopening the Comment Period and Requesting Additional Comment;

• *Proposed Rule:* Amendments to the Swap Clearing Requirement Exemption for Inter-Affiliate Swaps;

• *Proposed Rule:* Settlements in Administrative and Civil Proceedings; and

• *Final Rule:* Amendments to Part 13 of the Commission's Regulations (Public Rulemaking Procedures).

The agenda for this meeting will be available to the public and posted on the Commission's website at *https://www.cftc.gov.* In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's website.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, Secretary of the Commission, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: December 3, 2019.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2019–26427 Filed 12–4–19; 11:15 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Agency Information Collection Activities: Notice of Office of Management and Budget Approval of Information Collection Requirements

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of approval of information collection requirements.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA) and the Code of Federal Regulations, the Consumer Financial Protection Bureau (Bureau) is announcing Office of Management and Budget (OMB) approval of revised information collection requirements contained in a final rule published in the **Federal Register** on October 29, 2019, regarding Regulation C, Home Mortgage Disclosure. See the **SUPPLEMENTARY INFORMATION** section below for additional information about this OMB approval.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of these information collection requests is available at *www.reginfo.gov.* Requests for additional information should be directed to Darrin King, PRA Officer, at (202) 435–9575, or email: *CFPB_PRA@cfpb.gov.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*) the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. On October 29, 2019, the Bureau published a final rule in the **Federal Register** titled ''Home Mortgage Disclosure (Regulation C).'' [1] The final rule amends 12 CFR part 1003 (Regulation C), which implements the Home Mortgage Disclosure Act (HMDA). The Bureau's OMB control number for Regulation C is 3170–0008. This final rule revises the information collection requirements contained in Regulation C that were previously approved by OMB under that OMB control number as follows: (1) Extends for two years Regulation C's current temporary threshold of 500 open-end lines of credit for open-end institutional and transactional coverage, and (2) implements the new, separate Economic Growth, Regulatory Relief, and Consumer Protection Act [2] partial exemptions that apply to some HMDA reporting requirements. Pursuant to 5 CFR 1320.11(h), the Bureau submitted the Final Rule with an information collection request (ICR) to OMB on October 17, 2019 and OMB approved this ICR on November 27, 2019. In accordance with the PRA and 5 CFR 1320.11(k), the Bureau hereby announces OMB approval of the revised information collection requirements as contained in the subject final rule which will be effective January 1, 2020.

Dated: December 3, 2019.

Darrin King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2019–26366 Filed 12–5–19; 8:45 am]

BILLING CODE 4810–AM–P

[1] The Bureau issued the final rule for Regulation C on its website on October 10, 2019, *https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/.* The Notice of Final Rulemaking was published in the **Federal Register** on October 29, 2019 (84 FR 57946), RIN 3170–AA76.

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

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0151]

Agency Information Collection Activities; Comment Request; GEPA Section 427 Guidance for All Grant Applications

AGENCY: Office of the Secretary, Department of Education.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 4, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0151. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of Strategic Collections and Clearance, Governance and Strategy Division, Office of Planning, Evaluation and Policy Development, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208B, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Alfreida Pettiford, 202–245–6110.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: GEPA Section 427 Guidance for All Grant Applications.

OMB Control Number: 1894–0005.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 13,497.

Total Estimated Number of Annual Burden Hours: 20,219.

Abstract: On October 20, 1994, the Improving America's Schools Act, Public Law 103–382 (The Act), became law. The Act added a provision to the General Education Provisions Act (GEPA). Section 427 of GEPA requires an applicant for assistance under Department programs to develop and describe in the grant application the steps it proposes to take to ensure equitable access to, and equitable participation in, its proposed project for students, teachers, and other program beneficiaries with special needs. The current GEPA Section 427 guidance for discretionary grant applications and formula grant applications has approval through April 30, 2020. The Department is requesting an extension of this approval.

Dated: December 2, 2019.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2019–26306 Filed 12–5–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 14–179–LNG]

Change in Control; Pieridae Energy (USA) Ltd.

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of change in control.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of a Notice of Change in Control (Notice) filed by Pieridae Energy (USA) Ltd. (Pieridae US) in the above-referenced docket on November 6, 2019. The Notice describes changes in the ownership of Pieridae Energy Limited, Pieridae US's parent company.

DATES: Protests, motions to intervene, or notices of intervention, as applicable, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, December 23, 2019.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Benjamin Nussdorf or Amy Sweeney, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–7893; (202) 586–2627, *benjamin.nussdorf@hq.doe.gov*, *amy.sweeney@hq.doe.gov*

Cassandra Bernstein or Kari Twaite, U.S. Department of Energy (GC–76) Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–9793; (202) 586–6978, *cassandra.bernstein@hq.doe.gov*, *kari.twaite@hq.doe.gov*

SUPPLEMENTARY INFORMATION:

Summary of Change in Control

The Notice was filed under section 3 of the Natural Gas Act (NGA), 15 U.S.C. 717b. In the Notice, Pieridae US states that it is wholly-owned by Pieridae Energy Limited (Pieridae). Pieridae US states that, on or about October 16, 2019, Pieridae completed an equity offering. Pieridae's shares became listed on the TSX (Venture) Exchange on or about October 24, 2019.

As a consequence of the offering, Pieridae US states that: (i) Erikson National Energy Inc., a Canadian corporation, acquired beneficial ownership representing approximately 14.7% or more of Pieridae's issued and outstanding common shares; and (ii) Alberta Investment Management Corporation, a Canadian corporation, acquired beneficial ownership representing approximately 10.53% or more of Pieridae's issued and outstanding common shares.[1] Additional details can be found in Pieridae US's Notice, posted on the DOE/FE website at: *https://www.energy.gov/sites/prod/files/2019/11/f68/Change%20in%20Control%20-%20Notification%20-%20FE%20Docket%20No.%2014-179-LNG%20%282019%29.pdf.*

DOE/FE Evaluation

DOE/FE will review Pieridae US's Notice in accordance with its Procedures for Changes in Control Affecting Applications and Authorizations to Import or Export Natural Gas (CIC Procedures).[2] Consistent with the CIC Procedures, this notice addresses only Pieridae US's final authorization to export liquefied natural gas (LNG) to non-free trade agreement (non-FTA) countries, granted in DOE/FE Order No. 3768 (FE Docket No. 14–179–LNG). If no interested person protests the change in control and DOE takes no action on its own motion, the proposed change in control will be deemed granted 30 days after publication in the **Federal Register**. If one or more protests are submitted, DOE will review any motions to intervene, protests, and answers, and will issue a determination as to whether the proposed change in control has been demonstrated to render the underlying authorization inconsistent with the public interest.

[1] Pieridae US is advised that its described change in control may also require the approval of the Committee on Foreign Investment in the United States (CFIUS). DOE expresses no opinion regarding the need for review by CFIUS. Additional information may be obtained at: *http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-inUS.aspx.*

[2] 79 FR 65541 (Nov. 5, 2014).

Public Comment Procedures

Interested persons will be provided 15 days from the date of publication of this notice in the **Federal Register** in order to move to intervene, protest, and answer Pieridae US's Notice. Protests, motions to intervene, notices of intervention, and written comments are invited in response to this notice only as to the change in control described in Pieridae US's Notice.[3] All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by DOE's regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Preferred method: Emailing the filing to *fergas@hq.doe.gov;* (2) mailing an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation, Analysis, and Engagement at the address listed in **ADDRESSES**. All filings must include a reference to the individual FE Docket Number(s) in the title line, or Pieridae Energy (USA) Ltd. Change in Control in the title line. *Please Note:* If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

Pieridae US's Notice and any filed protests, motions to intervene, notices of intervention, and comments are available for inspection and copying in the Office of Regulation, Analysis, and Engagement docket room, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The Notice and any filed protests, motions to intervene, notices of intervention, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

[3] Intervention, if granted, would constitute intervention only in the change in control portion of this proceeding, as described herein.

Signed in Washington, DC, on December 3, 2019.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Oil and Natural Gas.

[FR Doc. 2019–26358 Filed 12–5–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Record of Decision for the Long-Term Management and Storage of Elemental Mercury

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Record of Decision.

SUMMARY: The U.S. Department of Energy (DOE) is issuing this Record of Decision (ROD) for the long-term management and storage of elemental mercury to meet the federal government's statutory responsibility for long-term storage of the elemental mercury generated within the United States. This ROD is issued for the *Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423; Final Elemental Mercury Storage EIS) and the *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S1; Final SEIS). In 2019 DOE prepared a *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423–SA–01) to determine if there have been substantial changes to the proposal or if there are significant new circumstances or information relevant to environmental concerns as compared with those presented in the Final Elemental Mercury Storage EIS and Final SEIS. This ROD announces the DOE decision to store up to 6,800 metric tons (7,480 tons) of elemental mercury in existing buildings at Waste Control Specialists near Andrews, Texas.

ADDRESSES: For copies of this Record of Decision, the Supplement Analysis, the *Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423), or the *Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement (DOE/EIS–0423–S1),* please contact Dave Haught at U.S. Department of Energy, Office of Environmental Management, Office of Waste Disposal (EM–4.22), 1000 Independence Avenue SW, Washington, DC 20585 or at *David.Haught@em.doe.gov*. Electronic files can be accessed at *https://www.energy.gov/nepa/nepa-documents*.

FOR FURTHER INFORMATION CONTACT: For further information on the management and storage of elemental mercury, please contact Dave Haught at *David.Haught@em.doe.gov* or visit *https://www.energy.gov/em/services/waste-management/waste-and-materials-disposition-information/long-term-management-and*. For general information on the Office of Environmental Management's National Environmental Policy Act of 1969 process, please contact Bill Ostrum, at *William.Ostrum@hq.doe.gov* and at (202) 586–2513.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to Section 5 of the Mercury Export Ban Act of 2008 (Pub. L. 110–414; MEBA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, (Pub. L. 114–182) (herein referred to as MEBA), the U.S. Department of Energy (DOE) was directed to designate a facility or facilities for the long-term management and storage of elemental mercury generated within the United States.

On July 2, 2009, DOE issued a Notice of Intent in the **Federal Register** (74 FR 31723) to prepare a draft environmental impact statement for elemental mercury storage. This notice invited the public to participate in the public scoping process on the proposed management and storage alternatives for analysis in the draft EIS and included information on public scoping meeting dates and locations.

On January 29, 2010, DOE issued a Notice of Availability in the **Federal Register** (75 FR 4801) to notify the public of the issuance of the *Draft Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423–D; Draft Elemental Mercury Storage EIS) for public comment and announce public hearings. The Draft Elemental Mercury Storage EIS analyzed the storage of up to 10,000 metric tons (11,000 tons) of elemental mercury in a facility or facilities constructed and operated in accordance with the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (74 FR 31723). DOE evaluated seven government and commercial sites as the range of reasonable alternatives in the Draft Elemental Mercury Storage EIS. In the Draft Elemental Mercury Storage EIS, DOE identified the Waste Control Specialists (WCS) facility as its preferred alternative.

On January 28, 2011, DOE issued a Notice of Availability in the **Federal**

Register (76 FR 5145) to notify the public of the issuance of the *Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423) (Final Elemental Mercury Storage EIS). The Final Elemental Mercury Storage EIS evaluated the same seven government and commercial sites for management and storage of elemental mercury and considered all public comments received on the Draft Elemental Mercury Storage EIS.

On June 5, 2012, DOE issued a Notice of Intent in the **Federal Register** (77 FR 33204) to prepare a supplement to the Final Elemental Mercury Storage EIS to evaluate additional alternatives for a facility at and in the vicinity of the Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico, and to update some of the analyses presented in the Final Elemental Mercury Storage EIS. DOE announced the availability of the *Draft Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S1–D; Draft Elemental Mercury Storage SEIS) on April 19, 2013 (78 FR 23548) for public comment. The *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS–0423–S1; Final Elemental Mercury Storage SEIS) was published on October 4, 2013. The Final Elemental Mercury Storage SEIS did not change the DOE preferred alternative, which remained as the WCS facility near Andrews, Texas.

DOE prepared a *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS–0423–SA–01; SA) to determine whether supplemental or new National Environmental Policy Act of 1969 (NEPA) documentation was required to address the proposal to manage and store elemental mercury. The SA provided an analysis of the potential impacts presented in the Final Elemental Mercury Storage EIS and Final SEIS to determine if there have been substantial changes to the proposal since 2013 or if there are significant new circumstances or information relevant to environmental concerns. The SA was prepared in accordance with the DOE NEPA implementing procedures at 10 CFR 1021.314(c) and concluded that there was not a substantial change to the proposal evaluated in the Final Elemental Mercury Storage EIS or Final SEIS or significant new circumstances or information relevant to environmental concerns that would require preparation of an additional SEIS or new EIS. DOE determined that no further NEPA analysis was required.

Purpose and Need for Agency Action

MEBA prohibits the export of elemental mercury from the United States (subject to certain essential-use exemptions). MEBA also prohibits, as of October 14, 2008, any Federal agency from conveying, selling, or distributing to any other Federal agency, any state or local government agency, or any private individual or entity any elemental mercury under the control or jurisdiction of the Federal agency (with certain limited exceptions). Banning the export of elemental mercury from the United States is expected to result in surplus inventories of elemental mercury.

Section 5 of MEBA directs DOE to designate a DOE facility or facilities for the long-term management and storage of elemental mercury generated within the United States. In the Final Elemental Mercury Storage EIS, DOE identified a need to provide such a facility capable of managing an elemental mercury inventory estimated to range up to 10,000 metric tons (11,000 tons) for a 40-year period of analysis. In the SA, DOE updated the projected inventory of elemental mercury that could need future storage to 6,800 metric tons (7,480 tons) for a 40-year period of analysis.

Proposed Action

As identified in the Final Elemental Mercury Storage EIS, DOE proposes to construct one or more new facilities and/or select one or more existing facilities (including modification as needed) for the long-term management and storage of elemental mercury, as mandated by Section 5 of MEBA. Any such facility(ies) must comply with applicable requirements of Section 5 of MEBA, including the requirements of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901 *et seq.*) and other permitting requirements.

Alternatives

On March 20, 2009 (74 FR 11923), DOE published a Request for Expressions of Interest seeking potential locations for the elemental mercury storage facility(ies) from interested Federal agencies and the private sector. In addition, DOE issued an internal memorandum requesting that DOE site offices determine if they have a facility(ies) that could be used for elemental mercury storage. At the same time, DOE developed objective criteria for identifying candidate sites within the scope of the Final Elemental Mercury Storage EIS. In addition to the No Action Alternative, DOE evaluated seven government and commercial sites as the range of reasonable alternatives in the Final Elemental Mercury Storage EIS: The DOE Grand Junction Disposal Site, Grand Junction, Colorado; the DOE Hanford Site, Richland, Washington; Hawthorne Army Depot, Hawthorne, Nevada; Idaho Nuclear Technology and Engineering Center and Radioactive Waste Management Complex at the DOE Idaho National Laboratory, Idaho Falls, Idaho; DOE Kansas City Plant, Kansas City, Missouri; DOE Savannah River Site, Aiken, South Carolina; and WCS, Andrews, Texas. The Final Elemental Mercury Storage SEIS evaluated additional alternatives for a facility at and in the vicinity of WIPP.

Existing buildings at the candidate locations were considered in the Final Elemental Mercury Storage EIS to store the elemental mercury. Recognizing that existing buildings may not be available or adequate at some candidate locations, DOE also evaluated construction and operation of new facilities that would meet RCRA requirements.

Potential Environmental Impacts

The Final Elemental Mercury Storage EIS and SEIS evaluated the construction of a new facility and the use of existing facilities for the long-term management and storage of elemental mercury. The documents included the assessment of potential impacts from the transportation of the elemental mercury from the origin sites to the long-term storage location via either truck or rail. The analysis of potential environmental impacts included an evaluation of the following environmental resource areas: Land use and visual resources; geology, soils, and geologic hazards; water resources; meteorology, air quality, and noise; ecological resources; cultural and paleontological resources; site infrastructure; waste management; occupational and public health and safety; ecological impacts; socioeconomics; and environmental justice. Based on analyses in the Final EIS and Final SEIS, the potential impacts on the various resource areas at each analyzed site from construction and operation of an elemental mercury storage facility(ies) would range from none to minor.

The SA further evaluated whether the proposed change in the quantity of elemental mercury to be stored and managed (to 6,800 metric tons from 10,000 metric tons) and potential use of two existing facilities (Container Storage Building and Bin Storage Unit 1) rather than one at WCS represented a substantial change to the proposal action relevant to environmental concerns or if there were significant new circumstances or information relevant to environmental concerns. While the SA found no effect on the potential impacts analyzed in the Final Elemental Mercury Storage EIS and Final SEIS for many resource areas, it identified waste management and occupational and public health and safety as resource areas potentially affected.

Modification of the existing facilities would produce negligible quantities of nonhazardous waste. Operations of elemental mercury storage facilities are estimated to generate approximately 23 drums of hazardous waste and less than 16,000 gallons of liquid sanitary waste annually. Since elemental mercury storage would not involve any treatment or processing of elemental mercury, the rate of hazardous waste generation would be very low. Any hazardous waste would be disposed in a licensed facility. In addition, the existing sanitary waste systems at WCS have sufficient capacity to handle the projected liquid sanitary waste volume, therefore, the potential impacts to waste management would be negligible.

The potential impacts to occupational and public health and safety were presented in the Final Elemental Mercury Storage EIS, Final SEIS, and SA for normal operations, facility accidents, and intentional destructive acts. Normal operations would involve the receipt and long-term storage of elemental mercury. Exposures could arise during normal operating conditions from small amounts of mercury vapor accumulating in the storage areas. The estimated consequences to involved workers, noninvolved workers, or members of the public are predicted to be negligible.

Facility accidents could include elemental mercury spills inside or outside the storage building. The Final Elemental Mercury Storage EIS and Final SEIS report the potential risks to workers and the offsite public to be negligible-to-low for these spills for all alternatives. Similarly, the Final Elemental Mercury Storage EIS and SEIS report that human health risks of transportation accidents would be negligible-to-low for all alternatives. The Final Elemental Mercury Storage EIS and Final SEIS analyzed intentional destructive acts and found that, while the probability of an intentional destructive act cannot be determined, consequences of such an act, were one to occur, were expected to be similar for all alternatives.

Environmentally Preferable Alternative

Constructing a new building would produce additional environmental impacts. Therefore, although the construction impacts are anticipated to be minimal, alternatives involving no construction are environmentally preferable. Although storage of the entire inventory of elemental mercury in an existing building at WCS was not evaluated in the Final Elemental Mercury Storage EIS and Final SEIS, DOE has subsequently learned that the existing Container Storage Building and Bulk Storage Unit could be used to store the entire inventory of elemental mercury. Transportation of elemental mercury to any of these existing buildings would result in negligible-to-low human health risks from transportation accidents. The potential impacts of operating these elemental mercury storage buildings would be similar regardless of the location.

The No Action Alternative would not involve the construction of a new facility for consolidation and storage of the elemental mercury. However, the No Action Alternative would still include transportation to and from elemental mercury storage sites, as described in Section 4.2.9.4 of the Final Elemental Mercury Storage EIS, and therefore would not be significantly different than the transportation impacts under the action alternatives. Under the No Action Alternative, elemental mercury would be stored indefinitely at multiple non-DOE facilities; therefore, the biggest impact of the No Action Alternative would be widely dispersed storage. Taking this under consideration, the No Action Alternative would not be the environmentally preferable alternative.

Federal and State Permits, Consultations, and Notifications

MEBA prohibits the export of elemental mercury. Section 5 of the Act directs DOE to designate a facility(ies) for the long-term management and storage of elemental mercury generated within the United States. MEBA also requires that the facility(ies) be constructed and operated in accordance with the Solid Waste Disposal Act, as amended by RCRA.

Comments Received on the Final Elemental Mercury Storage EIS and Final SEIS

DOE received five comment letters after publishing the Final Elemental Mercury Storage EIS and Final SEIS. They included: (1) One letter from an individual that agreed with the DOE preferred alternative of the WCS site, (2) one letter from an individual that did not agree with potential selection of the WCS site, (3) one letter from the Environmental Protection Agency that indicated the agency had no additional comments, (4) one letter that requested modifications to the EIS mailing list, and (5) one letter from the Texas Parks and Wildlife Department notifying DOE that the federal listing status of two species had changed since the issuance of the Draft EIS. Since the use of existing buildings at the WCS site would not impact ecological resources, this change to the federal listing status of two species would not affect the potential impacts presented in the Final Elemental Mercury Storage EIS or Final SEIS. DOE has considered these comments and finds that they do not present ''significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts'' within the meaning of 40 CFR 1502.9(c) and 10 CFR 1021.314(a) and therefore do not require preparation of a new or a supplemental EIS.

Decision

Based on consideration of the analysis in the Final Elemental Mercury Storage EIS, Final SEIS, and SA; DOE has decided to designate the WCS site near Andrews, Texas for the management and storage of up to 6,800 metric tons (7,480 tons) of elemental mercury and to manage and store the elemental mercury in leased portions of existing buildings, the Container Storage Building and Bin Storage Unit 1, at the WCS site. This decision is also based on other programmatic, policy, logistic, and cost considerations. For example, use of the Container Storage Building and Bin Storage Unit 1 avoids the costs associated with design and construction of a new facility and the utilization of an existing Basic Ordering Agreement with WCS simplifies the procurement process and allows DOE to mitigate some of the liabilities associated with the incentives added to MEBA, as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.

Mitigation

All practicable means to avoid or minimize environmental harm from the alternative selected have been adopted. Because the Final Elemental Mercury Storage EIS and Final SEIS identified that potential environmental impacts associated with long-term management and storage of 10,000 metric tons of elemental mercury would be negligible-to-low, mitigation measures would not be required as part of this ROD.

Signed at Washington, DC, on December 3, 2019.

William I. White,

Senior Advisor for Environmental Management to the Under Secretary for Science.

[FR Doc. 2019–26344 Filed 12–5–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–486–000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization; Golden Fields Solar III, LLC

This is a supplemental notice in the above-referenced proceeding of Golden Fields Solar III, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 23, 2019.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26342 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC20–20–000.
Applicants: Verso Androscoggin LLC, Verso Energy Services LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Verso Androscoggin LLC, et al.
Filed Date: 11/27/19.
Accession Number: 20191127–5218.
Comments Due: 5 p.m. ET 12/18/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2041–014; ER11–2042–014.
Applicants: Innovative Energy Systems, LLC, Seneca Energy II, LLC.
Description: Notice of Non-Material Change in Status of Innovative Energy Systems, LLC, et al.
Filed Date: 12/2/19.
Accession Number: 20191202–5017.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER17–194–004.
Applicants: Hartree Partners, LP.
Description: Notice of Non-Material Change in Status of Hartree Partners, LP.
Filed Date: 11/27/19.
Accession Number: 20191127–5216.
Comments Due: 5 p.m. ET 12/18/19.

Docket Numbers: ER19–62–000.
Applicants: OneEnergy Baker Point Solar, LLC.
Description: Report Filing: Refund Report (ER19–62–) to be effective N/A.
Filed Date: 12/2/19.
Accession Number: 20191202–5023.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–32–001.
Applicants: AEP Texas Inc.
Description: Tariff Amendment: AEPTX(n)-LCRA TSC Hayter Ranch FDA Amend Pending to be effective 9/27/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5093.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–494–000.
Applicants: Milligan 3 Wind LLC.
Description: Request for Waiver, et al. of Milligan 3 Wind LLC.
Filed Date: 11/27/19.
Accession Number: 20191127–5204.
Comments Due: 5 p.m. ET 12/16/19.

Docket Numbers: ER20–495–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–12–02_SA 3380 Entergy Louisiana-Fresh Air Energy II GIA (J639) to be effective 11/15/2019.
Filed Date: 12/2/19.
Accession Number: 20191202–5004.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–497–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 211, Amendment 20 to be effective 1/31/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5035.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–498–000.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: § 205(d) Rate Filing: 2019–12–02_SA 3382 OTP–NSPM FSA (J460) Hankinson-Wahpeton to be effective 2/1/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5040.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–499–000.
Applicants: ISO New England Inc., The United Illuminating Company.
Description: § 205(d) Rate Filing: The United Illuminating Company; Docket No. ER20–____–000 to be effective 1/31/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5065.
Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–500–000.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: § 205(d) Rate Filing: 2019–12–02_SA 3383 OTP-Crowned Ridge Wind II FSA (G736 J442) to be effective 2/1/2020.
Filed Date: 12/2/19.
Accession Number: 20191202–5071.

Comments Due: 5 p.m. ET 12/23/19.

Docket Numbers: ER20–501–000.

Applicants: Alabama Power Company.

Description: § 205(d) Rate Filing: Americus Solar & Battery Amended and Restated LGIA Filing to be effective 11/15/2019.

Filed Date: 12/2/19.

Accession Number: 20191202–5098.

Comments Due: 5 p.m. ET 12/23/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26340 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–15–000]

Notice of Application; Puget Sound Energy, Inc.

Take notice that on November 15, 2019, Puget Sound Energy, Inc. (Puget), 10885 NE 4th Street, Bellevue, Washington 98004, filed in the above referenced docket an application pursuant to section 7(c) of the Natural Gas Act requesting authorization to amend its certificate issued in Docket No. CP06–465–000 to recomplete Well SU–50 at its Jackson Prairie Storage Facility located in Lewis County, Washington. Puget states the recompletion of Well SU–50 will increase operational efficiency and provide a backup gas recycle well. Puget estimates the cost of the project to be $701,714, all as more fully described in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Andrea Chambers, DLA Piper, LLP, 500 8th Street NW, Washington, DC 20004, by telephone at (202) 799–4130, or by emailing *andrea.chambers@dlapiper.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must provide a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to show good cause why the time limitation should be waived, and should provide justification by reference to factors set forth in Rule 214(d)(1) of the Commission's Rules and Regulations.[2]

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on December 23, 2019.

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC 61,167 at 50 (2018).

[2] 18 CFR 385.214(d)(1).

Dated: December 2, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26337 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14989–000]

Pumped Hydro Storage LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 8, 2019, Pumped Hydro Storage LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Montezuma Pumped Storage Project (Montezuma Project or project) to be located near Maricopa, Pinal County, Arizona. 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 consist of the following: (1) A new rockfill, concrete-face impoundment, 3,000 feet by 110 feet creating an upper reservoir with a maximum elevation of 3,000 feet above mean sea level (MSL), and a usable storage capacity of 9,500 acre-feet; (2) a new rockfill, concrete-face impoundment, 4,000 feet by 130 feet creating a lower reservoir with a maximum elevation of 1,350 feet MSL, and a usable storage capacity of 9,500 acre-feet; (3) two 32-foot-diameter, 7,000-foot-long reinforced concrete penstocks; (4) a powerhouse constructed of reinforced concrete with approximate dimensions of 900 feet by 150 feet and 150 feet high, and containing six turbine-generator units with a total installed capacity of 2100 megawatts; (5) a tailrace constructed of reinforced concrete with approximate dimensions of 1,200 feet by 50 feet by 50 feet; (6) a 500-kilovolt substation; (7) a 500-kilovolt, 11-mile-long transmission line; (8) a 500-kilovolt, 8-mile-long transmission line; (9) one 24-inch-diameter, ductile iron pipe pipeline connecting the project to the existing City of Phoenix 91st Avenue Wastewater Treatment Plant; (10) one 24-inch-diameter, ductile iron pipe pipeline connecting the project to the existing Salt River Project irrigation canal; (11) one 24-inch-diameter, ductile iron pipe pipeline connecting the project to the existing Gila River Indian Community irrigation canal; (12) one 24-inch-diameter, ductile iron pipe pipeline connecting the project to a new water supply well in Santa Cruz Wash; (13) one steel casing water supply well in Santa Cruz wash rated at 2,000 gallons-per-minute; (14) one 1-million-gallon steel overflow tank; (15) six agricultural fields, 2-square-miles in area, that would be irrigated with excess water from the steel overflow tank; and (16) appurtenant facilities. The proposed project would produce about 9,600 megawatt hours of energy daily. The estimated annual generation of the Montezuma Project would be 3,504 gigawatt-hours.

Applicant Contact: Mr. Steve Irwin, Pumped Hydro Storage LLC, 6514 41st Lane, Phoenix, AZ 85041; phone: (602) 696–3608.

FERC Contact: Evan Williams; phone: (202) 502–8462.

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–14804–000.

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–14989) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 2, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26343 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP20–278–000.
Applicants: Chandeleur Pipe Line, LLC.
Description: Compliance filing Chandeleur Annual Fuel and Gas Loss Retention Adjustment Filing.
Filed Date: 11/27/19.
Accession Number: 20191127–5044.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–279–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: TCO December Negotiated Rate Agreements to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5066.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–280–000.
Applicants: Dominion Energy Questar Pipeline, LLC.
Description: § 4(d) Rate Filing: FGRP for 2020 to be effective 1/1/2020.
Filed Date: 11/27/19.
Accession Number: 20191127–5069.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–281–000.
Applicants: Eastern Shore Natural Gas Company.
Description: § 4(d) Rate Filing: Capital Cost Surcharge to be effective 1/1/2020.
Filed Date: 11/27/19.
Accession Number: 20191127–5076.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–282–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 112719 Negotiated Rates—Mercuria Energy America, Inc. R–7540–02 to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5081.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–283–000.
Applicants: Mojave Pipeline Company, L.L.C.
Description: § 4(d) Rate Filing: Annual Fuel and L&U Filing 2020 to be effective 1/1/2020.
Filed Date: 11/27/19.

Accession Number: 20191127–5098.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–284–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: Neg Rate 2019–11–27 Ultra to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5108.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–285–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Annual Fuel and L&U Filing 2020 to be effective 1/1/2020.
Filed Date: 11/27/19.
Accession Number: 20191127–5120.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–286–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update Filing (Conoco Dec 19) to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5143.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–287–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: § 4(d) Rate Filing: Vol. 2—Negotiated Rate Agreement—Conexus Energy to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5164.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–288–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Col Gas K860005 Releases eff 12–1–2019 to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5169.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–289–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements—DTE and NJR eff 12–1–19 to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5173.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–290–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20191127 Negotiated Rates to be effective 12/1/2019.
Filed Date: 11/27/19.
Accession Number: 20191127–5184.
Comments Due: 5 p.m. ET 12/9/19.

Docket Numbers: RP20–291–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Negotiated Rates—Lambertville East Project to be effective 12/1/2019.
Filed Date: 11/29/19.
Accession Number: 20191129–5000.
Comments Due: 5 p.m. ET 12/11/19.

Docket Numbers: RP20–292–000.
Applicants: Eastern Shore Natural Gas Company.
Description: § 4(d) Rate Filing: Negotiated Rate—DCRC to be effective 12/1/2019.
Filed Date: 11/29/19.
Accession Number: 20191129–5021.
Comments Due: 5 p.m. ET 12/11/19.

Docket Numbers: RP20–293–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Cherokee AGL—Replacement Shippers—Dec 2019 to be effective 12/1/2019.
Filed Date: 11/29/19.
Accession Number: 20191129–5022.
Comments Due: 5 p.m. ET 12/11/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–26341 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–16–000]

Portland Natural Gas Transmission System; Notice of Application

Take notice that on November 18, 2019, Portland Natural Gas Transmission System (PNGTS), 700 Louisiana Street, Suite 700, Houston, Texas 77002–2700, filed in the above referenced docket an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations requesting authorization to construct its Westbrook XPress Project Phases II and III. Specifically, PNGTS proposes to: (1) Install an additional 15,900 horsepower compressor unit and appurtenances at its Westbrook Compressor Station; (2) modify certain facilities at the Westbrook Compressor Station; and (3) modify certain facilities at its Westbrook Metering and Regulating Station, all located in Cumberland County, Maine. The project will increase the certificated capacity on PNGTS' wholly-owned northern system by 80,998 thousand cubic feet per day (Mcf/d) and increase PNGTS's certificated capacity on its system jointly-owned with Maritimes & Northeast Pipeline, L.L.C. by 50,119 Mcf/d. PNGTS estimates the cost to be approximately $117.3 million, all as more fully described in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Robert Jackson, Manager, Certificates & Regulatory Administration, Portland Natural Gas Transmission System, 700 Louisiana Street, Suite 700, Houston, Texas 77002–2700, by telephone at (832) 320–5487 or by email at *robert_jackson@tcenergy.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must provide a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to show good cause why the time limitation should be waived, and should provide justification by reference to factors set forth in Rule 214(d)(1) of the Commission's Rules and Regulations.[2]

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on December 23, 2019.

Dated: December 2, 2019.

Kimberly D. Bose,

Secretary.

[FR Doc. 2019–26339 Filed 12–5–19; 8:45 am]

BILLING CODE 6717–01–P

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC 61,167 at 50 (2018).

[2] 18 CFR 385.214(d)(1).

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9048–3]

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 11/25/2019 10 a.m. ET Through 12/02/2019 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. 20190285, Draft, USFWS, CA, Draft Environmental Impact Statement/Supplemental Environmental Impact Report for the Proposed Upper Santa Ana River Wash Habitat Conservation Plan, Comment Period Ends: 01/21/2020, Contact: Karin Cleary-Rose 760–322–2070 ext 406

EIS No. 20190286, Final Supplement, BLM, CA, United States Gypsum Company Expansion/Modernization Project, Imperial County, California Final Supplemental Environmental Impact Statement, Review Period Ends: 01/06/2020, Contact: Miriam Liberatore 541–618–2200

EIS No. 20190287, Draft, BR, CO, Paradox Valley Unit of the Colorado River Basin Salinity Control Program Environmental Impact Statement, Comment Period Ends: 02/04/2020, Contact: Lesley McWhirter 970–248–0608

Dated: December 2, 2019.

Robert Tomiak,

Director, Office of Federal Activities.

[FR Doc. 2019–26353 Filed 12–5–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, December 11, 2019 at 10:00 a.m.

PLACE: 1050 First Street NE, Washington, DC.

STATUS: This Meeting Will Be Closed to the Public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109. Matters relating to internal personnel decisions, or internal rules and practices.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2019–26492 Filed 12–4–19; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than December 23, 2019.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Kalista Ann Stover Carroll, Dyer, Tennessee, and Terrie Lou Stover Joyner, Trenton, Tennessee;* individually, and as members of a group acting in concert with Julie Joyner Hager, Trenton, Tennessee, and Kellie Joyner Ashburn, Rives, Tennessee, to retain voting shares of Dyer F & M Bancshares, Inc., and thereby indirectly retain voting shares of The Farmers & Merchants Bank, both of Dyer, Tennessee.

Board of Governors of the Federal Reserve System, December 3, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–26382 Filed 12–5–19; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT

Board Member Meeting

77 K Street NE, 10th Floor, Washington, DC 20002

December 16, 2019, 10:00 a.m., Telephonic

Open Session

1. Approval of the November 13, 2019 Board Meeting Minutes
2. Monthly Reports
   (a) Participant Activity Report
   (b) Investment Performance
   (c) Legislative Report
3. Quarterly Reports
   (d) Vendor Risk Management Update

Closed Session

Information covered under 5 U.S.C. 552b (c)(4).

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: December 3, 2019.

Megan Grumbine,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2019–26376 Filed 12–5–19; 8:45 am]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[Docket No. ATSDR–2019–0008]

Availability of Draft Toxicological Profiles

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Agency for Toxic Substances and Disease Registry (ATSDR), within the Department of Health and Human Services (HHS), announces the opening of a docket to obtain comments on Draft Toxicological Profiles for 1,2-Dichloropropane, 1,1-Dichloroethene, Di(2-ethylhexyl)phthalate (DEHP), DDT/DDE/DDD, Chlorobenzene, Hexachlorobutadiene, and 1,1,2-Trichloroethane.

DATES: Written comments must be received on or before March 5, 2020.

ADDRESSES: You may submit comments, identified by docket number ATSDR–2019–0008, by any of the following methods:

• *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Division of Toxicology and Human Health Sciences, Agency for Toxic Substances and Disease Registry, 1600 Clifton Rd. NE, Mail Stop S102–1, Atlanta, GA 30329–4027. Attn: Docket No. ATSDR–201x–0008.

Instructions: All submissions must include the agency name and Docket Number. All relevant comments received will be posted without change to *http://regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Susan Ingber, Agency for Toxic Substances and Disease Registry, Division of Toxicology and Human Health Sciences, 1600 Clifton Rd. NE, Mail Stop S102–1, Atlanta, GA 30329–4027, Email: *ATSDRToxProfileFRNs@cdc.gov;* Phone: 1–800–232–4636.

SUPPLEMENTARY INFORMATION: ATSDR has updated these profiles based on availability of new health effects information since their initial release. On March 21, 2016 ATSDR announced that it was preparing to develop Draft Toxicological Profiles for public comment release (81 FR 15110), which include those profiles mentioned above. All toxicological profiles issued as ''Drafts for Public Comment'' represent the result of ATSDR's evidence-based evaluations to provide important toxicological information on priority hazardous substances. ATSDR is seeking public comments and additional information or reports on studies about the health effects of 1,2-dichloropropane, 1,1-dichloroethene, di(2-ethylhexyl)phthalate (DEHP), DDT, DDE, DDD, chlorobenzene, hexachlorobutadiene, and 1,1,2-trichloroethane for review and potential inclusion in the profiles. ATSDR considers key studies for these substances during the profile development process. This document solicits any relevant, additional studies. ATSDR will evaluate the quality and relevance of such data or studies for possible inclusion into the profile.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, information, and data.

Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on *https://www.regulations.gov.* Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. ATSDR will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. ATSDR will carefully consider all comments submitted in preparation of the final Toxicological Profiles and may revise the profiles as appropriate.

Legislative Background

The Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9601 *et seq.*] amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) [42 U.S.C. 9601 *et seq.*] by establishing certain requirements for ATSDR and the U.S. Environmental Protection Agency (EPA) regarding the hazardous substances most commonly found at facilities on the CERCLA National Priorities List (NPL). Among these statutory requirements is a mandate for the Administrator of ATSDR to prepare toxicological profiles for each substance included on the priority list of hazardous substances [also called the Substance Priority List (SPL)]. This list identifies 275 hazardous substances that ATSDR and EPA have determined pose the most significant potential threat to human health. The SPL is available online at *www.atsdr.cdc.gov/spl.*

In addition, CERCLA provides ATSDR with the authority to prepare toxicological profiles for substances not found on the SPL. CERCLA authorizes ATSDR to establish and maintain an inventory of literature, research, and studies on the health effects of toxic substances (CERCLA Section 104(i)(1)(B); 42 U.S.C. 9604(i)(1)(B)); to respond to requests for health consultations (CERCLA Section 104(i)(4); 42 U.S.C. 9604(i)(4)); and to support the site-specific response actions conducted by the agency.

Availability

These Draft Toxicological Profiles will be available online at *http://www.atsdr.cdc.gov/ToxProfiles* and at *www.regulations.gov,* Docket No. ATSDR–0008.

Pamela I. Protzel Berman,

Director, Office of Policy, Partnerships and Planning, Agency for Toxic Substances and Disease Registry.

[FR Doc. 2019–26361 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–70–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–20–0263; Docket No. CDC–2019–0110]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS)

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on Requirements for the Importation of Nonhuman Primates into the United States. This information collection contains the reporting and documentation requirements for registered importers of nonhuman primates, as outlined in 42 Code of Federal Regulations part 71.53 Requirements for importers of nonhuman primates.

DATES: CDC must receive written comments on or before February 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2019–0110 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, of the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

Proposed Project

Requirements for the Importation of Nonhuman Primates into the United States (OMB Control No. 0920–0263, Exp. 08/31/2020)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Under the 42 CFR 71.53, CDC collects information pertaining to importers and imported nonhuman primates. This information collection enables CDC to evaluate compliance with pre-arrival of shipment notification requirements, to investigate the number and species of imported nonhuman primates, and to determine if adequate measures are being taken for the prevention of exposure to persons and animals during importation.

Since May 1990, CDC has monitored the arrival and/or uncrating of certain shipments of non-human primates imported in to the United States. In February 2013, CDC promulgated two regulations pertaining to the importation of nonhuman primates. The first rule, Establishment of User Fees for Filovirus Testing of Nonhuman Primate Liver Samples, outlines a process by which importers can send liver tissues to CDC from primates that die during importation from reasons other than trauma (2/12/2013, Vol.78, No. 29, p.9828). CDC performs these tests due to the absence of a private sector option.

The second rule, Requirements for Importers of Nonhuman Primates, consolidates into 42 CFR 71.53 the requirements previously found in 42 CFR part 71.53 with those found in the Special Permit to Import Cynomolgus, African Green, or Rhesus Monkeys into the United States (2/15/2013, Vol. 78, No. 32/p. 11522). It also rescinded the six-month special-permit requirements for cynomolgus, African green, and rhesus monkeys and extended the time period for registration/permit renewal from 180 days to two years, reducing much of the respondent burden. CDC feels these regulatory changes and reporting requirements balance the public health risks posed by the importation of nonhuman primates with the burden imposed on regulating their importation.

All registered importers of non-human primates are required by 42 CFR part 71.53 to maintain certain disease control procedures and keep certain records. Standard business practices likely dictate that importers already keep records on the origin, transportation, and disposition of the nonhuman primates. Thus, CDC asks for information which should already be maintained by the importers and need only be assembled and reported. The estimate of burden hours and costs reflects assembling and reporting only. CDC requests approval for an estimated 185 annual burden hours. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name/CFR reference	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Nonhuman Primate Importer.	CDC 75.10A Application for Registration as an Importer of Nonhuman Primates (New Importer).	1	1	10/60	1
Nonhuman Primate Importer.	CDC 75.10A Application for Registration as an Importer of Nonhuman Primates (Re-Registration).	12	1	10/60	2
Nonhuman Primate Importer.	71.53(g)(1)(iii) and (h) Documentation and Standard Operating Procedures (no form) (New Importer).	1	1	10	10
Nonhuman Primate Importer.	71.53(g)(1)(iii) and (h) Documentation and Standard Operating Procedures (no form) (Registered Importer).	12	1	30/60	6
Nonhuman Primate Importer.	Recordkeeping and reporting requirements for importing NHPs: Notification of shipment arrival 71.53(n) (no form).	25	6	15/60	38
Nonhuman Primate Importer.	Statements regarding the health of the nonhuman primates during travel and CDC quarantine (42 CFR 71.53(m) (no form).	25	6	15/60	38
Nonhuman Primate Importer.	Statements, including necropsy reports, about the nonhuman primates upon their release from CDC quarantine. (42 CFR 71.53(m)(no form).	25	3	15/60	19
Nonhuman Primate Importer.	Quarantine release 71.53(l)(no form)	25	6	15/60	38
Nonhuman Primate Importer.	71.53 (v) Form: Filovirus Diagnostic Specimen Submission Form for Non-human Primate Materials.	10	10	20/60	33
Total	....	....	....	....	185

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26371 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–20–1193; Docket No. CDC–2019–0105]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Assessment of Technical Assistance and Training (TTA) Approaches to Accelerate Comprehensive Cancer Control Outcomes. CDC is requesting to collect information about TTA offered using case studies and a web-based survey to assess whether a specific cooperative agreement has been implemented as intended, and has contributed to National Comprehensive Cancer Control Program (NCCCP) awardees' achievements in program goals and outcomes.

DATES: CDC must receive written comments on or before February 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2019–0105 by any of the following methods:

• *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

Proposed Project

Assessment of Technical Assistance and Training (TTA) Approaches to Accelerate Comprehensive Cancer Control Outcomes (OMB Control No. 0920–1193)—Reinstatement with Change—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Cancer is the second leading cause of death in the United States, and health care costs for cancer care are expected to rise to $158 billion by 2020. Addressing this public health problem requires primary prevention, early detection and treatment, support for cancer survivors, and a reduction in health disparities. Providing support to state, tribal, territorial and local organizations to implement evidence-based strategies has the potential to impact population-level cancer outcomes and reduce the burden of cancer.

The Centers for Disease Control and Prevention's (CDC) National Comprehensive Cancer Control Program (NCCCP) has been a primary funder for state and community-based cancer control interventions since its inception in the late 1990s. The program supports states and communities in developing a comprehensive approach to cancer prevention and control that includes supporting an infrastructure for state, local, and population-based interventions and multi-sectoral partnerships and coalitions. Currently, NCCCP supports 66 cancer control program grantees including programs in all 50 states, the District of Columbia, and in a number of tribes, tribal organizations, and U.S. Associated Pacific Islands/territories. In addition, CDC's Office on Smoking and Health (OSH) also has worked to build state health department infrastructure and capacity to conduct coordinated comprehensive tobacco prevention and control activities which contribute to cancer health outcomes.

In striving to build capacity and maximize the impact of CDC's funded programs, CDC has focused on developing and implementing innovative programs to enhance TTA delivered to NCCCP awardees. CDC funds two awardees under a cooperative agreement—Provision of Technical Assistance and Training to Assure Comprehensive Cancer Control Outcomes (DP18–1805). DP18–1805 awardees are charged with developing and delivering high-quality TTA for NCCCP funded programs, coalition members, and partners focused on improving implementation of evidence-based strategies for cancer prevention and control. The TTA activities DP18–1805 awardees implement include; (1) conducting needs assessments, (2) developing framework for building CCC capacity, (3) coordinating and collaborating with existing partners, (4) developing a TTA plan, (5) implementing a TTA plan and conducting performance monitoring and continuous quality improvement; and 6) conducting a comprehensive evaluation of TTA.

CDC proposes to conduct an assessment DP18–1805 to: (1) Document the nature of the TTA provided by DP18–1805 awardees and the extent to which the cooperative agreement was able to achieve planned short-term outcomes, and (2) identify the extent to which DP18–1805 TTA efforts contributed to NCCCP funded programs' achievement in program outcomes. There are no other data collection efforts currently underway to assess implementation or perceived effectiveness of TTA administered under DP18–1805.

This information collection request will involve two complementary data collection efforts: (1) Case studies of DP18–1805 awardees (consisting of interviews with DP18–1805 program managers/directors, evaluators, and partners) and (2) a cross-sectional web-based survey administered to NCCCP program directors, coalition members, and partners. The case studies will be used to explore how DP18–1805 awardees are implementing their respective cooperative agreements and administering TTA to NCCCP awardees; the factors that affect the implementation of specific TTA components; and the extent to which they were able to achieve planned short-term outcomes. The web-based survey will inform CDC's understanding of the reach of DP18–1805 TTA efforts; elicit information from NCCCP programs and coalitions about the TTA received, including type, dosage, frequency and format; and assess the perceptions of the effectiveness of the TTA. CDC will use findings from the assessment to inform development of future TTA efforts to more effectively and efficiently support NCCCP's partner organizations.

OMB approval is requested for three years. Participation is voluntary and respondents will not receive incentives for participation. There are no costs to respondents other than their time. CDC requests approval for an estimated 152 annual burden hours associated with this activity.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)	Total burden hours
DP18–1805 Awardee Organizations	Worksheet for Identifying Case Study Interviewees.	2	1	1	2
DP18–1805 Program Directors/Managers.	Case Study Interview Guide for DP18–1805 Program Directors or Managers.	4	1	90/60	6
DP18–1805 Evaluators	Case Study Interview Guide for DP1–1315 Evaluators.	4	1	1	4
DP18–1805 Partners	Case Study Interview Guide for DP1–1315 Partners.	8	1	1	8
NCCCP Program Directors, Staff, Coalition Members, and Partners.	Web-based Survey	264	2	15/60	132
Total		282			152

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26373 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–20–0020; Docket No. CDC–2019–0109]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Coal Workers' Health Surveillance Program (CWHSP). The CWHSP is a congressionally-mandated medical examination program for monitoring the health of coal miners and was originally established under the Federal Coal Mine Health and Safety Act of 1969 with all subsequent amendments (the Act).

DATES: CDC must receive written comments on or before February 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2019–0109 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–

D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

Proposed Project

Coal Workers' Health Surveillance Program (CWHSP), (OMB Control No. 0920–0020, Exp. 09/30/2021)—Revision—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH would like to submit an Information Collection Request (ICR) to revise the data collection instruments being utilized within the Coal Workers' Health Surveillance Program (CWHSP). The CWHSP is a congressionally-mandated medical examination program for monitoring the health of coal miners, and was originally established under the Federal Coal Mine Health and Safety Act of 1969 with all subsequent amendments (the Act). The Act provides the regulatory authority for the administration of the CWHSP. This Program, which operates in accordance with 42 CFR part 37, is useful in providing information for protecting the health of and also in documenting trends and patterns in the prevalence of coal workers' pneumoconiosis ('black lung' disease) among U.S. coal miners.

HHS proposes to revise the CWHSP regulations (42 CFR part 37) by adding a provision to allow NIOSH to suspend or revoke physician B Reader certification for any B Reader suspected of violating the B Reader Code of Ethics or routinely providing chest radiograph classifications in practice that are determined by the CWHSP to be inaccurate. In addition to the B Reader provisions, HHS would also amend existing regulatory text to allow compensation for pathologists who perform autopsies on coal miners at a market rate, on a discretionary basis as needed for public health purposes. These changes to 42 CFR 37 have necessitated this revision ICR.

The total estimated annualized burden hours of 11,757 is based on the following collection instruments:

• Coal Mine Operator Plan (2.10) and Coal Contractor Plan (2.18)—Under 42 CFR part 37, every coal operator and coal contractor in the U.S. must submit a plan approximately every four years, providing information on how they plan to notify their miners of the opportunity to obtain the medical examination. Completion of this form with all requested information (including a roster of current employees) takes approximately 30 minutes.

• Radiographic Facility Certification Document (2.11)—X-ray facilities seeking NIOSH approval to provide miner radiographs under the CWHSP must complete an approval packet including this form which requires approximately 30 minutes for completion.

• Miner Identification Document (2.9)—Miners who elect to participate in the CWHSP must fill out this document which requires approximately 20 minutes. This document records demographic and occupational history, as well as information required under the regulations in relation to the examinations.

• Chest Radiograph Classification Form (2.8)—NIOSH utilizes a radiographic classification system developed by the International Labor Office (ILO) in the determination of pneumoconiosis among coal miners. Physicians (B Readers) fill out this form regarding their interpretations of the radiographs (each image has at least two separate interpretations, and approximately 7% of the images require additional interpretations). Based on prior practice it takes the physician approximately three minutes per form.

• Physician Application for Certification (2.12)—Physicians taking the B Reader examination are asked to complete this registration form which provides demographic information as well as information regarding their medical practices. It typically takes the physician about 10 minutes to complete this form.

• Spirometry Facility Certification Document (2.14)—This form is analogous to the Radiographic Facility Certification Document (2.11) and records the spirometry facility equipment/staffing information. Spirometry facilities seeking NIOSH approval to provide miner spirometry testing under the CWHSP must complete an approval packet which includes this form. It is estimated that it will take approximately 30 minutes for this form to be completed at the facility.

• Respiratory Assessment Form (2.13)—This form is designed to assess respiratory symptoms and certain medical conditions and risk factors. It is estimated that it will take approximately five minutes for this form to be administered to the miner by an employee at the facility.

• Spirometry Results Notification Form (2.15)—This form is used to: Collect information that will allow NIOSH to identify the miner in order to provide notification of the spirometry test results; assure that the test can be done safely; record certain factors that can affect test results; provide documentation that the required components of the spirometry examination have been transmitted to NIOSH for processing; and conduct quality assurance audits and interpretation of results. It is estimated that it will take the facility approximately 20 minutes to complete this form.

• Pathologist Invoice—Under the NCWAS, the invoice submitted by the pathologist must contain a statement that the pathologist is not receiving any other compensation for the autopsy. Each participating pathologist may use their individual invoice as long as this statement is added. It is estimated that only five minutes is required for the pathologist to add this statement to the standard invoice that they routinely use.

• Pathologist Report—Under the NCWAS the pathologist must submit information found at autopsy, slides, blocks of tissue, and a final diagnosis indicating presence or absence of pneumoconiosis. The format of the autopsy reports is variable depending on the pathologist conducting the autopsy. Since an autopsy report is routinely completed by a pathologist, the only additional burden is the specific request for a clinical abstract of terminal illness and final diagnosis relating to pneumoconiosis. Therefore, only five minutes of additional burden is estimated for the pathologist's report.

• Consent, Release and History Form (2.6)—This form documents written authorization from the next of kin to perform an autopsy on the deceased miner. A minimum of essential information is collected regarding the deceased miner including an occupational history and a smoking history. From past experience, it is estimated that 15 minutes is required for the next-of-kin to complete this form.

• DRAFT Authorization for Payment of Autopsy Form (2.XX)—Revised 42 CFR part 37.204 outlines a need for a physician pathologist to obtain written authorization from NIOSH and agreement regarding payment amount for services specified in § 37.202(a) by completing the Authorization for Payment of Autopsy form and submitting it to the CWHSP for authorization prior to completing an autopsy on a coal miner. This is a new form. It will be completed by the pathologist who intends on conducting an autopsy and the form will collect: Demographic information on the deceased miner, characteristics of the miner's pneumoconiosis (if known by the pathologist), demographic and medical licensure information from the requesting pathologist, and proposed payment amount to complete the autopsy in accordance with § 37.203. It is estimated that 15 minutes is required for the pathologist to complete this form.

There are no costs to respondents other than their time. The total estimated burden being requested is 11,757 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Coal Mine Operator	2.10	220	1	30/60	110
Coal Mine Contractor	2.18	160	1	30/60	80
Radiograph Facility Supervisor	2.11	20	1	30/60	10
Coal Miner	2.9	8,500	1	20/60	2833
Coal Miner—Radiograph	No form required	8,500	1	15/60	2125
B Reader Physician	2.8	10	1,760	3/60	880
B Reader Physician Challenge to Disciplinary Action and Appeal of Decertification Decision.	No form required	2	4	30/60	4
Physicians taking the B Reader Examination	2.12	220	1	10/60	37
Spirometry Facility Supervisor	2.14	15	1	30/60	8
Spirometry Facility Employee	2.13	8,500	1	5/60	708
Spirometry Technician	2.15	8,500	1	20/60	2833
Coal Miner—Spirometry	No form required	8,500	1	15/60	2125
Pathologist	Invoice—No standard form.	4	1	5/60	1
Pathologist	Pathology Report—No standard form.	4	1	5/60	1
Next-of-kin for deceased miner	2.6	4	1	15/60	1
Autopsy Prior Authorization	0.1585	4	1	15/60	1
Total					11,757

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26370 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–20–0853; Docket No. CDC–2019–0106]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled ''Asthma Information Reporting System (AIRS)'' (OMB Control No. 0920–0853; expiration date 5/31/2020). The purpose of AIRS is to collect performance measure and surveillance data designed to increase the efficiency and effectiveness of state, local and territorial asthma programs and to monitor the impact of state, local, territorial and national programs.

DATES: CDC must receive written comments on or before February 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2019–0106 by any of the following methods:

• *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

5. Assess information collection costs.

Proposed Project

Asthma Information and Reporting System (AIRS)—Revision—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In 1999, the CDC began its National Asthma Control Program (NACP), a public health approach to address the burden of asthma. The program supports the proposed objectives of ''Healthy People 2030'' for asthma, and is based on the public health principles of surveillance, partnerships, interventions, and evaluation. The CDC requests a three-year approval to revise the ''Asthma Information Reporting System (AIRS)'' (OMB Control No. 0920–0853; expiration date 5/31/2020). Specifically, CDC seeks to make the following changes:

- Increase the number of respondents from 25 to 30.
- Increase the burden from 89 hours to 105 hours.
- Reduce and consolidate the required performance measures (PMs), from 18 to eight core measures.
- Change the collection method for receipt of PMs from an Excel spreadsheet to a newly developed electronic reporting tool (SharePoint site).
- Include instructions for the newly developed electronic reporting tool that will be utilized to report the eight core PMs.
- Change the collection method for receipt of surveillance data, from uploading to a SharePoint site to submitting by email to a dedicated mailbox.
- Update the estimated annualized cost to the government to reflect current funding for the cooperative agreement, updated salaries for staff, and contractor costs for development of the new electronic reporting tool.

The three-year approval will allow CDC to continue to monitor states' program planning and delivery of public health activities and the programs' collaboration with health care systems through a new five-year cooperative agreement—*A Comprehensive Public Health Approach to Asthma Control through Evidence-Based Interventions* (CDC–RFA–EH19–1902).

The goal of this data collection is to provide NCEH with routine information about the activities and performance of the state, local and territorial recipients funded under the NACP through an annual reporting system. NACP requires recipients to report activities related to partnerships, infrastructure, evaluation and interventions to monitor the programs' performance in reducing the burden of asthma. AIRS also includes two forms to collect aggregate emergency department (ED) visits and hospital discharge (HD) data from recipients.

AIRS was first approved by OMB in 2010 to collect data in a web-based system to monitor and guide participating state health departments. Since implementation in 2010, AIRS and the technical assistance provided by CDC staff have provided states with uniform data reporting methods and linkages to other states' asthma program information and resources. Thus, AIRS has saved state resources and staff time when asthma programs embark on asthma activities similar to those conducted elsewhere.

In the past three years, AIRS data were used to:

- Serve as a resource to NCEH when addressing congressional, departmental and institutional inquiries.
- Help the branch align its current interventions with CDC goals and allowed the monitoring of progress toward these goals.
- Allow the NACP and the state asthma programs to make more informed decisions about activities to achieve objectives.
- Facilitate communication about interventions across states and enable inquiries regarding interventions by populations with a disproportionate burden, age groups, geographic areas and other variables of interest.
- Provide feedback to the grantees about their performance relative to others through the distribution of two written reports and several presentations (webinar and in-person) summarizing the results.
- Customize and provide technical assistance and support materials to address implementation challenges.

There will be no cost to respondents other than their time to complete the PM Reporting Tool, ED Visits Reporting Form, and HD Reporting Form, on an annual basis. The estimated annualized time burden is 105 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Funded Asthma Program Recipients	Performance Measures Reporting Tool.	30	1	150/60	75
	Emergency Department Visits Reporting Form.	30	1	30/60	15
	Hospital Discharge Reporting Form	30	1	30/60	15
Total					105

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26372 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Center for Preparedness and Response, (BSC, CPR); Meeting

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 Board of Scientific Counselors, Center for Preparedness and Response, (BSC, CPR). This meeting is open to the public, limited only by the space available. The meeting room accommodates up to 60 people. Public participants should pre-register for the meeting (see **SUPPLEMENTARY INFORMATION** for more information). The public is also welcome to listen to the meeting via Adobe Connect. Pre-registration is required by clicking the links below.

WEB ID January 23, 2020 registration: https://adobeconnect.cdc.gov/epvdyo95oxsu/event/registration.html.

WEB ID January 24, 2020 registration: https://adobeconnect.cdc.gov/ek6t1uq3f5zy/event/registration.html.

Dial in number: 1–888–790–2046; Participant code: 5041683.

DATES: The meeting will be held on January 23, 2020, 12:30 p.m. to 5:00 p.m., EST; and January 24, 2020, 8:30 a.m. to 2:30 p.m., EST.

ADDRESSES: Centers for Disease Control and Prevention (CDC), Global Communications Center, Building 19, Auditorium B3, 1600 Clifton Road NE, Atlanta, Georgia 30329–4027.

FOR FURTHER INFORMATION CONTACT: Dometa Ouisley, Office of Science and Public Health Practice, CDC, 1600 Clifton Road NE, Mailstop H21–6, Atlanta, Georgia 30329–4027; Telephone: (404) 639–7450; Fax: (404) 471–8772; Email: *OPHPR.BSC.Questions@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: This Board is charged with providing advice and guidance to the Secretary, Department of Health and Human Services (HHS), the Assistant Secretary for Health (ASH), the Director, Centers for Disease Control and Prevention (CDC), and the Director, Center for Preparedness and Response (CPR), concerning strategies and goals for the programs and research within CPR, monitoring the overall strategic direction and focus of the CPR Divisions and Offices, and also may administer and oversee peer review of CPR scientific programs. For additional information about the Board, please visit: *https://www.cdc.gov/cpr/bsc/index.htm.*

Matters to Be Considered: The two-day agenda will include: Day One: The meeting will cover briefings and BSC deliberation on the following topics: (1) CPR Updates from the Director, (2) CPR Interval Updates from the Division Directors, and (3) the Report from the Biological Agent Containment Working Group (BACWG). Day Two: The meeting will cover briefings and BSC deliberation on the following topics: (1) Current CDC Responses and the Graduated Response Framework, (2) Emergency Preparedness and Response to Address Highest Burden and Need; and (3) Preparedness Updates and CPR Discussion: Liaison Representatives. Agenda items are subject to change as priorities dictate.

Members of the public that wish to attend this meeting in person should pre-register by submitting the following information by email, facsimile, or phone (see Contact Person for More Information) no later than 12:00 noon (EDT) Friday, January 17, 2020:

- Full Name
- Organizational Affiliation
- Complete Mailing Address
- Citizenship
- Phone Number or Email Address

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. 2019–26329 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–20–1208; Docket No. CDC–2019–0108]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction

Act of 1995. This notice invites comment on Developmental Projects to Improve the National Health and Nutrition Examination Survey and Related Programs. This generic clearance request covers projects that will help evaluate and improve upon issues such as survey design and operations, as well as examine the feasibility and challenges that may arise with developing future content for the National Health and Nutrition Examination Survey (NHANES) (OMB# 0920–0950, expires November 30, 2021) or similar studies.

DATES: CDC must receive written comments on or before February 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2019–0108 by any of the following methods:

- *Federal eRulemaking Portal: Regulation.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

Please note: Submit all comments through the Federal eRulemaking portal (Regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

Proposed Project

Developmental Projects to Improve the National Health and Nutrition Examination Survey and Related Programs, (OMB Control No. 0920–1208 Exp. Date 12/31/2020)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability; environmental, social and other health hazards; and determinants of health of the population of the United States. The Division of Health and Nutrition Examination Surveys (DHNES) has conducted national surveys and related projects periodically between 1970 and 1994, and continuously since 1999. The mission of DHNES programs is to produce descriptive statistics which measure the health and nutrition status of the general population. The continuous operation of DHNES programs presents unique challenges in testing new survey content and activities, such as outreach or participant screening etc.

This generic request covers developmental projects to help evaluate and enhance DHNES existing and proposed data collection activities to increase research capacity and improve data quality. The information collected through this Generic Information Collection Request will not be used to make generalizable statements about the population of interest or to inform public policy. However, methodological findings from these projects may be reported.

The purpose and use of projects under this NHANES generic clearance would include developmental projects necessary for activities such as; testing new procedures, equipment, technology and approaches that are going to be folded into NHANES or other NCHS programs; designing and testing examination components or survey questions; creating new studies including biomonitoring and clinical measures; creating new cohorts, including a pregnancy and/or a birth—24 month cohort; testing of the cognitive and interpretive aspects of survey methodology; feasibility testing of proposed new components or modifications to existing components; testing of human-computer interfaces/usability; assessing the acceptability of proposed NHANES components among likely participants; testing alternative approaches to existing NHANES procedures, including activities related to improving nonresponse; testing the use of or variations/adjustments in incentives; testing content of web based surveys; testing the feasibility of obtaining bodily fluid specimens (blood, urine, semen, saliva, breastmilk) and tissue sample (swabs); testing digital imaging technology and related procedures (*e.g.,* retinal scan, liver ultrasound, Dual-energy X-ray absorptiometry (DEXA), prescription and over-the-counter dietary supplements bottles); testing the feasibility of and procedure/processes for accessing participant's medical records from healthcare settings (*e.g.,* hospitals and physician offices); testing the feasibility and protocols for home examination measurements; testing survey materials and procedures to improve response rates, including changes to advance materials and protocols, changes to the incentive structure, introduction of new and timely outreach and awareness procedures including the use of social media; conducting crossover studies; creating and testing digital survey materials; and conducting customer satisfaction assessments.

The types of participants covered by the NHANES generic may include current or past NHANES participants; family or household members of NHANES participants; individuals eligible to be participants in NHANES, but who did not screen into the actual survey; convenience samples; volunteers; subject matter experts or consultants such as survey methodologist, academic researchers, clinicians or other health care providers; NHANES data or website users; members of the general public or individuals abroad who would be part of a collaborative development project or projects between NCHS and related public health agencies in the U.S. and/or abroad. The type of participant involved in a given developmental project would be determined by the nature of the project. The details of each project will be included in the specific GenIC submissions.

There is no cost to respondents other than their time. A three-year clearance is requested. The estimated annualized burden hours for this generic data collection is 59,465.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Individuals or Households	Developmental Projects & Focus Group documents.	35,000	1	1.5	52,500
Volunteers	Developmental Projects & Focus Group documents.	300	1	1.5	450
Individuals or households, Volunteers, NHANES Participants.	24-hour developmental projects	200	1	25	5,000
NHANES participants	Developmental Projects	1,000	1	1.5	1,500
Subject Matter Experts	Focus Group/Developmental Project Documents.	15	1	1	15
Total					59,465

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26374 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–20–1011]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled Emergency Epidemic Investigation Data Collections (OMB control number 0920–1011), for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on September 4, 2019 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Emergency Epidemic Investigation Data Collections (OMB Control No. 0920–1011, Exp. 01/31/2020)—Extension—Center for Surveillance, Education, and Laboratory Services (CSELS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC previously conducted Emergency Epidemic Investigations (EEIs) under Office of Management and Budget (OMB) Control Number 0920–0008. In 2013, CDC received OMB approval (OMB Control Number 0920–1011) for a new OMB generic clearance for a three-year period to collect vital information during EEIs in response to urgent outbreaks or events (*i.e.,* natural, biological, chemical, nuclear, radiological) characterized by undetermined agents, undetermined sources, undetermined transmission, or undetermined risk factors. This generic clearance was approved for a three-year extension, which expires on 1/31/2020. CDC seeks OMB approval for an extension of this generic clearance for an additional three-year period.

Supporting effective emergency epidemic investigations is one of the most important ways that CDC protects the health of the public. CDC is frequently called upon to conduct EEIs at the request of local, state, or international health authorities seeking support to respond to urgent outbreaks or urgent public health-related events. In response to external partner requests, CDC provides necessary epidemiologic support to identify the agents, sources, modes of transmission, or risk factors to effectively implement rapid prevention and control measures to protect the public's health. Data collection is a critical component of the epidemiologic support provided by CDC; data are analyzed to determine the agents, sources, modes of transmission, or risk factors so that effective prevention and control measures can be implemented. During an unanticipated outbreak or event, immediate action by CDC is necessary to minimize or prevent public harm. The legal justification for EEIs are found in the Public Health Service Act (42 U.S.C. Sec. 301 [241]) (a).

Successful investigations are dependent on rapid and flexible data collection that evolves during the investigation and is customized to the unique circumstances of each outbreak or event. Data collection elements will be those necessary to identify the agents, sources, mode of transmission, or risk factors. Examples of potential data collection methods include telephone or face-to-face interview; email, web or other type of electronic questionnaire; paper-and-pencil questionnaire; focus groups; medical record review; laboratory record review; collection of clinical samples; and environmental assessment. Respondents will vary depending on the nature of the outbreak or event; examples of potential respondents include health care professionals, patients, laboratorians, and the general public. Participation in EEIs is voluntary and there are no anticipated costs to respondents other than their time. CDC will use the information gathered during EEIs to rapidly identify and effectively implement measures to minimize or prevent public harm.

CDC projects 60 EEIs in response to outbreaks or events characterized by undetermined agents, undetermined sources, undetermined transmission, or undetermined risk factors annually. The projected average number of respondents is 200 per EEI, for a total of 12,000 respondents. CDC estimates the average burden per response is 0.5 hours and each respondent will be asked to respond once. Therefore, the total estimated annual burden hours are 6,000. These estimates are based on the reported burden for EEIs that have been performed during the previous two years. OMB approval is requested for three years.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Emergency Epidemic Investigation Participants.	Emergency Epidemic Investigation Data Collection Instruments.	12,000	1	30/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26368 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–20–1154]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled CDC/ATSDR Formative Research and Tool Development to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on August 23, 2019 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

CDC/ATSDR Formative Research and Tool Development—(OMB Control No. 0920–1154, Exp. 1/31/2020)—Extension—Office of Science (OS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) requests approval for an extension of a generic clearance for CDC/ATSDR Formative Research and Tool Development. This information collection request is designed to allow CDC to conduct formative research information collection activities used to inform many aspects of surveillance, communications, health promotion, and research project development at CDC. Formative research is the basis for developing effective strategies including communication channels, for influencing behavior change. It helps researchers identify and understand the characteristics—interests, behaviors and needs—of target populations that influence their decisions and actions.

Formative research is integral in developing programs as well as improving existing and ongoing programs. Formative research looks at the community in which a public health intervention is being or will be implemented and helps the project staff understand the interests, attributes and needs of different populations and persons in that community. Formative research occurs before a program is designed and implemented, or while a program is being conducted.

At CDC, formative research is necessary for developing new programs or adapting programs that deal with the complexity of behavior, social context, cultural identity, and health care that underlie the epidemiology of diseases and conditions in the U.S. CDC conducts formative research to develop public-sensitive communication messages and user friendly tools prior to developing or recommending interventions, or care. Sometimes these studies are entirely behavioral but most often they are cycles of interviews and focus groups designed to inform the development of a product. Products from these formative research studies will be used for prevention of disease. Findings from these studies may also be presented as evidence to disease-specific National Advisory Committees, to support revisions to recommended prevention and intervention methods, as well as new recommendations.

Much of CDC's health communication takes place within campaigns that have fairly lengthy planning periods—timeframes that accommodate the standard Federal process for approving data collections. Short term qualitative interviewing and cognitive research techniques have previously proven invaluable in the development of scientifically valid and population-appropriate methods, interventions, and instruments.

This request includes studies investigating the utility and acceptability of proposed sampling and recruitment methods, intervention contents and delivery, questionnaire domains, individual questions, and interactions with project staff or electronic data collection equipment. These activities will also provide information about how respondents answer questions, and ways in which question response bias and error can be reduced.

This request also includes collection of information from public health programs to assess needs related to initiation of a new program activity or expansion or changes in scope or implementation of existing program activities to adapt them to current needs. The information collected will be used to advise programs and provide capacity-building assistance tailored to identify needs.

Overall, these development activities are intended to provide information that will increase the success of the surveillance or research projects through increasing response rates and decreasing response error, thereby decreasing future data collection burden to the public. The studies that will be covered under this request will include one or more of the following investigational modalities: (1) Structured and qualitative interviewing for surveillance, research, interventions and material development, (2) cognitive interviewing for development of specific data collection instruments, (3) methodological research (4) usability testing of technology-based instruments and materials, (5) field testing of new methodologies and materials, (6) investigation of mental models for health decision-making, to inform health communication messages, and (7) organizational needs assessments to support development of capacity. Respondents who will participate in individual and group interviews (qualitative, cognitive, and computer assisted development activities) are selected purposively from those who respond to recruitment advertisements. In addition to utilizing advertisements for recruitment, respondents who will participate in research on survey methods may be selected purposively or systematically from within an ongoing surveillance or research project.

Participation of respondents is voluntary. There is no cost to participants other than their time. The total estimated annual burden is 20,000 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average hours per response
General public and health care providers	Screener	10,000	1	15/60
	Interview	5,000	1	1
	Focus Group Interview	5,000	1	2
	Survey	5,000	1	30/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–26369 Filed 12–5–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–379, CMS–10242, CMS–1771, CMS–10180 and CMS–R–199]

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 February 4, 2020.

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–379 Financial Statement of Debtor
CMS–10242 Emergency and Non-Emergency Ambulance Transports and Beneficiary Signature Requirements
CMS–1771 Attending Physicians Statement and Documentation of Medicare Emergency
CMS–10180 Children's Health Insurance Program (CHIP) Report on Payables and Receivables
CMS–R–199 Medicaid Report on Payables and Receivables

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:* Extension of a currently approved collection; *Title of Information Collection:* Financial Statement of Debtor; *Use:* Section 1893(f)(1) of the Social Security Act and 42 CFR 401.607 provides the authority for collection of this information. Section 42 CFR 405.607 requires that, CMS recover amounts of claims due from debtors including interest where appropriate by direct collections in lump sums or in installments. In addition, the DOJ Final Rule, the Federal Claims Collection Standards, which was published as 32 CFR parts 900–904, on November 22, 2000, in the **Federal Register**, Section 32 CFR 900.1 stipulates that, ''. . . standards for Federal agency use in the administrative collection, offset, compromise, and the suspension or termination of collection activity . . .'' Section 32 CFR 901.8(a) states that, ''Agencies should obtain financial statements from debtors who represent that they are unable to pay the debt in one lump sum.'' *Form Number:* CMS–379 (OMB control number: 0938–0270); *Frequency:* Yearly; *Affected Public:* Private Sector; Business or other for-profits; *Number of Respondents:* 500; *Total Annual Responses:* 500; *Total Annual Hours:* 1,000. (For policy questions regarding this collection contact Anita Crosier at (410) 786–0217.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Emergency and Non-Emergency Ambulance Transports and Beneficiary Signature Requirements; *Use:* The statutory authority requiring a beneficiary's signature on a claim submitted by a provider is located in section 1835(a) and in 1814(a) of the Social Security Act (the Act), for Part B and Part A services, respectively. The authority requiring a beneficiary's signature for supplier claims is implicit in sections 1842(b)(3)(B)(ii) and in 1848(g)(4) of the Act. Federal regulations at 42 CFR 424.32(a)(3) state that all claims must be signed by the beneficiary or on behalf of the Beneficiary (in accordance with 424.36). Section 424.36(a) states that the beneficiary's signature is required on a claim unless the beneficiary has died or the provisions of 424.36(b), (c), or (d) apply. For emergency and nonemergency ambulance transport services, where the beneficiary is physically or mentally incapable of signing the claim (and the beneficiary's authorized representative is unavailable or unwilling to sign the claim), that it is impractical and infeasible to require an ambulance provider or supplier to later locate the beneficiary or the person authorized to sign on behalf of the beneficiary, before submitting the claim to Medicare for payment. Therefore, an exception was created to the beneficiary signature requirement with respect to emergency and nonemergency ambulance transport services, where the beneficiary is physically or mentally incapable of signing the claim, and if certain documentation requirements are met. Thus, we added subsection (6) to paragraph (b) of 42 CFR 424.36. The information required in this ICR is needed to help ensure that services were in fact rendered and were rendered as billed. *Form Number:* CMS–10242 (OMB control number: 0938–1049); *Frequency:* Yearly; *Affected Public:* Private Sector; Business or other for-profits, Not-for-profit Institutions; *Number of Respondents:* 10,229; *Total Annual Responses:* 13,318,440; *Total Annual Hours:* 1,110,757. (For policy questions regarding this collection contact Martha Kuespert at (410) 786–4605.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Attending Physicians Statement and Documentation of Medicare Emergency; *Use:* Section 1866 of the Social Security Act states that any provider of services shall be qualified to participate in the Medicare program and shall be eligible for payments under Medicare if it files an agreement with the Secretary to meet the conditions outlined in this section of the Act. Section 1814(d)(1) of the

Social Security Act and 42 CFR 424.100, allows payment of Medicare benefits for a Medicare beneficiary to a nonparticipating hospital that does not have an agreement in effect with the Centers for Medicare and Medicaid Services. These payments can be made if such services were emergency services and if CMS would be required to make the payment if the hospital had an agreement in effect and met the conditions of payment. This form is used in connection with claims for emergency hospital services provided by hospitals that do not have an agreement in effect under Section 1866 of the Social Security Act. 42 CFR 424.103(b) requires that before a non-participating hospital may be paid for emergency services rendered to a Medicare beneficiary, a statement must be submitted that is sufficiently comprehensive to support that an emergency existed. Form CMS–1771 contains a series of questions relating to the medical necessity of the emergency. The attending physician must attest that the hospitalization was required under the regulatory emergency definition (42 CFR 424.101 attached) and give clinical documentation to support the claim. A photocopy of the beneficiary's hospital records may be used in lieu of the CMS–1771 if the records contain all the information required by the form. *Form Number:* CMS–1771 (OMB control number: 0938–0023); *Frequency:* Yearly; *Affected Public:* Private Sector; Business or other for-profits, Not-for-profit Institutions; *Number of Respondents:* 100; *Total Annual Responses:* 200; *Total Annual Hours:* 50. (For policy questions regarding this collection contact Shauntari Cheely at (410) 786–1818.)

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Children's Health Insurance Program (CHIP) Report on Payables and Receivables; *Use:* Section 2105 of the Social Security Act (Title XXI) requires the Secretary to estimate the amount each State should be paid at the beginning of each quarter. This amount is based on a report filed by the State. Section 2105 of the Social Security Act authorizes the Secretary to pay the amount estimated, reduced or increased to the extent of any overpayment or underpayment for any prior quarter. Section 3515 of the CFO Act requires government agencies to produce auditable financial statements in accordance with Office of Management and Budget guidelines on Form and Content. The Government Management and Reform Act of 1994 requires that all offices, bureaus and associated activities of the 24 CFO Act agencies must be covered in an agency-wide, audited financial statement. Collection of CHIP data and the calculation of the CHIP Incurred But Not Reported (IBNR) estimate are pertinent to CMS' financial audit. The CHIP Report on Payables and Receivables will provide the information needed to calculate the CHIP IBNR. Failure to collect this information could result in non-compliance with the law. *Form Number:* CMS–10180 (OMB control number: 0938–0988); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 504. (For policy questions regarding this collection contact Beverly Boher at (410) 786–7806.)

5. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Report on Payables and Receivables; *Use:* Section 1903(b)(d)(1) of the Social Security Act requires the Secretary to estimate the amount each State should be paid at the beginning of each quarter. This amount is to be based on a report filed by the State. Section 1903(b)(d)(2)(A) of the Social Security Act authorizes the Secretary to pay the amount estimated, reduced or increased to the extent of any overpayment or underpayment for any prior quarter. Section 3515 of CFO Act requires government agencies to produce auditable financial statements in accordance with Office of Management and Budget guidelines on Form and Content. The Government Management and Reform Act of 1994 requires that all offices, bureaus and associated activities of the 24 CFO Act agencies must be covered in an agency. *Form Number:* CMS–R–199 (OMB control number: 0938–0697); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 504. (For policy questions regarding this collection contact Beverly Boher at (410) 786–7806.)

Dated: December 3, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–26362 Filed 12–5–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10717]

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 February 4, 2020.

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–10717 Medicare Part C and Part D Program Audit and Industry-Wide Part C Timeliness Monitoring Project (TMP) Protocols

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:* New Collection (Request for a new OMB control number); *Title of Information Collection:* Medicare Part C and Part D Program Audit and Industry-Wide Part C Timeliness Monitoring Project (TMP) Protocols; *Use:* Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and implementing regulations at 42 CFR parts 422 and 423, Medicare Part D plan sponsors and Medicare Advantage organizations are required to comply with all Medicare Parts C and D program requirements. CMS' annual audit plan ensures that we evaluate sponsoring organizations' compliance with these requirements by conducting program audits that focus on high-risk areas that have the greatest potential for beneficiary harm. As such, CMS has developed the following audit protocols for use by sponsoring organizations to prepare for their audit:

- Compliance Program Effectiveness (CPE)
- Part D Formulary and Benefit Administration (FA)
- Part D Coverage Determinations, Appeals, and Grievances (CDAG)
- Part C Organization Determinations, Appeals, and Grievances (ODAG)
- Special Needs Plans Care Coordination (SNPCC)

CMS generally conducts program audits at the parent organization level in an effort to reduce burden and, for routine audits, subjects each sponsoring organization to all applicable program area protocols. For example, if a sponsoring organization does not offer a special needs plan, or an accrediting organization has deemed a special needs plan compliant with CMS regulations and standards, CMS would not apply the SNPCC protocol. Likewise, CMS would not apply the ODAG audit protocol to an organization that offers only a standalone prescription drug plan since that organization does not offer the MA benefit. Conversely, ad hoc audits resulting from referral may be limited in scope and, therefore, all program area protocols may not be applied.

In addition, as part of the robust program audit process, CMS also requires sponsoring organizations that have undergone a program audit and found to have deficiencies to undergo a validation audit to ensure correction. The validation audit uses the same audit protocols, but only tests the elements where deficiencies were found as opposed to re-administering the entire audit. Finally, CMS conducts annual industry-wide timeliness monitoring of all Part C organizations by using a subset of the ODAG protocol. However, sponsoring organizations that successfully submitted all of their Part C data in response to a program audit in the prior year are excluded from submitting new data for the timeliness monitoring effort in the year following their program audit.

The information gathered during this program audit will be used by the Medicare Parts C and D Oversight and Enforcement Group (MOEG) within the Center for Medicare (CM) and CMS Regional Offices to assess sponsoring organizations' compliance with Medicare program requirements. If outliers or other data anomalies are detected, Regional Offices will work in collaboration with MOEG and other divisions within CMS for follow-up and resolution. Additionally, MA and Part D organizations will receive the audit results and will be required to implement corrective action to correct any identified deficiencies. *Form Number:* CMS–10717 (OMB control number: 0938–New); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 190; *Total Annual Responses:* 179; *Total Annual Hours:* 36,082. (For policy questions regarding this collection contact Kellie Simons at 410–786–0886.)

Dated: December 3, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–26385 Filed 12–5–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–2567]

Agency Information Collection Activities: Submission for OMB Review; 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 (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 a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate 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 on the collection(s) of information must be received by the OMB desk officer by January 6, 2020.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR* Email: *OIRA_submission@omb.eop.gov*.

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 Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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 (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-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 that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement without change of a currently approved collection; *Title of Information Collection:* Statement of Deficiencies and Plan of Correction Supporting Regulations; *Use:* Section 1864(a) of the Social Security Act requires that the Secretary use state survey agencies to conduct surveys to determine whether health care facilities meet Medicare and Clinical Laboratory Improvement Amendments participation requirements. The Form CMS–2567 is the means by which the survey findings are documented. This section of the law further requires that compliance findings resulting from these surveys be made available to the public within 90 days of such surveys. The Form CMS–2567 is the vehicle for this disclosure. The form is also used by health care facilities to document their plan of correction and by CMS, the states, facilities, purchasers, consumers, advocacy groups, and the public as a source of information about quality of care and facility compliance. The regulations at 42 CFR 488.18 require that state survey agencies document all deficiency findings on a statement of deficiencies and plan of correction, which is the CMS–2567. Sections 488.26 and 488.28 further delineate how compliance findings must be recorded and that CMS prescribed forms must be used. *Form Number:* CMS–2567 (OMB Control Number: 0938–0391); *Frequency:* Yearly and occasionally; *Affected Public:* Private Sector (Business or other for-profit and Not-for-profit institutions); *Number of Respondents:* 64,500; *Total Annual Responses:* 64,500; *Total Annual Hours:* 129,000. (For policy questions regarding this collection contact Caecilia Blondiaux at 410–786–2190.)

Dated: December 3, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–26364 Filed 12–5–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; State Plan Child Support Collection and Establishment of Paternity Title IV–D OCSE–100 and OCSE–21–U4

AGENCY: Office of Child Support Enforcement, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting a three-year extension of the forms OCSE–21–U4: Transmittal and Notice of Approval of State Plan Material for: Title IV–D of the Social Security Act and OCSE–100: State Plan (OMB #0970–0017, expiration 7/31/2020).

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, the Administration for Children and Families 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 *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: OCSE has approved an IV–D state plan for each state. Federal regulations require states to amend their state plans only when necessary to reflect new or revised federal statutes, regulations, or material changes in any state laws, regulations, policies, or IV–D agency procedures. The requirement for submission of a state plan and plan amendments for the Child Support Enforcement Program is found in sections 452, 454, and 466 of the Social Security Act. OCSE made minor revisions to the OCSE–21–U4 to remove outdated language and add an option for states to electronically request or renew an exemption from the mandatory laws and procedures in Section 466 of the Social Security Act via the online state plan system. These revisions do not increase the burden of the OCSE–21–U4.

Respondents: State IV–D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours
State Plan (OCSE–100)	54	12	.5	324
State Plan Transmittal (OCSE–21–U4)	54	12	.25	162

Estimated Total Annual Burden Hours: 486.

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: Sections 452, 454, and 466 of the Social Security Act

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2019–26323 Filed 12–5–19; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–5552]

Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee. The general function of the committees is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on January 14, 2020, from 8 a.m. to 5:30 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2019–N–5552. The docket will close on January 13, 2020. Submit either electronic or written comments on this public meeting by January 13, 2020. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 13, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 13, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Comments received on or before December 30, 2019, will be provided to the committees. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–5552 for ''Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kalyani Bhatt, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *AADPAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The committees will discuss new drug application 211802 for oxycodegol, a new molecular entity full mu-opioid receptor agonist, submitted by Nektar Therapeutics, for the management of chronic low back pain in adult patients with pain severe enough to require daily, around-the-clock, long-term opioid treatment and for which alternative treatment options are inadequate. The committees will be asked to discuss the safety and efficacy data as well as the overall risk-benefit profile of the product.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before December 30, 2019, will be provided to the committees. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before December 19, 2019. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by December 20, 2019.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Kalyani Bhatt (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 2, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–26338 Filed 12–5–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2019–E–1076 and FDA–2019–E–1079]

Determination of Regulatory Review Period for Purposes of Patent Extension; PALYNZIQ

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for PALYNZIQ and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by February 4, 2020. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 3, 2020. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 4, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 4, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–E–1076 and FDA–2019–E–1079 For ''Determination of Regulatory Review Period for Purposes of Patent Extension; PALYNZIQ.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological product becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product PALYNZIQ (pegvaliase-pqpz). PALYNZIQ is indicated to reduce blood phenylalanine concentrations in adult patients with phenylketonuria who have uncontrolled blood phenylalanine concentrations greater than 600 micromole/L on existing management. Subsequent to this approval, the USPTO received patent term restoration applications for PALYNZIQ (U.S. Patent Nos. 7,534,595 and 7,537,923) from Biomarin Pharmaceutical Inc., and the USPTO requested FDA's assistance in determining a patent's eligibility for patent term restoration. In a letter dated May 13, 2019, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of PALYNZIQ represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for PALYNZIQ is 3,803 days. Of this time, 3,474 days occurred during the testing phase of the regulatory review period, while 329 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* December 27, 2007. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on December 27, 2007.
2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262):* June 30, 2017. FDA has verified the applicant's claim that the biologics license application (BLA) for PALYNZIQ (BLA B761079) was initially submitted on June 30, 2017.
3. *The date the application was approved:* May 24, 2018. FDA has verified the applicant's claim that BLA B761079 was approved on May 24, 2018.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,743 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *https://www.regulations.gov* at Docket Nos. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 2, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–26327 Filed 12–5–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–5611]

Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice, establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming joint public advisory committee meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee. The general function of the committees is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on January 15, 2020, from 8 a.m. to 5:30 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2019–N–5611. The docket will close on January 14, 2020. Submit either electronic or written comments on this public meeting by January 14, 2020. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 14, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 14, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Comments received on or before December 31, 2019, will be provided to the committees. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management

Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–5611 for ''Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify the information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Moon Hee V. Choi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *AADPAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: During the morning session, the committees will discuss new drug application (NDA) 213426, for tramadol 44 milligrams (mg) and celecoxib 56 mg tablet, which contains a fixed-dose combination of an opioid and a non-steroid anti-inflammatory drug, submitted by Esteve Pharmaceuticals, S.A., for the management of acute pain in adults that is severe enough to require an opioid analgesic and for which alternative treatments are inadequate. The committees will be asked to discuss the safety and efficacy data as well as the overall risk-benefit profile of the product.

During the afternoon session, the committees will discuss NDA 209653, for an extended-release oral tablet formulation of oxycodone, submitted by Intellipharmaceutics Corp., with the management of moderate-to-severe pain when a continuous, around-the-clock opioid analgesic is needed for an extended period of time. The product has been formulated with properties intended to deter abuse, and the applicant has submitted data to support these abuse-deterrent properties for this product. The committees will be asked to discuss whether the applicant has demonstrated abuse-deterrent properties for their product that would support labeling, as well as to discuss the overall risk-benefit profile of the product.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. Written submissions may be made to the contact person on or before December 31, 2019. Oral presentations from the public will be scheduled between approximately 10:30 a.m. to 11 a.m. and 3:30 p.m. to 4 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before December 20, 2019. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by December 23, 2019.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Moon Hee V. Choi (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 3, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–26377 Filed 12–5–19; 8:45 am]

BILLING CODE 4164–01–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: The Division of Independent Review Application Reviewer Recruitment Form, OMB No. 0915–0295—Extension

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 February 4, 2020.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 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, the 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: The Division of Independent Review Application Reviewer Recruitment Form, OMB No. 0915–0295—Extension.

Abstract: HRSA's Division of Independent Review (DIR) is responsible for administering the review of eligible applications submitted for grants under HRSA competitive announcements. DIR ensures that the objective review process is independent, efficient, effective, economical, and complies with the applicable statutes, regulations, and policies. Applications are reviewed by subject matter experts knowledgeable in health and public health disciplines. Review findings are advisory to HRSA programs responsible for making award decisions.

This ICR is for continuation of a web-based data collection system, the Reviewer Recruitment Module (RRM), used to gather critical reviewer information. The RRM uses standardized categories of information in drop down menu format for data such as the following: Degree, specialty, occupation, work setting, and in select instances, affiliations with organizations and institutions that serve special populations. Some program regulations require that objective review panels contain consumers of health services. Other demographic data may be voluntarily provided by a potential reviewer. Defined data elements assist HRSA in finding and selecting expert reviewers for objective review committees.

HRSA maintains a roster of approximately 9,000 qualified individuals who served on HRSA objective review committees. The web-based RRM simplifies reviewer registration entry using a user-friendly Graphical User Interface with a few data drop down menu choices, a search engine that supports key word queries in the actual resume or Curriculum Vitae text, and also permits reviewers to access and update their information as needed. The RRM is 508 compliant and accessible by the general public via a link on the HRSA ''Grants'' internet site, or by keying the RRM URL into their browser. The RRM is accessible using any of the commonly used internet browsers.

Need and Proposed Use of the Information: HRSA currently uses the RRM to collect information from individuals who wish to volunteer as objective review committee participants for the Agency's discretionary and competitive grant or cooperative agreement funding opportunities. The RRM provides HRSA with an effective search and communication functionality with which to identify and contact qualified potential reviewers. The RRM has an enhanced search and reporting capability to help DIR ensure that the HRSA reviewer pool has the necessary skills, education, and diversity to meet the ever-evolving need for qualified reviewers. If DIR identifies any other specific needs that are under-represented in the RRM pool, DIR is able to recruit specifically to address those needs as expertise is always the primary determinant in selecting potential reviewers for any specific grant review. However, no reviewer is required to provide demographic information to join the reviewer pool or be selected as a reviewer for any competition.

All HRSA reviewers must possess the technical skill and ability to access the internet on a secure desktop laptop or touch pad, and either a land line or Voice Over Internet Protocol capability in order to participate in HRSA objective review committees. Reviewers are professionals with expertise and experience consistent with the HRSA mission. Certain legislation requires HRSA programs to include consumers of specific health care services in the objective review committee.

Likely Respondents: Potential respondents are subject matter professionals with expertise and experience in the social, cultural, and health care fields that are consistent with the HRSA mission and competitive program needs to address the availability and delivery of quality health care to all Americans.

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	Responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
New reviewer	1,194	1	1,194	.166	198
Updating reviewer information	7,953	1	7,953	.333	2,648
Total	9,147		9,147		2,846

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, Executive Secretariat.

[FR Doc. 2019–26384 Filed 12–5–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; R13 Review.

Date: December 12, 2019.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Li Jia, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH, 6001 Executive Boulevard, Room 3208D, Rockville, MD 20852, 301 451–2854, *li.jia@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Child Neurology K12 Review.

Date: December 18, 2019.

Time: 7:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: William C Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, (301) 496–0660, *benzingw@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 2, 2019.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26381 Filed 12–5–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Aging.

Date: January 21–22, 2020.

Closed: January 21, 2020, 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Open: January 22, 2020, 8:00 a.m. to 2:00 p.m.

Agenda: Call to order and report from the Director; Discussion of future meeting dates; Consideration of minutes of last meeting; Reports from Task Force on Minority Aging Research, Working Group on Program; Council Speaker; Program Highlights.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Robin Barr, Ph.D., Director, Office of Extramural Activities, National Institute on Aging, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322, *barrr@nia.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nia.nih.gov/about/naca,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 2, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26313 Filed 12–5–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Aging.

Date: May 26–27, 2020.

Closed: May 26, 2020, 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Open: May 27, 2020, 8:00 a.m. to 12:45 p.m.

Agenda: Call to order and report from the Director; Discussion of future meeting dates; Consideration of minutes of last meeting; Reports from Task Force on Minority Aging Research, Working Group on Program; Council Speaker; Program Highlights.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1 & E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Robin Barr, Ph.D., Director, Office of Extramural Activities, National Institute on Aging, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322 *barrr@nia.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nia.nih.gov/about/naca,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 2, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26316 Filed 12–5–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: February 6, 2020.

Closed: 9:00 a.m. to 9:15 a.m.

Agenda: Presentation of the AABSC Report.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Rooms A, B & C, 6700B Rockledge Drive, Bethesda, MD 20817.

Closed: 9:15 a.m. to 9:50 a.m.

Agenda: To review and evaluate Grant Applications and Cooperative Agreements.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Rooms A, B & C, 6700B Rockledge Drive, Bethesda, MD 20892.

Open: 9:50 a.m. to 3:00 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Rooms A, B & C, 6700B Rockledge Drive, Bethesda, MD 20892.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Advisory Council, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 1458, MSC 6902 Bethesda, MD 20892, 301–443–9737, *bautista@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niaaa.nih.gov/AboutNIAAA/AdvisoryCouncil/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: December 2, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26315 Filed 12–5–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Biomedical Imaging and Bioengineering.

Date: January 23, 2020.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: Report from the Institute Director, other Institute Staff and presentation of task group reports.

Place: The William F. Bolger Center, Franklin Building, Classroom 1, 9600 Newbridge Drive, Potomac, MD 20854.

Closed: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, Franklin Building, Classroom 1, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: David T. George, Ph.D., Acting Associate Director, Office of Research Administration, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 920, Bethesda, MD 20892, (301) 496–9474, *georged@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm,* where an agenda and any additional information for the meeting will be posted when available.

Dated: December 2, 2019.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–26314 Filed 12–5–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are 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) 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.

Proposed Project: SAMHSA SOAR Web-Based Data Form (OMB No. 0930–0329)—EXTENSION

In 2009 the SAMHSA created a Technical Assistance Center to assist in the implementation of the Supplemental Security Income (SSI)/Social Security Disability Insurance (SSDI) Outreach, Access, and Recovery (SOAR) effort in all states. The primary objective of SOAR is to improve the allowance rate for the Social Security Administration's (SSA) disability benefits for people who are experiencing or at risk of homelessness, and who have serious mental illnesses.

During the SOAR training, the importance of keeping track of SSI/SSDI applications through the process is stressed. In response to requests from states implementing SOAR, the Technical Assistance Center under SAMHSA's direction developed a web-based data form that case workers can use to track the progress of submitted applications, including decisions received from SSA either on initial application or on appeal. This password-protected web-based data form is hosted on the SOAR website (*https://soartrack.prainc.com*). Use of this form is completely voluntary.

There are two parts to the SOAR Web-based Data Form. Part I of the SOAR Web-based Data Form is intended for SOAR-trained case workers to enter the outcomes of SOAR-assisted SSI/SSDI applications. Part II of the SOAR Web-based Data Form includes two sections reserved for SOAR State Team Leads to report annually. The first section of Part II collects quantitative summary data from states that do not track SOAR-assisted SSI/SSDI applications using the SOAR Web-based Data Form Part I. The second section of Part II collects qualitative (open-ended) questions on annual SOAR accomplishments, identified challenges, and collaborations.

Data from Part I of the SOAR Web-based Data Form can be compiled into reports on decision results and the use of SOAR critical components, such as the SSA–1696 Appointment of Representative, which allows SSA to communicate directly with the case worker assisting with the application. These reports will be reviewed by agency directors, SOAR state-level leads, and the SAMHSA SOAR Technical Assistance Center to quantify the success of the effort overall and to identify areas where additional technical assistance is needed.

There are no proposed changes to Part I of this form. These questions will be answered by all 700 case worker respondents, on average 3 times per year. There are no proposed changes to Part II. These questions will be answered by 75 respondents once per year.

The estimated response burden is as follows:

Form name	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
SOAR Web-based Data Form (Part I)	700	3	2,100	.25	525
Annual Report Questions (Part II)	75	1	75	1	37.50
Total	775		2,175		562.50

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 15E–57B, 5600 Fishers Lane, Rockville, MD 20857 *OR* email her a copy at *summer.king@samhsa.hhs.gov.* Written comments should be received by February 4, 2020.

Summer King,

Statistician.

[FR Doc. 2019–26324 Filed 12–5–19; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0095]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information or new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 4, 2020.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0095 in the body of the letter, the agency name and Docket ID USCIS–2008–0027. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2008–0027;

(2) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW, Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW, Washington, DC 20529–2140, telephone number 202–272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS is required to provide 60-day notice in the **Federal Register** to solicit comments from the public on proposed collections of information. USCIS published this Notice at 84 FR 39359 on August 9, 2019. USCIS received comments and in reviewing has made a determination that additional edits to the collection of information are necessary. Due to the nature of the changes, USCIS is publishing a second 60-day notice in the **Federal Register** to present these changes and to obtain public comment.

II. Proposed Changes to the Form Instructions for Form I–290B

USCIS is proposing several changes to the Form I–290B Instructions. USCIS proposes to clarify the AAO's procedures pertaining to the consideration of evidence submitted for the first time on appeal and the requirement that affected parties address each ground of ineligibility raised in the unfavorable decision. USCIS proposes to permit affected parties to waive the ''initial field review'' of their appeal for faster processing. USCIS proposes to explain its standard of review for appeals of discretionary decisions. USCIS also proposes to clarify that it does not have appellate jurisdiction over Adam Walsh Act ''no-risk'' determinations. USCIS is proposing these changes to better inform affected parties of administrative appellate procedures and facilitate the AAO's review of the substantive merits of appeals. The specific changes proposed are discussed as follows:

(1) Appeals Must Address All Grounds of Ineligibility Identified in the Unfavorable Decision

The proposed Form I–290B and instructions state that appeals must address each ground of ineligibility identified in the unfavorable decision. If an affected party does not address one or more ground(s) of ineligibility in the unfavorable decision, the issue(s) may be deemed waived for the appeal. Further, the proposed form and instructions explain that a waived ground of ineligibility may form the sole basis for a dismissed appeal. *See, e.g., Matter of M-A-S-,* 24 I&N Dec. 762, 767 n.2 (BIA 2009). This proposed language underscores to affected parties the importance of addressing each stated ground of the unfavorable decision on appeal. USCIS believes that this clarification of current practice will improve the quality of appeals and facilitate the AAO's review of the substantive merits of appeals.

(2) Affected Parties May Waive the ''Initial Field Review'' Process

The proposed Form I–290B and instructions permit affected parties to waive the ''initial field review'' (IFR) process. The regulations at 8 CFR 103.3(a)(2)(ii)–(v) provide that an appeal to the AAO be reviewed by the officer that made the unfavorable decision (or by the officer with jurisdiction over the matter in cases where the affected party has moved) before the appeal is sent to the AAO. The officer reviews the appeal to determine whether to take favorable action (*e.g.,* by granting a motion to reopen or a motion to reconsider and approving the benefit request). If the officer decides not to take favorable action, the appeal is then forwarded to the AAO for appellate review.

Unless favorable action is taken, the IFR process delays the adjudication of appeals, because of the additional step prior to AAO review. Many stakeholders are not aware of the IFR process, and they contact the AAO for case status inquiries when the AAO has yet to receive the appeal. This delay often causes frustration. Further, affected parties sometimes send supplemental materials to the AAO when the appeal itself is at a USCIS service center or field office pending IFR. Other times, affected parties incorrectly send materials to a service center or field office when the appeal has already been transferred to the AAO.

USCIS proposes to provide affected parties with the option to waive the IFR process in order to have their case reviewed sooner by the AAO. However, USCIS acknowledges that taking advantage of this option means that the affected party will give up the opportunity to have favorable action taken more quickly on their case during IFR. In addition, by waiving IFR and having the appeal sent directly to the AAO, the affected party waives review by the officer who made the unfavorable decision of whether an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider under 8 CFR 103.3(a)(2)(v)(B)(*2*).

(3) Clarification of the ''Initial Field Review'' Process When Evidence Is Not Submitted Concurrently With the Appeal; and Treatment of Newly Submitted Evidence on Appeal

DHS regulations do not provide for the submission of evidence in support of a standard appeal. The regulations allow for the submission of a brief only. *See* 8 CFR 103.3(a)(2)(vi) (''The affected party may submit a brief with Form I–290B.''); *see also* 8 CFR 103.3 (1958), 7.11 (1952). Only the Special Agricultural Worker and Legalization regulations specifically allow for the submission of new evidence on appeal, since these applicants may not file a motion to reopen or reconsider. 8 CFR 103.3(a)(3)(i) (noting that the Form I–694 appeal may be ''accompanied by any additional new evidence'').

In 1991, the Immigration and Naturalization Service amended the instructions to Form I–290B to include the option of submitting new evidence with the appeal brief. The reason for this change was the implementation of the IFR process. The submission of evidence on appeal permitted the immigration officer who issued the unfavorable decision to decide during IFR whether to treat the appeal as a motion to reopen or forward the appeal to the AAO for review. 54 FR 29344 (Proposed Rule); 55 FR 20767–01 (Final Rule).

In *Matter of Obaigbena,* 19 I&N Dec. 533 (BIA 1988), the Board of Immigration Appeals (BIA) determined that where a petitioner fails to timely and substantively respond to a Notice of Intent to Deny (NOID) or make a reasonable request for an extension, the BIA will not consider any evidence first offered on appeal as its review is limited to the record of proceeding before the district director. In *Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988), the BIA held that if a petitioner was put on notice of an evidentiary requirement (by statute, regulation, form instructions, request for evidence (RFE), NOID, etc.) and was given a reasonable opportunity to provide the evidence, then any new evidence submitted on appeal pertaining to that requirement would not be considered, and the appeal would be adjudicated based on the evidentiary record before the director. Conversely, if the petitioner had not been put on notice of the deficiency or given a reasonable opportunity to address it before the denial, and on appeal the petitioner submits additional evidence addressing the deficiency, the record would generally be remanded to allow the director to initially consider and address the newly submitted evidence.

For these reasons, except in exigent circumstances and at USCIS discretion, the AAO will not consider evidence submitted for the first time on appeal if:

- The affected party was put on notice of an evidentiary requirement (by statute, regulation, form instructions, RFE, NOID, notice of intent to revoke, etc.);
- The affected party was given a reasonable opportunity to provide the evidence; and
- The evidence was reasonably available to the affected party at the time it was supposed to have been submitted.

USCIS also proposes to clarify on Form I–290B that if the affected party elects to submit evidence on appeal, the evidence must be submitted concurrently with the appeal in order for the officer who issued the unfavorable decision (or the officer with jurisdiction over the matter in cases where the affected party has moved) to review the new evidence for favorable action as a motion to reopen. If the affected party elects to submit a brief or evidence after the filing of the appeal, the affected party must submit it directly to the AAO. *See* 8 CFR 103.3 (a)(2)(viii); Instructions for Notice of Appeal or Motion at *https://www.uscis.gov/i-290b.* This means that the officer conducting IFR will not have an opportunity to review the new evidence and therefore cannot treat the appeal as a motion to reopen prior to forwarding the appeal to the AAO. This clarification in the form and instructions is meant to make it absolutely clear to filers what happens if the evidence is not concurrently submitted with the Form I–290B but is instead submitted later with the brief to the AAO. Further, as the appellate process was not meant to provide for the submission of evidence in support of an appeal, this clarification also elucidates that, except in exigent circumstances, the submission of evidence directly to the AAO may only result at most in a remand, provided the evidence is material and does not fall into one of the three categories described above.

(4) Abuse of Discretion Standard of Review for Discretionary Decisions

For USCIS discretionary decisions, the officer generally identifies and weighs the applicable positive and negative factors, which may include the alien's conduct, character, relationships, ties to the United States, medical condition, and other humanitarian factors. *See, e.g., USCIS Policy Manual,* Vol. 7, Ch. 10, ''Legal Analysis and Use of Discretion'' (2019). To determine whether a denial is based on discretion, the AAO reviews the written decision for an analysis that weighs both positive and adverse factors, followed by unambiguous language to indicate that the matter is denied ''as a matter of discretion,'' and a specific citation to a statute that confers discretionary authority.

A majority of discretionary immigration benefits are not subject to review on appeal. *See, e.g.,* 8 CFR 207.3 (refugee waivers), 209.2(f) (application for adjustment of status of alien granted asylum), 212.3(c) (application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act), 214.1(c)(5) (applications for extension of nonimmigrant stay), 216.5(f) (hardship waiver for joint petition to remove conditions for alien spouse), 240.25(e) (application for voluntary departure), 245.2(a)(5)(ii) (adjustment of status under section 245(a) of the Act), 245.2(a)(5)(iii) (adjustment of status under the Act of 1966), 245.2(c) (adjustment of status under section 214(d) of the Act), 249.2(b) (record of admission under section 249 of the Act), and 274a.13(c) (applications for employment authorization). A smaller number of discretionary case types fall under the appellate jurisdiction of the AAO. *See* 8 CFR 212.2(h) (requests for consent to reapply for admission), 212.7(a)(3) (applications for waiver of certain grounds of inadmissibility), 223.2(g) (applications for reentry permits and refugee travel documents), 244.10(d) (application for Temporary Protected Status), 245.23(i) (applications for T adjustment of status), and 245.24(f)(2) (applications for U adjustment of status).

The AAO may review questions of law, policy, fact, and discretion *de novo. See* section 557(b) of the Administrative Procedure Act (APA); *Powers and Duties of Service Officers,* 49 FR 7355 (Feb. 29, 1984). *See also Soltane* v. *USDOJ,* 381 F.3d 143, 145–46 (3rd Cir. 2004); *Sadeghzadeh* v. *USCIS,* 322 F.Supp.3d 12, 19 (DDC 2018). The AAO's *de novo* review authority is also acknowledged in its precedent decisions. *See, e.g., Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542, 542 n.1 (AAO 2015).

While *de novo* review may be suitable for questions of law and fact, DHS has questioned whether this *de novo* review approach is appropriate for discretionary decisions given the initial adjudicator's role in developing the record, identifying the discretionary factors, and ultimately weighing the alien's conduct, character, relationships, and other humanitarian factors. Appellate bodies traditionally use three different standards of review (*de novo,* clear error, and abuse of discretion) depending on whether the issue being reviewed is a question of law, fact, or discretion, respectively. *De novo* review is the lowest or least deferential standard of review. With *de novo* review, the appellate adjudicator does not give any deference to the decision below. It considers the issue anew, as if no decision had been previously rendered. *De novo* review traditionally applies to questions of law, such as statutory and regulatory interpretation. Conversely, ''abuse of discretion'' is the highest or most deferential standard of review. Abuse of discretion requires a firm conviction that a discretionary decision is grossly unsound, unreasonable, contrary to law, or unsupported by the evidence. *See* Black's Law Dictionary (11th ed. 2019). This level of deference is traditionally given to an exercise of discretionary authority.

To that end, DHS proposes to revise the instructions for Form I–290B to inform affected parties that the AAO will review discretionary USCIS decisions using the abuse of discretion standard of review. This means that the AAO will not overrule the an exercise of discretion unless there is a firm conviction the decision is grossly unsound, unreasonable, contrary to law, or unsupported by the evidence. This level of review is appropriate because the AAO should not overturn a reasonable exercise of discretion simply because the appeals officer in his or her discretion would have reached a different result.

(5) AAO Does Not Have Appellate Jurisdiction Over ''No Risk'' Determinations Under the Adam Walsh Act

The proposed Form I–290B Instructions clarify that the AAO does not have jurisdiction over appeals of ''no risk'' determinations under the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, 120 Stat. 587 (AWA). Section 402(a)(2) of the AWA bars approval of family-based visa petitions filed by U.S. citizens who have been convicted of a ''specified offense against a minor'' unless the DHS Secretary, in his or her ''sole and unreviewable discretion,'' determines that the U.S. citizen poses ''no risk'' to the beneficiary of the petition.

The AAO's appellate jurisdiction is based on a delegation of authority from the Secretary of Homeland Security. *See* Delegation Number 0150.1(U) (effective March 1, 2003). The Secretary may delegate any authority or function to administer and enforce the immigration laws to any official, officer, or DHS employee. 6 U.S.C. 112(b)(1) (2012); 8 U.S.C. 1103(a)(4); 8 CFR 2.1.

Regarding AWA ''no risk'' determinations, in *Matter of Aceijas-Quiroz,* 26 I&N Dec. 294 (BIA 2014), the BIA held that Congress entrusted AWA ''no risk'' determinations to DHS, not the BIA. USCIS subsequently issued a policy memorandum agreeing that DHS maintains sole jurisdiction over AWA ''no risk'' determinations. *See* PM–602–0124, *Initial Field Review of Appeals to the Administrative Appeals Office* (Nov. 4, 2015). However, the Secretary has not delegated appellate authority to the AAO by revising Delegation 0150.1(U) or through other means provided by 8 CFR 2.1. Although USCIS officers may certify cases involving AWA ''no risk'' determinations to the AAO, the Secretary has not yet delegated *appellate* authority over AWA ''no risk'' determinations to the AAO. Accordingly, in order for USCIS to review an adverse AWA ''no risk'' determination decision, the correct course of action is to file a motion to reopen or reconsider on Form I–290B.

This clarification has been added to the Form I–290B Instructions because in the past, the AAO is aware that it incorrectly reviewed at least one appeal of an AWA ''no risk'' determination, in addition to multiple cases that were properly certified for review. Additionally, the AAO had posted inconsistent information on the USCIS website regarding AWA jurisdiction. Consequently, to reduce stakeholder confusion regarding this issue, this proposed language has been included in the update to the Form I–290B Instructions.

III. Administrative Procedure Act (APA)

This proposed Form revision is a procedural rule and as a rule ''of agency organization, procedure, or practice,'' is exempt from the APA and USCIS is not required to provide notice and an opportunity to comment prior to its issuance. *See* 5 U.S.C. 553(b)(3)(A). The proposed revisions to the form and instructions clearly outline the requirements and documentation necessary to support a request for an appeal or motion. The revised Form I–290B simply effectuates technical changes to appeals and motions squarely within the definition of a procedural rule. The substantive standards for appeals and motions remain unchanged and a revision that changes evidence or filing requirements but does not ''change the substantive standards by which [USCIS] evaluates [appeals] . . . fall[s] comfortably within the realm of the 'procedural.' '' *JEM Broad. Co.,* 22 F.3d at 327; *see also Am. Hosp. Ass'n* v. *Bowen,* 834 F.2d 1037, 1055 (D.C. Cir. 1987) (concluding that ''the focus and timing of review are matters for agency discretion, falling well within § 553's procedural exemption'' provided substantive standards remain unchanged).

To the extent the proposed revisions are not procedural, they are still exempt from notice-and-comment rulemaking because they are, at most, ''interpretive.'' Interpretive rules, which ''merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule.'' *Mora-Meraz* v. *Thomas,* 601 F.3d 933, 940 (9th Cir. 2010) (''[A]gencies issue interpretive rules to clarify or explain existing law or regulations so as to advise the public of the agency's construction of the rules it administers.'' Here, 8 CFR 103.3 and 103.5 set forth the requirements for appeals including the evidence to support the reasons the USCIS decision is incorrect. The five changes outlined above simply clarify regulatory requirements and do not change substantive standards for appeals and motions, just the procedural steps and evidence for filing.

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2008–0027 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov*.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Notice of Appeal or Motion.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–290B; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–290B standardizes requests for appeals and motions and ensures that the basic information required to adjudicate appeals and motions is provided by applicants and petitioners, or their attorneys or representatives. USCIS uses the data collected on Form I–290B to determine whether an applicant or petitioner is eligible to file an appeal or motion, whether the requirements of an appeal or motion have been met, and whether the applicant or petitioner is eligible for the requested immigration benefit. Form I–290B can also be filed with ICE by schools appealing decisions on Form I–17 filings for certification to ICE's Student and Exchange Visitor Program (SEVP).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–290B is 28,000 and the estimated hour burden per response is 1.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 42,000 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $8,652,000.

Dated: November 29, 2019.

Kathy Nuebel Kovarik,

Acting Deputy Director, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2019–26331 Filed 12–5–19; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS00000.L19200000.ET0000. LRORF1708700.XXX .MO# 4500140293]

Public Land Order No. 7890, Extension of Public Land Order No. 7419; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This Public Land Order (PLO) extends the duration of the withdrawal created by PLO No. 7419, issued effective December 9, 1999, for an additional 20-year term. The extension is necessary for the Department of the Air Force (DAF), Nellis Air Force Base (AFB), to continue providing safety buffers from potentially hazardous areas, protect populated areas, and comply with Department of Defense Directive No. 6055.09E regarding ammunition and explosive safety standards on lands adjacent to the Live Ordnance Loading Areas at Nellis AFB, northeast of Las Vegas, Clark County, Nevada. The safety buffer zone includes security patrol roads and a security checkpoint.

DATES: This PLO takes effect on December 10, 2019.

FOR FURTHER INFORMATION CONTACT: Tom Seley, Project Manager, at email *tseley@blm.gov* or call 702–515–5293; Bureau of Land Management, Southern Nevada District Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This Order extends the existing withdrawal to continue its protective purpose and reserve the lands for use by the DAF, Nellis AFB.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), it is ordered as follows:

1. Public Land Order No. 7419 (64 FR 69025 (1999)), which withdrew public lands from settlement, sale, location, or entry under the United States mining laws but not from leasing under the mineral leasing laws for the DAF Nellis AFB, with the legal land description amended as described in the November 19, 2018, **Federal Register** notice of withdrawal application (83 FR 58282), is hereby extended for a period of 20 years.

2. This withdrawal extended by this Order will expire on December 9, 2039, unless, as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be further extended.

Dated: December 2, 2019.

Rob Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2019–26335 Filed 12–5–19; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD07000.51010000.ER0000. LVRWB09B1670 19X; CACA–44014, CACA–56477; MO#4500140313]

Notice of Availability of the Final Supplemental Environmental Impact Statement for the United States Gypsum Company Mine Expansion/Modernization Project, Imperial County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Final Supplemental Environmental Impact Statement (EIS) analyzing the potential impacts of the United States Gypsum Company (USG) Mine Expansion and Modernization Project (Project), and by this notice is announcing its availability.

DATES: The BLM will not issue a final decision on the proposal for a minimum of 30 days after the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Final Supplemental EIS are available for public inspection in the BLM El Centro Field Office at 1661 S 4th St, El Centro, CA 92243; at the BLM-California Desert District Office, 22835 Calle San Juan de los Lagos, Moreno Valley, CA 92553; and electronically on the project website: *https://bit.ly/2QiGK0m*.

Compact disc copies of the Final Supplemental EIS are available by request.

FOR FURTHER INFORMATION CONTACT: Miriam Liberatore, BLM Project Manager, by telephone at (541) 618–2400; by mail at Bureau of Land Management, Medford District Office, 3040 Biddle Road, Medford, OR 97504; or by email at *mliberat@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 Ms. Liberatore during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Project is located in southwestern Imperial County, California, and involves both the Plaster City Wallboard Plant (processing plant) and Plaster City Quarry (quarry). The processing plant is located on Evan Hewes Highway approximately 18 miles west of the city of El Centro. The quarry is located on Split Mountain Road approximately 26 miles northwest of Plaster City. Both sites are located within the BLM's California Desert Conservation Area.

A joint Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) was published in 2006, and a Final EIR/EIS was published in 2008. The BLM did not issue a Record of Decision and the United States Army Corps of Engineers (USACE) was not a party to the EIR/EIS. This Supplemental EIS revises and supplements the 2008 Final EIR/EIS, updating conditions and effects that have changed since 2008, and includes the USACE and the United States Environmental Protection Agency (USEPA) as Cooperating Agencies.

Certain aspects of the Project originally analyzed in the 2006 Draft EIR/EIS and 2008 Final EIR/EIS have been implemented under the conditions and approvals provided by Imperial County and were not subject to the jurisdiction of the BLM or the USACE. The BLM will use the Final Supplemental EIS to support its decisions on the Mining Plan of Operations and on rights-of-way (ROW) applications to construct, operate, maintain, and decommission: (a) A new water line with associated buried electrical service between the quarry and a proposed new well (CACA–56477); (b) A new water line between US Gypsum's processing plant and the Imperial Irrigation District (IID) Westside Main Canal; and (c) A replacement line between USG's processing plant and existing wells in Ocotillo (CACA–44014).

The USACE will use the Final Supplemental EIS to support its decision on an application by USG for a permit under Section 404 of the Clean Water Act (CWA). The USEPA has authority to review projects requiring a CWA 404 permit, but does not have a direct permitting role in the project.

The Final Supplemental EIS considers the Proposed Action, a No-Action Alternative, and six action alternatives. Alternative 1, Proposed Action, would expand the quarry as described in the Mining Plan of Operations, replace the existing water line, and install a new water line between the quarry and the new well. Alternative 2, No Action, would continue operations as they currently are permitted without expanding the quarry or replacing the existing water line. Alternative 3, Partial IID Water Supply, would provide for a new water line between the processing plant and the IID Westside Main Canal to partially replace processing water from a groundwater source with a surface water source. Alternative 4, Full IID Water Supply, would fully replace the processing water with surface water. Alternatives 5 through 8 are variations on the mining plan proposed in the Mining Plan of Operations. The BLM has selected Alternative 3, Partial IID Water Supply, as the Agency-Preferred Alternative in the Final Supplemental EIS.

The BLM published a Notice of Availability of the Draft Supplemental EIS in the **Federal Register** on July 19, 2019, announcing a 45-day public comment period (84 FR 34924). The BLM held a public-comment meeting on August 5, 2019. Seven individuals attended the meeting. The BLM received 13 comment letters during the comment period. Following the public comment period, comments were used to inform the Final Supplemental EIS. The BLM responded to substantive comments and made appropriate revisions to the document, or explained why a comment did not warrant a change. Comments did not result in substantive changes to effects analysis, findings or conclusions.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2)

Danielle Chi,

Deputy State Director, Resources.

[FR Doc. 2019–26288 Filed 12–5–19; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–29304; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before November 9, 2019, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by December 23, 2019.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before November 9, 2019. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State Historic Preservation Officers:

FLORIDA

Miami-Dade County

Barry University Historic District, 1300 NE Second Ave., Miami Shores, SG100004782

GEORGIA

Spalding County

Milner-Walker House, 708 South Hill St., Griffin, SG100004786

MICHIGAN

Genesee County

City of Flint Municipal Center, 1101 Saginaw St., 210 East Fifth St., 310 East Fifth St., Flint, SG100004775

NEW YORK

Erie County

Boarding House at 72–74 Sycamore Street, 72 Sycamore St., Buffalo, SG100004805

Monroe County

Polvino Building, 216 Central Park, Rochester, SG100004804

Montgomery County

Amsterdam Free Library, 28 Church St., Amsterdam, SG100004800

Rockland County

Pousette-Dart, Richard, House and Studio, 932 Haverstraw Rd., Suffern vicinity, SG100004802

Schuyler County

First Presbyterian Church of Watkins Glen, 520 North Decatur St., Watkins Glen, SG100004801

Wayne County

Clyde Downtown Historic District, Portions of Glasgow St., Caroline St., Columbia St., Sodus St., North & South Park Sts. & West Genesee St., Clyde, SG100004803

NORTH CAROLINA

Bertie County

Colerain Historic District, North & West Academy Sts., Britton St., Cedar St., Glover St., North & South Main Sts., East & West River Sts. & Winton St., Colerain, SG100004797

Forsyth County

Evergreen Farm, 2532 Jonestown Rd., Winston-Salem, SG100004796

Montgomery County

Mount Carmel Presbyterian Church and Cemetery, 1367 Clayton Carriker Rd., Norman, SG100004795

Northampton County

Warren Place, 925 Willis Hare Rd., Pendleton vicinity, SG100004792

Richmond County

Mount Carmel Presbyterian Church and Cemetery, 1367 Clayton Carriker Rd., Norman, SG100004795

Surry County

Ridge Westfield Elementary School, 4416 Westfield Rd., Mount Airy vicinity, SG100004794

Graves, Ben and Barbara, House, 309 Fairview Ave., Mount Airy, SG100004799

Vance County

Morgan, Thomas A., Farm, 1471, 1473 & 1475 Morgan Rd., Townsville vicinity, SG100004798

Wake County

St. Ambrose Episcopal Church, 813 Darby St., Raleigh, SG100004791

Oakwood Cemetery, 701 Oakwood Ave., Raleigh, SG100004793

OHIO

Cuyahoga County

Myrtle-Highview Historic District, 16209 to 16408 Highview Dr. & 16200 to 16409 Myrtle Ave.; Roughly bounded by Lee Rd., Myrtle Ave., Highview Dr. & dead end., Cleveland, SG100004778

Lucas County

Landers Brothers Company Building, 443 10th St., Toledo, SG100004779

Overmyer Building, The, 15 South Ontario St., Toledo, SG100004780

Marion County

Marion Women's Club, 1126 East Center St., Marion, SG100004781

RHODE ISLAND

Providence County

Moore Fabric Company Plant, 45–47 Washington St., Pawtucket, SG100004785

Washington County

Wakefield Historic District (Boundary Increase), Mains St., High St., Robinson St., Wright Ave., South Kingstown, BC100004777

WASHINGTON

King County

Freeway Park, 700 Seneca St., Seattle, SG100004789

Skagit County

Fraternal Order of Eagles Hall-Anacortes, 901 Seventh St., Anacortes, SG100004790

Spokane County

Bleeker, Harry and Catherine, House, 1707 North West Point Rd., Spokane, SG100004787

Warner, William and Ella, House, 2627 South Manito Blvd., Spokane, SG100004788

Additional documentation has been received for the following resource:

RHODE ISLAND

Washington County

Wakefield Historic District (Additional Documentation), Roughly, Main St. from Belmont Ave. to Columbia St., South Kingstown, AD96000572

Authority: Section 60.13 of 36 CFR part 60.

Dated: November 12, 2019.

Julie H. Ernstein,

Supervisory Archeologist, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2019–26328 Filed 12–5–19; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04963000, XXXR0680R1, RR.17549661.1000000]

Notice of Intent To Prepare a Draft Environmental Impact Statement and Public Scoping Period for the Lake Powell Pipeline Project

AGENCY: Bureau of Reclamation, Upper Colorado Basin, Interior Region 7.

ACTION: Notice of intent; request for scoping comments.

SUMMARY: The Bureau of Reclamation (Reclamation) intends to prepare an Environmental Impact Statement (EIS) on the Lake Powell Pipeline (LPP) Project. Reclamation is requesting public scoping comments to identify significant issues or other alternatives to be addressed in the EIS.

DATES: Submit comments on or before January 10, 2020.

Three scoping meetings will be held during the scoping period from 6:00 p.m. to 8:00 p.m. on January 7–9, 2020.

ADDRESSES: Provide written scoping comments and requests to be added to the mailing list to Mr. Rick Baxter, Program Manager, Bureau of Reclamation, Provo Area Office, 302 East Lakeview Parkway, Provo, UT 84606; via submittal form at *https://www.usbr.gov/uc/envdocs/eis/LakePowellPipeline/index.html*; or email *lpp@usbr.gov*.

The three scoping meetings will be held at the following locations:

January 7, 2020—Kanab Center, 20 North 100 East, Kanab, Utah 84741
January 8, 2020—Dixie Center, 1835 South Convention Center Dr., St. George, Utah 84790
January 9, 2020—Valley High, 325 West 11000 South, South Jordan, Utah 84095

FOR FURTHER INFORMATION CONTACT: Mr. Rick Baxter, Program Manager, Bureau of Reclamation, Provo Area Office, 302 East Lakeview Parkway, Provo, UT 84606; telephone (801) 379–1078; facsimile (801) 379–1159; email *lpp@usbr.gov*. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FedRelay) at 1–800–877–8339 TTY/ASCII to contact the above individual during normal business hours or to leave a message or question after hours. You will receive a reply during normal business hours. Information on this project may also be found at: *https://www.usbr.gov/uc/envdocs/eis/LakePowellPipeline/index.html*.

SUPPLEMENTARY INFORMATION: Reclamation is issuing this notice pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 *et seq.*; the Council on Environmental Quality's regulations for implementing NEPA, 40 CFR parts 1500 through 1508; Department of the Interior's NEPA regulations, 43 CFR part 46; and Bureau of Land Management regulations at 43 CFR 1610.2.

Background

Reclamation will prepare an EIS for the LPP Project as proposed by the Utah Board of Water Resources (UBWR). The LPP is a proposed 140-mile, 69-inch-diameter water delivery pipeline that begins at Lake Powell near Glen Canyon Dam in Page, Arizona, and ends at Sand Hollow Reservoir near St. George, Utah. The pipeline would deliver up to 86,249 acre-feet of water from Lake Powell to Sand Hollow Reservoir. UBWR proposes building the LPP in order to bring a second source of water to Washington and Kane Counties in Utah to meet future water demands, diversify the regional water supply portfolio, and enhance the water supply reliability.

UBWR previously proposed a pipeline project with an intake at Lake Powell that included a hydroelectric peaking station at Hurricane Cliffs, Utah. The Federal Energy Regulatory Commission (FERC) was the lead Federal agency for that project because it would have required a hydroelectric license issued by the FERC. The UBWR withdrew its application to the FERC on September 25, 2019, and the project was terminated effective October 10, 2019. (*https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20191016-3069*) Reclamation has been designated the lead Federal agency by the Department for the LPP NEPA process. The Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), Bureau of Indian Affairs (BIA) and National Park Service (NPS) are cooperating agencies. Based on the changes to project design and the lead federal agency, Reclamation is initiating a new public scoping process, which will require interested parties to submit new comments on the current proposal. Reclamation is also reinitiating government to government consultation with Indian tribes under section 106 of the National Historic Preservation Act and in accordance with Executive Order 13175.

Two pipeline alignments have been proposed: The Southern Alternative and the Highway Alternative. Both alternatives begin and end in the same locations. The Southern Alternative would travel south of the Kaibab Indian Reservation while the alignment for the Highway Alternative would cross lands held in trust by the United States for the benefit of the Kaibab Band of Paiute Indians, following Arizona State Route 389. The Southern Alternative would cross land administered by the BLM in Utah and Arizona and would require multiple right-of-way (ROW) grants and an amendment to the Arizona Strip Resource Management Plan (RMP), because a small portion of the pipeline would go outside an approved utility corridor.

The Highway Alternative would cross BLM and Tribal trust lands, which would require the BLM and BIA to issue ROW grants and require a tribal resolution from the Kaibab Band of Paiute Indians. Both alternatives would cross lands administered by Reclamation and the NPS, requiring Reclamation to issue a license agreement and the NPS to issue a ROW permit under either alternative.

In addition, UBWR has requested a water exchange contract with Reclamation. Under the exchange contract, UBWR would forbear the diversion of a portion of the natural flows to which UBWR is entitled and allow these flows to contribute to meeting the Endangered Species Act Upper Colorado River Recovery Implementation Program requirements in the Green River. In exchange, UBWR would deplete an equal amount of water released from Flaming Gorge Dam throughout the year and available at Lake Powell. This exchange contract would not entitle UBWR to call for releases from Flaming Gorge.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Brent Esplin,

Regional Director, Upper Colorado Basin—Interior Region 7, Bureau of Reclamation.

[FR Doc. 2019–26357 Filed 12–5–19; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 201S180110; S2D2S SS08011000 SX064A000 20XS501520; OMB Control Number 1029–0049]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Special Permanent Program Performance Standards—Operations in Alluvial Valley Floors

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 6, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov*; or via facsimile to (202) 395–5806. Please provide a copy of your comments to

Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C. Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov*. Please reference OMB Control Number 1029–0049 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at (202) 208–2716. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain*.

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.

A Federal Register notice with a 60-day public comment period soliciting comments on this collection of information was published on October 2, 2018 (83 FR 49572). No comments were received.

We are again 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 OSMRE; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the OSMRE enhance the quality, utility, and clarity of the information to be collected; and (5) how might the OSMRE 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. 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: Sections 510(b)(5) and 515(b)(10)(F) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) protect alluvial valley floors from the adverse effects of surface coal mining operations west of the 100th meridian. Part 822 requires the permittee to install, maintain, and operate a hydrologic monitoring system in order to provide specific protection for alluvial valley floors. This information is necessary to determine whether the hydrologic conditions of alluvial valley floors are protected according to the Act.

Title of Collection: Special Permanent Program Performance Standards—Operations in Alluvial Valley Floors.

OMB Control Number: 1029–0049.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Coal mining operators and State regulatory authorities.

Total Estimated Number of Annual Respondents: 1 operator and 2 regulatory authorities.

Total Estimated Number of Annual Responses: 60.

Estimated Completion Time per Response: 160 hours for operator and an average of 15 hours for regulatory authorities.

Total Estimated Number of Annual Burden Hours: 5,250 hours.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Dated: November 26, 2019.

Signed:

Paul J. Ehret,

Acting Chief Division of Regulatory Support.

[FR Doc. 2019–26332 Filed 12–5–19; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 201S180110; S2D2S SS08011000 SX064A000 20XS501520; OMB Control Number 1029–0113]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; General Reclamation Requirements

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 6, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0113 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at (202) 208–2716. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

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.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on October 2, 2018 (83 FR 49573). No comments were received.

We are again 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 OSMRE; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the OSMRE enhance the quality, utility, and clarity of the information to be collected; and (5) how might the OSMRE 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. 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: Part 874 establishes land and water eligibility requirements, reclamation objectives and priorities and reclamation contractor responsibility. The regulations at 30 CFR 874.17 require consultation between the Abandoned Mine Land (AML) agency and the appropriate Title V regulatory authority on the likelihood of removing the coal under a Title V permit and concurrences between the AML agency and the appropriate Title V regulatory authority on the AML project boundary and the amount of coal that would be extracted under the AML reclamation project.

Title of Collection: General Reclamation Requirements.

OMB Control Number: 1029–0113.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State regulatory authorities.

Total Estimated Number of Annual Respondents: 3 States.

Total Estimated Number of Annual Responses: 3.

Estimated Completion Time per Response: 83 hours.

Total Estimated Number of Annual Burden Hours: 249 hours.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: November 26, 2019.

Paul J. Ehret,

Acting Chief Division of Regulatory Support.

[FR Doc. 2019–26333 Filed 12–5–19; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 201S180110; S2D2S SS08011000 SX064A000 20XS501520; OMB Control Number 1029–0030]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; State Processes for Designating Areas Unsuitable for Surface Coal Mining Operations

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before January 6, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov*; or via facsimile to (202) 395–5806. Please provide a copy of your comments to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240; or by email to *mgehlhar@osmre.gov*. Please reference OMB Control Number 1029–0030 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at (202) 208–2716. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain*.

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.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on October 2, 2018 (83 FR 49573). No comments were received.

We are again 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 OSMRE; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the OSMRE enhance the quality, utility, and clarity of the information to be collected; and (5) how might the OSMRE 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. 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: This part implements the requirement of section 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95–87, which provides authority for citizens to petition States to designate lands unsuitable for surface coal mining operations, or to terminate such designation. The regulatory authority uses the information to identify, locate, compare and evaluate the area requested to be designated as unsuitable, or terminate the designation, for surface coal mining operations.

Title of Collection: State Processes for Designating Areas Unsuitable for Surface Coal Mining Operations.

OMB Control Number: 1029–0030.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: individuals or interest groups that petition the State regulatory authority, and the State regulatory authority that processes the petition.

Total Estimated Number of Annual Respondents: 1 petitioner and 1 State regulatory authority.

Total Estimated Number of Annual Responses: 2.

Estimated Completion Time per Response: 600 hours for petitioner and 1,900 for State regulatory authority.

Total Estimated Number of Annual Burden Hours: 2,500 hours.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $120.

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.*).

Dated: November 26, 2019.

Paul J. Ehret,

Acting Chief Division of Regulatory Support.

[FR Doc. 2019–26334 Filed 12–5–19; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–623 and 731–TA–1449 (Final)]

Vertical Metal File Cabinets From China; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of vertical metal file cabinets (''VMFCs'') from China, provided for in subheadings 9403.10.00 and 9403.20.00 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV''), and to be subsidized by the government of China.

Background

The Commission, pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)), instituted these investigations effective April 30, 2019, following receipt of petitions filed with the Commission and Commerce by Hirsh Industries LLC, Des Moines, Iowa. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of VMFCs from China were subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)) and sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on August 21, 2019 (84 FR 43613). The hearing was held in Washington, DC, on October 8, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 705(b) and 735(b) of the Act (19 U.S.C. 1671d(b) and 19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on December 2, 2019. The views of the Commission are contained in USITC Publication 4995 (December 2019), entitled *Vertical Metal File Cabinets from China: Investigation Nos. 701–TA–623 and 731–TA–1449 (Final).*

By order of the Commission.

Issued: December 2, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–26318 Filed 12–5–19; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1110]

Certain Strontium-Rubidium Radioisotope Infusion Systems, and Components Thereof Including Generators; Notice of Commission Final Determination of No Violation of Section 337; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to affirm with modification 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. The investigation is terminated.

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 (''Bracco''). *See* 83 FR 19112 (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 initial determination (''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 ID determines 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) declines 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. The FID also contains the ALJ's 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 petitioned for review of the FID's findings with respect to invalidity, while the IA petitioned for review of the FID's findings with respect to domestic industry. On August 22, 2019, the parties filed responses to the respective petitions.

On September 30, 2019, the Commission determined to review the FID in part with respect to invalidity and domestic industry. *See* 84 FR 53177 (Oct. 4, 2019). The Commission determined not to review the remainder of the FID. *See id.*

Having considered the FID, the parties' petitions, responses thereto, and the record in this investigation, the Commission has determined to affirm with modification the FID's findings and conclusion of no violation of section 337. Specifically, as explained in the Commission Opinion issued concurrently herewith, the Commission has determined to affirm with modification and to supplement the FID's findings with respect to the invalidity of the asserted patent claims. The Commission has further determined to affirm in part and vacate in part the FID's findings with respect to the domestic industry requirement. All findings in the FID that are not inconsistent with the Commission's final determination are affirmed. The investigation is terminated except with respect to the declassification proceeding presently before the Commission.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 2, 2019.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2019–26317 Filed 12–5–19; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1190–0008]

Agency Information Collection Activities, Proposed eCollection eComments Requested Extension Without Change, of a Previously Approved Collection Federal Coordination and Compliance Section (FCS) Complaint and Consent Form

AGENCY: Civil Rights Division, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Civil Rights Division, Federal Coordination and Compliance Section, 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.

DATES: The Department of Justice encourages public comment and will accept input until February 4, 2020.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Christine Stoneman, Acting Chief, Federal Coordination and Compliance Section, 950 Pennsylvania Avenue NW–4CON, Washington, DC 20002 (phone: 202–307–2222).

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;

—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.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Complaint and Consent Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1190–0008. The applicable component within the Department of Justice is the Federal Coordination and Compliance Section, in the Civil Rights Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* General public.

Information is used to find jurisdiction to investigate the alleged discrimination, to seek whether a referral to another agency is necessary and to provide information needed to initiate investigation of the complaint. Respondents are individuals.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 4000 respondents will complete each form within approximately 30 minutes.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 2000 total annual burden hours associated with this collection.

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, Room 3E.405A, Washington, DC 20530.

Dated: December 3, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–26330 Filed 12–5–19; 8:45 am]

BILLING CODE 4410–13–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–295, 50–304, and 72–1037; NRC–2019–0236]

In the Matter of ZionSolutions, LLC and Exelon Generation Company, LLC; Zion Nuclear Power Station, Units 1 and 2

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Direct transfer of license; order.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an order approving the direct transfer of Facility Operating License Nos. DPR–39 and DPR–48 for Zion Nuclear Power Station (ZNPS), Units 1 and 2, respectively, and the general license for the ZNPS independent spent fuel storage installation (ISFSI) from the current holder, Zion*Solutions,* LLC (ZS), to Exelon Generation Company, LLC (EGC). The NRC is also amending the facility operating licenses for administrative purposes to reflect the license transfer from ZS to EGC. The NRC determined that EGC is qualified to be the holder of the licenses and that the transfer of the licenses is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission. The order approving the transfer of the ZNPS licenses to EGC became effective on November 26, 2019.

DATES: The order was issued on November 26, 2019, and is effective for one year.

ADDRESSES: Please refer to Docket ID NRC–2019–0236 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

• *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2019–0236. Address questions about NRC Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

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

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: John B. Hickman, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3017; email: *john.hickman@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the order is attached.

Dated at Rockville, Maryland, this 3rd day of December 2019.

For the Nuclear Regulatory Commission.

John B. Hickman,

Project Manager, Reactor Decommissioning Branch, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.

Attachment—Order Approving the Transfer of Licenses and Conforming Amendments

United States of America

Nuclear Regulatory Commission

In the Matter of: Zion*Solutions,* LLC, and Exelon Generation Company, LLC, Zion Nuclear Power Station, Units 1 and 2, EA–19–125.

Docket Nos. 50–295, 50–304, and 72–1037
License Nos. DPR–39 and DPR–48

Order Approving Transfer of Licenses and Conforming Amendments

I.

Zion*Solutions,* LLC (ZS) is the holder of Facility Operating License Nos. DPR–39 and DRP–48 for Zion Nuclear Power Station (ZNPS), Units 1 and 2, respectively, and the general license for the ZNPS independent spent fuel storage installation (ISFSI). ZS is authorized to possess and maintain ZNPS and the ZNPS ISFSI, which are located in Zion, Illinois. ZNPS is located on the west shore of lake Michigan approximately midway between Chicago, Illinois and Milwaukee, Wisconsin.

ZNPS Units 1 and 2 were both Westinghouse 3250 MWt pressurized-water reactors. Unit 1 was granted an operating license on October 19, 1973 and was shut down on February 21, 1997. Unit 2 was granted an operating license on November 14, 1973 and was shut down on September 19, 1996.

In February 1998, pursuant to Title 10 of the *Code of Federal Regulations* (CFR) Part 50.82(a)(1)(i), the ZNPS licensee certified to the NRC that as of February 13, 1998, operations had permanently ceased at ZNPS and subsequently certified pursuant to 10 CFR 50.82(a)(1)(ii) that all fuel had been permanently removed from the units' reactor vessels (Agencywide Documents Access and Management System [ADAMS] Accession Nos. ML15232A492 and ML15232A487). Pursuant to 10 CFR 50.82(a)(2), operations or emplacement of fuel into the reactor vessels at ZNPS are no longer authorized under the licenses. On January 25, 2008, the ZNPS licensee submitted an application to transfer the ZNPS licenses from Exelon Generation Company, LLC (EGC) to ZS for the purpose of expedited decommissioning (ADAMS Accession No. ML080310521). The NRC consented to the license transfer on May 4, 2009 (ADAMS Accession No. ML090930037). Spent fuel transfer from the Spent Fuel Pool (SFP) to the ISFSI was completed on January 10, 2015. As of September 2019, the ZNPS site was in the final stages of radiological decommissioning, environmental remediation, and site restoration.

II.

By letter dated July 24, 2018 (ADAMS Accession No. ML18211A303), as supplemented by letters dated January 21, 2019 (ADAMS Accession No. ML19028A175) and February 8, 2019 (ADAMS Accession No. ML19043A673), ZS requested, on behalf of itself and EGC (collectively, the applicants), pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Section 50.80, ''Transfer of licenses,'' of 10 CFR, that the U.S. Nuclear Regulatory Commission (NRC, the Commission) consent to the transfer to EGC of Facility Operating License Nos. DPR–39 and DPR–48 for ZNPS, Units 1 and 2, respectively, and the generally licensed ZNPS ISFSI, which are currently held by ZS. Specifically, ZS intends to transfer its NRC-licensed possession, maintenance, and decommissioning authorities back to EGC upon the completion of the decommissioning activities at the ZNPS site. The application proposed no physical or operational changes to the facilities.

The NRC published a notice, ''Zion Nuclear Power Station, Units 1 and 2: Zion Solutions, LLC, Application for direct transfer of facility operating license and conforming amendment; opportunity to comment, request a hearing, and petition for leave to intervene,'' in the **Federal Register** on September 24, 2018 (83 FR 48343). No comments or hearing requests were received.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission gives its consent in writing. Upon review of the information in the application and other information before the Commission, and relying upon the representations and agreements contained in the application, the NRC staff has determined that EGC is qualified to hold the licenses. The NRC staff has also determined that the proposed license transfer is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the condition set forth below.

Upon review of the application for conforming amendments to the ZNPS licenses to reflect the transfer to EGC, the NRC staff determined the following:

(1) The application for the proposed license amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I.

(2) There is reasonable assurance that the activities authorized by the proposed license amendments can be conducted without endangering the health and safety of the public, and that such activities will be conducted in compliance with the Commission's regulations.

(3) The issuance of the proposed license amendments will not be inimical to the common defense and security or to the health and safety of the public.

(4) The issuance of the proposed license amendments is in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by an NRC safety evaluation dated November 26, 2019, which is available at ADAMS Accession No. ML19228A131.

III.

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Act, 42 U.S.C. Sections 2201(b), 2201(i), and 2234; and 10 CFR 50.80, *it is hereby ordered* that the application regarding the proposed license transfer is approved, subject to the following condition:

Prior to the consummation of the license transfer from ZS to EGC, EGC shall provide satisfactory documentary evidence to the Director of the Office of Nuclear Material Safety and Safeguards at the NRC that it has obtained or continues to possess the appropriate amount of insurance required of a licensee under 10 CFR part 140 and 10 CFR 50.54(w), consistent with the exemptions issued to ZNPS on December 21, 1999.

It is further ordered that, consistent with 10 CFR 2.1315(b), the license amendments that make changes, as indicated in Enclosure 2 to the cover letter forwarding this Order, to conform the licenses to reflect the subject license transfer are approved. The amendments shall be issued and made effective at the time the proposed license transfer is completed.

It is further ordered that, after receipt of all required regulatory approvals of the proposed transfer action, EGC shall inform the Director of the Office of Nuclear Material Safety and Safeguards in writing of such receipt, and of the date of closing of the transfer, no later than 5 business days before the date of the closing of the transfer. Should the proposed transfer not be completed within 1 year of this Order's date of issuance, this Order shall become null and void; provided, however, that upon written application and for good cause shown, such date may be extended by order. This Order is effective upon issuance.

For further details with respect to this Order, see the application dated July 24, 2018 (ADAMS Accession No. ML18211A303), the supplements dated January 21, 2019 (ADAMS Accession No. ML19028A175) and February 8, 2019 (ADAMS Accession No. ML 19043A673), and the NRC's safety evaluation dated November 26, 2019 (ADAMS Accession No. ML19228A131), which are available for public inspection at the NRC's Public Document Room located at One White Flint North, Public File Area O1–F21, 11555 Rockville Pike (First Floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by email to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 26th day of November, 2019.

For the Nuclear Regulatory Commission

/RA/

John W. Lubinski, Director,
Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–26352 Filed 12–5–19; 8:45 a.m.]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–334, 50–412, 72–1043, 50–346, 72–14, 50–440, and 72–69; NRC–2019–0137]

In the Matter of FirstEnergy Nuclear Operating Company; Beaver Valley Power Station, Unit Nos. 1 and 2, and Independent Spent Fuel Storage Installation (ISFSI); Davis-Besse Nuclear Power Station, Unit No. 1 and ISFSI; and Perry Nuclear Power Plant, Unit No. 1 and ISFSI

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct and indirect transfer of licenses; order.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing the Order approving the application filed by FirstEnergy Nuclear Operating Company (FENOC), acting on behalf of itself and FirstEnergy Nuclear Generation, LLC (FENGen), (together, the Applicants) on April 26, 2019, as supplemented. The application seeks an NRC order consenting to the direct and indirect transfer of licenses for Beaver Valley Power Station, Unit Nos. 1 and 2; Davis-Besse Nuclear Power Station, Unit No. 1; and Perry Nuclear Power Plant, Unit No. 1, and their respective generally licensed independent spent fuel storage installations (ISFSIs) (together, the Facilities). Specifically, the Applicants requested a direct transfer of operating authority for the Facilities from FENOC to an as-yet unnamed company, herein identified as OpCo; a direct transfer of ownership of the Facilities from FENGen to an as-yet unnamed company, herein identified as OwnerCo; and an indirect transfer of ownership of the Facilities to an as-yet unnamed parent company, herein identified as New HoldCo (FirstEnergy Corp. is currently the ultimate parent company). The Applicants also requested the NRC's prior written consent and issuance of conforming amendments to the licenses. No physical changes to the Facilities or operational changes were proposed in the application. The Order is effective upon issuance.

DATES: The Order was issued on December 2, 2019, and is effective for one year.

ADDRESSES: Please refer to Docket ID NRC–2019–0137 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0137. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Bhalchandra K. Vaidya, telephone: 301–

415–3308, email: *Bhalchandra.Vaidya@nrc.gov* or Joel S. Wiebe, telephone: 301–415–6606, email: *Joel.Wiebe@nrc.gov.* Both are staff of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001.

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS Accession No.
Application for Order Consenting to Transfer of Licenses and Conforming License Amendments, dated April 26, 2019	ML19116A087
Supplemental Information Needed for Acceptance of Requested Licensing Action RE: Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated May 31, 2019.	ML19151A531
Response to Request for Additional Information Regarding an Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated August 2, 2019.	ML19214A100
Supplemental to Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated August 29, 2019.	ML19241A462
Supplemental to Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated September 25, 2019.	ML19268A053
Supplemental to Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated September 25, 2019.	ML19268B133
Supplemental to Application for Order Consenting to Transfer of Licenses and Conforming License Amendments (EPID–L–2019–LLM–0000), dated October 17, 2019.	ML19290D432

Dated at Rockville, Maryland, this 3rd day of December 2019.

For the Nuclear Regulatory Commission.

Scott P. Wall,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Order Approving Direct and Indirect Transfers of Control of Licenses and Draft Conforming License Amendments

United States of America

Nuclear Regulatory Commission

In the Matter of Firstenergy Nuclear Operating Company, Firstenergy Nuclear Generation, LLC; Beaver Valley Power Station, Unit Nos. 1 and 2 and its generally licensed ISFSI, Docket Nos. 50–334, 50–412, and 72–1043, License Nos. DPR–66 and NPF–73; Davis-Besse Nuclear Power Station, Unit No. 1 and its generally licensed ISFSI, Docket Nos. 50–346 and 72–14, License No. NPF–3; Perry Nuclear Power Plant, Unit No. 1 and its generally licensed ISFSI, Docket Nos. 50–440 and 72–69; License No. NPF–58

Order Approving Direct and Indirect Transfers of Control of Licenses and Draft Conforming License Amendments

I.

FirstEnergy Nuclear Operating Company (FENOC) and FirstEnergy Nuclear Generation, LLC (FENGen) (together, the Applicants) operate and own, respectively, Beaver Valley Power Station (BVPS), Unit Nos. 1 and 2, and its generally licensed independent spent fuel storage installation (ISFSI); Davis-Besse Nuclear Power Station, Unit No. 1 (DBNPS) and its generally licensed ISFSI; and Perry Nuclear Power Plant, Unit No. 1 (PNPP) and its generally licensed ISFSI (together, the Facilities). Specifically, they are co-holders of:

(1) Renewed Facility Operating License Nos. DPR–66 and NPF–73 for BVPS, Units 1 and 2, respectively, located in Beaver County, Pennsylvania;

(2) Renewed Facility Operating License No. NPF–3 for DBNPS, located in Ottawa County, Ohio; and

(3) Facility Operating License No. NPF–58 for PNPP, located in Lake County, Ohio.

II.

By application dated April 26, 2019 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19116A087), as supplemented by letters dated May 31, 2019; August 2, 2019; August 29, 2019; September 25, 2019 (two submissions); and October 17, 2019 (ADAMS Accession Nos. ML19151A531, ML19214A100, ML19241A462, ML19268A053, ML19268B133, and ML19290D432, respectively), the Applicants requested, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Section 50.80, ''Transfer of licenses,'' of Title 10 of the *Code of Federal Regulations* (10 CFR), that the U.S. Nuclear Regulatory Commission (NRC, the Commission) consent to the transfer of licenses. Specifically, the Applicants requested a direct transfer of operating authority for the Facilities from FENOC to an as-yet unnamed company, herein identified as OpCo; a direct transfer of ownership of the Facilities from FENGen to an as-yet unnamed company, herein identified as OwnerCo; and an indirect transfer of ownership of the Facilities to an as-yet unnamed parent company, herein identified as New HoldCo (FirstEnergy Corp. is currently the ultimate parent company). The Applicants also requested the NRC's prior written consent and issuance of conforming amendments to the licenses pursuant to 10 CFR 50.80 and 10 CFR 50.90, ''Application for amendment of license, construction permit, or early site permit.''

On March 31, 2018, FirstEnergy Solutions Corp. (FES), together with FENOC, FENGen, and FES's other subsidiaries, filed voluntary petitions for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (Bankruptcy Court). By letter dated April 2, 2018 (ADAMS Accession No. ML18094A661), in accordance with 10 CFR 50.54(cc)(1), FENOC notified the NRC of the bankruptcy filing. The proposed direct and indirect license transfers would support the emergence from bankruptcy of the Applicants, along with FES and other affiliated companies that are currently debtors in the bankruptcy process, pursuant to the Eighth Amended Joint Plan of Reorganization (the Bankruptcy Reorganization Plan) filed with the Bankruptcy Court on October 11, 2019, and the Revised Eighth Amended Plan filed with the Bankruptcy Court on October 14, 2019, and confirmed by the Bankruptcy Court on October 16, 2019, as noted in the Applicants' supplemental letter dated October 17, 2019.

Under the Bankruptcy Reorganization Plan, at emergence from bankruptcy, a new privately-held holding company, New HoldCo, will be formed with shares initially held by certain current creditors of one or more of FES, FENOC, FENGen, or FirstEnergy Generation, LLC (FG) (a sister company of FENGen holding fossil fuel generation assets) and management of the new holding company. Both OpCo and OwnerCo will become wholly-owned subsidiaries of New HoldCo. New HoldCo will also have ultimate ownership of FES's existing non-nuclear generating assets as well as the retail and wholesale load-serving business.

A notice of the application and opportunity to request a hearing and to comment on the application was published in the **Federal Register** (FR) on June 27, 2019 (84 FR 30775). In response, on July 17, 2019, the Environmental Law & Policy Center filed a hearing request. The hearing request is currently pending before the Commission. The NRC did not receive any comments on the application.

Pursuant to 10 CFR 50.80, no license for a production or utilization facility, or any right thereunder, shall be transferred, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. Upon review of the information in the application for license transfer, as supplemented, and other information before the Commission, the NRC staff has determined that OpCo and OwnerCo are qualified to hold the licenses to the extent proposed to permit the transfer of the licenses from FENOC and FENGen to OpCo and OwnerCo, respectively, and that the transfers of the licenses, as described in the application, are otherwise consistent with applicable provisions of law, regulations, and orders issued by the NRC pursuant thereto, subject to the conditions set forth below.

Upon review of the information in the application for conforming amendments, as supplemented, the NRC staff has determined that:

(1) The application for conforming license amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I.

(2) The Facilities will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission.

(3) There is reasonable assurance that the activities authorized by the amendments can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations.

(4) The issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

(5) The issuance of the amendments is in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied.

The findings set forth above are supported by an NRC staff safety evaluation dated the same date as this Order, which is available at ADAMS Accession No. ML19305B131 (non-proprietary).

III.

Accordingly, pursuant to Sections 161b, 161i, and 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(b), 2201(i), and 2234; and 10 CFR 50.80, 10 CFR 72.50, and 10 CFR 50.90, *it is hereby ordered* that the application for license transfers, as described herein, is approved for BVPS, Unit 1, BVPS, Unit 2, DBNPS, and PNPP, and the respective ISFSIs, subject to the following conditions.

1. OwnerCo and OpCo shall provide satisfactory documentary evidence to the Director of the NRC Office of Nuclear Reactor Regulation that, as of the date of the license transfer, the licensees reflected in the amended licenses have obtained the appropriate amount of insurance required of a licensee under 10 CFR part 140 and 10 CFR 50.54(w).

2. On or by the closing date of the license transfer transaction, the Applicants shall take all necessary steps to ensure that the provisional trust agreement submitted on September 25, 2019, to address the shortfall identified for BVPS, Unit 1 is implemented and maintained consistent with the safety evaluation supporting this Order.

3. The NRC staff's approval of these license transfers is subject to the Commission's authority to rescind, modify, or condition the approved transfers based on the outcome of any post-effectiveness hearing on the license transfer application.

It is further ordered that after receipt of all required regulatory approvals of the proposed transfer actions, the Applicants shall inform the Director of the Office of Nuclear Reactor Regulation in writing of such receipt no later than 5 business days prior to the date of the closing of the transfer. Should the proposed transfer not be completed within 1 year from the date of this Order, this Order shall become null and void, provided, however, upon written application and for good cause shown, such date may be extended by order. The conditions of this Order may be amended upon application by the Applicants and approval by the Director of the Office of Nuclear Reactor Regulation.

It is further ordered that consistent with 10 CFR 2.1315(b), the license amendments that make changes, as indicated in Enclosures 2 through 5 to the letter transmitting this Order, to reflect the subject transfers, are approved. The amendments shall be issued and made effective within 30 days of the date when the proposed transfer actions are completed.

This Order is effective upon issuance.

For further details with respect to this Order, see the application dated April 26, 2019, as supplemented by letters dated May 31, 2019; August 2, 2019; August 29, 2019; September 25, 2019 (two submissions); and October 17, 2019, and the NRC safety evaluation dated the same date as this Order, which are available for public inspection at the NRC's Public Document Room (PDR) located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland this 2nd day of December 2019.

For the Nuclear Regulatory Commission.

/RA/

Eric J. Benner,

Deputy Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–26389 Filed 12–5–19; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* December 6, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 2, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 567 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–43, CP2020–41.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–26302 Filed 12–5–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87646; File No. SR–C2–2019–025]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Updating Various C2 Rules and Chapters To Reflect Changes to the Cboe Options Rulebook

December 2, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 20, 2019, Cboe C2 Exchange, Inc. (the "Exchange" or "C2") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the "Exchange" or "C2") proposes to update various C2 Rules and Chapters to reflect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

changes to the Cboe Options rulebook that became effective upon the October 7, 2019 migration of the Cboe Options' trading platform to the same system used by the Cboe Affiliated Exchanges (as defined below), including C2. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2016, the Exchange's parent company, Cboe Global Markets, Inc. (formerly named CBOE Holdings, Inc.) (''Cboe Global''), which is also the parent company of Cboe C2 Exchange, Inc. (''C2''), acquired Cboe EDGA Exchange, Inc. (''EDGA''), Cboe EDGX Exchange, Inc. (''EDGX'' or ''EDGX Options''), Cboe BZX Exchange, Inc. (''BZX'' or ''BZX Options''), and Cboe BYX Exchange, Inc. (''BYX'' and, together with Cboe Options, C2, EDGX, EDGA, and BZX, the ''Cboe Affiliated Exchanges''). On October 7, 2019, Cboe Options migrated its trading platform to the same system used by the Cboe Affiliated Exchanges. In connection with this technology migration, Cboe Options updated and reorganized its rulebook, which became effective upon the technology migration.

The Exchange now proposes to reorganize various Chapters in its Rulebook that incorporate Cboe Options chapters by reference in order to correspond to the post-migration structure of the Cboe Options rulebook. The proposed rule change also updates cross-references to Cboe Options rules and chapters that have been relocated in the Cboe Options post-migration rulebook. It also proposes to delete certain Chapters that incorporate by reference Cboe Option's chapters that are no longer holistically in the Cboe Options rulebook as a result of the reorganization of the rules under such chapters to various other Cboe Options rules and chapters. The proposed rule change moves and, where applicable, removes the rules as follows:

Proposed Chapter	Current Rule/Chapter
Chapter 3, Section B TPH Registration[5] Incorporates by reference certain Cboe Options rules under Cboe Options Chapter 3, Section B (rules formerly under Cboe Options Chapter 9).[6] Rule 3.30.	**Chapter 9 Doing Business with the Public** Incorporates by reference certain rules under former Cboe Options Chapter 9 (former Cboe Options Rules 9.1, 9.2, 9.3, 9.3A, 9.4, 9.5, 9.6). Rule 3.4.
Chapter 4, Section A Equity and ETP Options Incorporates by reference Cboe Options Chapter 4, Section A (former Cboe Options Chapter 5);[7] and **Chapter 4, Section B Index Options** Incorporates by reference Cboe Options Chapter 4, Section B (rules regarding index options listing under former Cboe Options Chapter 24).[8]	**Chapter 5 Securities Dealt In** Incorporates by reference former Cboe Options Chapter 5; and **Chapter 24 Index Options** Incorporates by reference former Cboe Options Chapter 24 (except for former Rules 24.6, 24.7, 24.13, 24.15, 24.19, 24.20, and 24.21).
Chapter 5 Business Conduct[9] Incorporates by reference Cboe Options Chapter 8 (comprised of former Cboe Options Chapter 4, as well as rules regarding position limits and exercise limits for index options under former Cboe Chapter 24).[10]	**Chapter 4 Business Conduct** Incorporates by reference former Cboe Options Chapter 4; and **Chapter 24 Index Options** Incorporates by reference former Cboe Options Chapter 24.
Chapter 6, Section F Exercises and Deliveries Incorporates by reference Cboe Options Chapter 6, Section B (former Cboe Options Chapter 11, as well as former Cboe Options Rule 24.18).	**Chapter 11 Exercises and Deliveries** Incorporates by reference former Cboe Options Chapter 11 **Chapter 24 Index Options** Incorporates by reference former Cboe Options Chapter 24.
Chapter 7, Section A General Incorporates by reference Cboe Options Chapter 7, Section A (former Cboe Options Chapter 15); and **Chapter 7, Section B Consolidated Audit Trail (CAT)** Incorporates by reference Cboe Options Chapter 7, Section B (which was former Cboe Options Chapter 6, Section F (Consolidated Audit Trail (CAT)).[11]	**Chapter 15 Records, Reports, and Audits** Incorporates by reference former Cboe Options Chapter 15. **Chapter 6, Section F Consolidated Audit Trail (CAT)** Incorporates by reference former Cboe Options Chapter 6, Section F.
Chapter 9 Doing Business with the Public Removes Rule 3.19, which is identical to Cboe Options Rule 9.20, and incorporates by reference Cboe Options Rule 9.20 (which becomes incorporated by reference under the umbrella of the overall incorporation by reference of Cboe Options Chapter 9).[12]	**Chapter 9 Doing Business with the Public** Incorporates by reference certain rules under Cboe Options Chapter 9 (Rules 9.7 through 9.25).
Chapter 10 Margin Requirements Incorporates by reference Cboe Options Chapter 10 (former Cboe Options Chapter 12).[13]	**Chapter 12 Margins** Incorporates by reference former Cboe Options Chapter 12.
Chapter 11 Net Capital Requirements	**Chapter 13 Net Capital Requirements**

Proposed Chapter	Current Rule/Chapter
Incorporates by reference Cboe Options Chapter 11 (former Cboe Options Chapter 13).[14]	Incorporates by reference former Cboe Options Chapter 13.
Chapter 12 Summary Suspension Incorporates by reference Cboe Options Chapter 12 (former Cboe Options Chapter 16), and as a result deletes current C2 Chapter 16.[15]	**Chapter 16 Summary Suspension** Incorporates by reference former Cboe Options Chapter 16.
Chapter 13 Discipline Incorporates by reference Cboe Options Chapter 13 (former Cboe Options Chapter 17), and as a result deletes current C2 Chapter 17.[16]	**Chapter 17 Discipline** Incorporates by reference former Cboe Options Chapter 17.
Chapter 14 Arbitration Incorporates by reference Cboe Options Chapter 14 (former Cboe Options Chapter 18), and as a result deletes current C2 Chapter 18.[17]	**Chapter 18 Arbitration** Incorporates by reference former Cboe Options Chapter 18.
Chapter 15 Hearings and Review Incorporates by reference Cboe Options Chapter 15 (former Cboe Options Chapter 19), and as a result deletes current C2 Chapter 19.[18]	**Chapter 19 Hearings and Review** Incorporates by reference former Cboe Options Chapter 19.
To be deleted	**Chapter 10 Closing Transactions**
To be deleted	**Chapter 24 Index Options**

The majority of the proposed changes are of a non-substantive nature and will not amend the relocated rules other than to update their Chapter numbers, make cross-reference changes, update or remove references to certain terms that have been updated or removed within the Cboe Options rules (*e.g.* ‘‘Department of Compliance’’, ‘‘Department of Financial and Sales Practice Compliance’’, and ‘‘Department of Member Firm Regulation’’ were all updated to the ‘‘Exchange’’ in Cboe Options rules, reference to the Floor is not found in any Cboe Options rules that remain in Cboe Options Chapter 9, and the terms ‘‘Constitution’’ and ‘‘membership are not found in Cboe Options Chapter 15 (Hearing and Review)) and update headings in order to correspond to the structure of the Cboe Options post-migration Rulebook. The Exchange notes it also updates cross-references to Cboe Options rules in C2 Rule 6.1 and in C2 Chapter 6, Section E, and removes the language under C2 Rule 1.3 that makes an exception for the applicability of Eastern Time in Cboe Options rules because the Cboe Options post-migration Rulebook was amended to also state all times in Eastern Time.[19]

As stated in the table above, the proposed rule change also incorporates Cboe Options Rule 9.20, which governs customer disclosures during Global Trading Hours, into C2 Chapter 9 by reference to Cboe Options Chapter 9. Current Rule 3.19 is identical to Cboe Options Rule 9.20. Therefore, the proposed rule change essentially just relocates current Rule 3.19 to Rule 9.20 in order to include Cboe Options Rule 9.20 in C2 Chapter 9's incorporation of Cboe Options Chapter 9 by reference, as it is within the same category of exchange rules otherwise incorporated into C2 Chapter 9 by reference to Cboe Options Chapter 9 (*i.e.* rule related to doing business with the public).

The proposed changes to remove certain C2 Chapters are of a non-substantive nature because they delete C2 Chapters that incorporate by reference certain Cboe Options chapters that are no longer applicable as a result of the reorganization of the Cboe Options rulebook. The proposed rule change removes current C2 Chapter 10 which incorporates (former) Cboe Options Chapter 10 by reference. The Exchange notes that prior to reorganization, Cboe Options Chapter 10 contained only three rules (Cboe Options Rules 10.1, 10.2, and 10.3). As a result of Cboe Option's reorganization, Cboe Options Rule 10.1 was relocated to

[5] The proposed rule change also adds a Section A (TPH Qualifications) heading to C2 Rules currently in Chapter 3, which is consistent with the section structure in Cboe Options Chapter 3.

[6] The filing to reorganize Cboe Options Chapter 9 and move rules to Cboe Options Chapter 3, Section B did not make any substantive changes to the rules. *See* Securities and Exchange Act Release No. 87229 (October 4, 2019), 84 FR 54704 (October 10, 2019) (SR–CBOE–2019–088).

[7] The filing to relocate former Cboe Options Chapter 5 to Cboe Options Chapter 4, Section A did not make any substantive changes to the rules. *See* Securities and Exchange Act Release No. 87272 (October 10, 2019) (SR–CBOE–2019–090).

[8] The filing to relocate rules regarding the listing of index options under former Cboe Options Chapter 24 to Cboe Options Chapter 4, Section B did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87337 (October 17, 2019), 84 FR 56879 (October 23, 2019) (SR–CBOE–2019–092).

[9] The Exchange notes that proposed C2 Chapter 5 incorporates by reference Cboe Options Chapter 8, as current C2 Chapter 8 is already comprised of C2 Market-Maker Rules.

[10] The filing to relocate former Cboe Options Chapter 4, as well as rules regarding position limits and exercise limits for index options under former Cboe Chapter 24, to Cboe Options Chapter 8 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87224 (October 4, 2019), 84 FR 54652 (October 10, 2019) (SR–CBOE–2019–081).

[11] The filing to relocate former Cboe Options Chapter 15, as well as former Cboe Options Chapter 6, Section F, to Cboe Options Chapter 7, Sections A and B, did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87216 (October 3, 2019), 84 FR 54231 (October 9, 2019) (SR–CBOE–2019–073).

[12] *See supra* note 5.

[13] The filing to relocate former Cboe Options Chapter 12 to Cboe Options Chapter 10 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87189 (October 1, 2019), 84 FR 53520 (October 7, 2019) (SR–CBOE–2019–069).

[14] The filing to relocate former Cboe Options Chapter 13 to Cboe Options Chapter 11 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87188 (October 1, 2019), 84 FR 53480 (October 7, 2019) (SR–CBOE–2019–066).

[15] The filing to relocate former Cboe Options Chapter 16 to Cboe Options Chapter 12 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87227 (October 4, 2019), 84 FR 54700 (October 10, 2019) (SR–CBOE–2019–067).

[16] The filing to relocate former Cboe Options Chapter 17 to Cboe Options Chapter 13 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87210 (October 3, 2019), 84 FR 54190 (October 9, 2019) (SR–CBOE–2019–068).

[17] The filing to relocate former Cboe Options Chapter 18 to Cboe Options Chapter 14 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87183 (October 1, 2019), 84 FR 53548 (October 7, 2019) (SR–CBOE–2019–065).

[18] The filing to relocate former Cboe Options Chapter 19 to Cboe Options Chapter 15 did not make any substantive changes to the rules. *See* Securities Exchange Act Release No. 87187 (October 1, 2019), 84 FR 53487 (October 7, 2019) (SR–CBOE–2019–072).

[19] *See* Cboe Options Rule 1.6.

Cboe Options Rule 6.3(g), Cboe Options Rule 10.2 was relocated to Cboe Options Rule 12.6, and Cboe Options Rule 10.3 was relocated to Cboe Options Rule 8.18. The Exchange notes that proposed C2 Chapter 12 incorporates Cboe Options Chapter 12 by reference, which now contains former Cboe Options Rule 10.2, and proposed C2 Chapter 5 incorporates Cboe Options Chapter 8 by reference, which now contains former Cboe Options Rule 10.3. Because the current C2 Rules do not incorporate Cboe Options Chapter 6 by reference, the proposed rule change simply adds the language, verbatim, from current Cboe Options Rule 6.3(g) (former Cboe Options Rule 10.1) to C2 Rule 6.27(b) (and updates the current rule text paragraph formatting and headings accordingly).

Likewise, the proposed change removes current C2 Chapter 24 which incorporates (former) Cboe Options Chapter 24 by reference. As indicated in the table above, a majority of the Cboe Options rules under former Cboe Options Chapter 24 were relocated to Cboe Options Chapter 4, Section B and Chapter 8, and thus covered under proposed C2 Chapters 4 and 5. The Exchange notes that former Cboe Options Rule 24.8 (governing the meaning of premium bids and offers for index options) and former Cboe Options Rule 24.14 (governing limitation of liability of Reporting Authority for indexes underlying options) were not relocated into either of these Chapters, and instead incorporated into Cboe Options Rules 5.3(a) and 1.12, respectively. Because the current C2 Rules do not incorporate post-migration Cboe Options Chapter 5 or Chapter 1 by reference, like the proposed rule change described above, the proposed rule change simply updates the language under current C2 Rule 6.3(a) to be consistent with the rule text under corresponding Cboe Options Rule 5.3(a), which now accounts for index options (from former Cboe Options Rule 24.8), and adds Rule 6.45, which is identical to the rule text under Cboe Options Rule 1.12 (former Cboe Options Rule 24.14). The proposed rule change does not incorporate former Cboe Options Rule 24.8.01 (current Cboe Options Rule 5.85(e)) nor former Cboe Options Rule 24.22 (current Cboe Options Rule 5.92) because both rules are specific to trading on open outcry which is not applicable to C2. The proposed change also removes the language under current C2 Chapter 24 which provides that Cboe Options Rules 24.6 (Days and Hours of Business); 24.7 (Trading Halts, Suspensions, or Primary Market Closure); 24.13 (Trading Rotations); 24.15 (Automatic Execution of Index Options); 24.19 (Multi-Class Broad-Based Index Option Spread Orders); 24.20 (SPX Combination Orders); and 24.21 (Index Crowd Space Dispute Resolution Procedures) do not apply to C2, because, as a result of the reorganization of the Cboe Options rulebook, each of these rules has either been deleted from the Cboe Options rulebook or relocated into another Cboe Options chapter that C2 does not incorporate by reference. The Exchange notes that the proposed rule changes described above do not make any substantive changes to the manner in which Cboe Options rules apply to C2.

Additionally, as a result of the reorganization of the Cboe Options rulebook, rules in certain former chapters that the Exchange does not currently incorporate by reference, such as chapters that had governed types of options specific to trading on Cboe Options (*i.e.* Range, Binary, Corporate Debt Security, Government security, Credit, and interest rate options), and other specific Cboe Options rules that do not apply to C2 (*i.e.* former Cboe Options Rules 6.2.06, 8.9, 8.6, 6.55, and 6.22),[20] were relocated to various Cboe Options chapters that C2 currently does incorporate by reference. For example, former Cboe Options Rules 28.16, 21.30, and 23.15 (none of which does C2 currently incorporate by reference) regarding record maintenance, retention, and furnishing for Market-Makers in Corporate Debt Security Options, Government security options, and interest rate options, respectively, were relocated into certain provisions in Cboe Options Chapter 7 (former Cboe Options Chapter 15, which C2 does incorporate by reference). Therefore, the proposed rule change makes explicit, where applicable, that Cboe Options rules regarding such options specific to trading on Cboe Options, as well as other specific Cboe Options rules not currently incorporated by reference into C2 Rules, continue to be inapplicable to C2.

The proposed rule change also updates certain rules under current C2 Rule 17.50 (proposed C2 Rule 13.15) to reflect recent changes to the corresponding Cboe Options rules.[21] Rule filing SR–CBOE–2019–025 amended Cboe Options Rule 13.15(g)(14) and (g)(19)[22] under its Minor Rule Violation Plan (''MRVP'') by removing referrals to the Business Conduct Committee (''BCC''), and incorporating ''subsequent'' offenses under the fine schedules corresponding to the last monetary range listed under these rules. For example, instead of providing that subsequent offenses may result in referral to the BCC, Cboe Options Rule 13.15(g)(14) now provides that a first offense may result in a fine of $2,000 to $4,000, and subsequent offenses may result in a fine ranging from $4,000 to $5,000. The Exchange notes that it does not incorporate Cboe Options Rules 13.15(g)(14) or (g)(19) (*i.e.,* current C2 Rules 17.50(g)(14) and (g)(19)) by reference, therefore, it now proposes to update these MRVP rules to be consistent with Cboe Options in its schedule of fines under proposed C2 Rules 13.15(g)(14) and (g)(19) (current C2 Rules 17.50(g)(14) and (g)(19)).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[23] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[24] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[25] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As stated, the proposed rule change generally makes no substantive changes to the rules. The proposed rule change is merely intended to reorganize C2 Chapters and update their numbers,

[20] Relocated to Cboe Options Rules 4.17, 7.6, 8.20, 8.21, and 8.22, respectively. The Exchange also notes that proposed Chapter 5 (current Chapter 4) updates the cross-reference from Cboe Options Rule 4.11, Interpretation and Policy .06, in the exclusion provision, to Cboe Options Rule 8.30.06.

[21] *See* Securities Exchange Act Release No. 85727 (April 26, 2019), 84 FR 18878 (May 02, 2019) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Chapter 17 of the Cboe Options Rules) (SR–CBOE–2019–025).

[22] The Exchange notes that at the time of this filing these rules were under Chapter 17 in the Cboe Options Rulebook, and have since been relocated to Chapter 13 as a result of the migration.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] *Id.*

cross-references, and headings, as well as remove C2 Chapters which reference Cboe Options chapters that are no longer applicable and/or are covered under other proposed C2 Chapters as a result of the Cboe Options rulebook restructuring, in order to correspond to the Cboe Options rulebook that was reorganized for the October 7, 2019 technology migration. The proposed change also updates language in certain C2 Chapters that incorporate Cboe Options chapters by reference to exclude Cboe Options rules regarding specific types of options and other specific Cboe Options rules that are not applicable to trading on C2, but, as a result of the Cboe Options rulebook reorganization, had been relocated into Cboe Options chapters that C2 currently does incorporate by reference. Additionally, the proposed change adds rule text to the C2 Rules that is identical to certain Cboe Options rules formerly in Cboe Options Chapter 24, which the Exchange currently incorporates by reference, which were relocated to Cboe Options chapters not incorporated by reference. Therefore, the proposed rule change does not alter any of the current rules incorporated by reference, and the same rules currently applicable to Trading Permit Holders will apply to Trading Permit Holders upon effectiveness of this rule filing in the same manner, whether those rules are incorporated by reference to Cboe Options rules or included in C2's Rules. Instead, it is designed 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 updating the organization and structure of the C2 Rulebook in order to align with the recently reorganized and restructured Cboe Options rulebook, making it easier to read and follow, thus allowing market participants better understand the rules of the Exchange, which will also result in less burdensome and more efficient regulatory compliance for market participants that are Trading Permit Holders of both Cboe Options and C2.

Additionally, the Exchange notes that the removal of a referral to the BCC for subsequent offenses under the proposed MRVP Rules 13.15(g)(14) and (g)(19) is substantively identical to the corresponding rules of Cboe Options, which have previously been filed with the Commission. As a result, the Exchange believes that the proposed change provides consistency between the rules and disciplinary process of the Exchange and its affiliate exchange, Cboe Options, which removes impediments to and perfects the mechanism of a free and open market and a national market system by making it easier for participants across the affiliated exchanges to understand and adhere to the disciplinary rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange reiterates that the proposed rule change is being proposed as a result of the recent technology migration and the related reorganization of the Cboe Options rulebook, and not as a competitive filing. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition because it merely reorganizes and updates its Chapters and Rules that incorporate Cboe Options chapters and rules by reference to align with the reorganized, post-migration Cboe Options rulebook that became effective October 7, 2019. The same rules that apply to C2 Trading Permit Holders today will apply to C2 Trading Permit Holders in the same manner upon effectiveness of this rule filing. Likewise, the proposed rule change to the C2 MRVP is also not intended to address competitive issues and will not impose any burden on intramarket competition because it does not impact trading on the Exchange but, rather, is concerned only with facilitating easier understanding of and adherence to the disciplinary rules for participants across the Exchange and Cboe Options. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition because the proposed rules are substantively the same as the Exchange's current rules, and the proposed change to the MRVP is substantively the same as the Cboe Options MRVP, all of which have been previously filed with the Commission.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [26] and Rule 19b–4(f)(6) thereunder.[27]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [28] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [29] 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 believes that relocating and updating the C2 Chapters to align the C2 Rulebook with the restructured, post-migration Cboe Options rulebook will help to avoid any potential confusion by providing investors with a C2 Rulebook that accurately incorporates Cboe Options rules and chapters by reference. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[30]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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,

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[28] 17 CFR 240.19b–4(f)(6).

[29] 17 CFR 240.19b–4(f)(6)(iii).

[30] 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).

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–C2–2019–025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2019–025. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference 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–C2–2019–025 and should be submitted on or before December 27, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–26308 Filed 12–5–19; 8:45 am]

BILLING CODE 8011–01–P

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87587A; File No. SR–CboeBZX–2019–100]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Remove Its Partial Post Only at Limit Order Type; Correction

December 2, 2019.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** on November 29, 2019, concerning a Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Remove its Partial Post Only at Limit Order Type. The document contained a typographical error.

FOR FURTHER INFORMATION CONTACT: Christopher W. Chow, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, (202) 551–5622.

Correction

In the **Federal Register** of November 29, 2019 in FR Doc. 25833, on page 65878, in the third and fourth line in the subheading under the heading ''SECURITIES AND EXCHANGE COMMISSION'' in the third column, correct the reference to ''Cboe EDGX Exchange, Inc'' instead to ''Cboe BZX Exchange, Inc.''

Dated: December 2, 2019.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–26299 Filed 12–5–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33707; 812–14967]

Blackstone Alternative Alpha Fund, et al.

December 2, 2019.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

APPLICANTS: Blackstone Alternative Alpha Fund (''BAAF''); Blackstone Alternative Alpha Fund II (''BAAF II''); Blackstone Alternative Alpha Master Fund (''BAAF Master Fund''); Blackstone Alternative Multi-Strategy Fund (''BAMSF'', and together with BAAF, BAAF II and the BAAF Master Fund, the ''BAAM Regulated Funds''); Blackstone Alternative Asset Management, L.P. (''BAAM''), the investment adviser to BAAF, BAAF II and BAAF Master Fund; Blackstone Alternative Investment Advisors LLC (''BAIA''), the investment adviser to BAMSF; the investment advisers set forth in Schedule A to the application (together with BAAM and BAIA, the ''BAAM Advisers''); the Existing Affiliated Investors set forth on Schedule A to the application.[1]

FILING DATES: The application was filed on October 24, 2018, and amended on June 3, 2019 and September 10, 2019.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 27, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F St. NE, Washington, DC 20549–1090.

[1] The Existing Affiliated Investors, together with their direct and indirect wholly-owned subsidiaries, are entities (i) whose primary investment adviser is a BAAM Adviser and (ii) that either (A) would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (B) rely on the rule 3a–7 exemption thereunder from investment company status.

Applicants: 345 Park Avenue, New York, New York 10154.

FOR FURTHER INFORMATION CONTACT: Asen Parachkevov, Senior Counsel, or Kaitlin Bottock, Branch Chief, at (202) 551–6821 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. BAAF, BAAF II and BAAF Master Fund, each a Massachusetts business trust, are externally managed, non-diversified, closed-end management investment companies. Each of BAAF's, BAAF II's and BAAF Master Fund's investment objective is to seek to earn attractive long-term risk-adjusted returns by primarily investing in non-traditional or ''alternative'' strategies. BAAF and BAAF II are ''feeder'' funds that invest substantially all of their assets in BAAF Master Fund. Each of BAAF, BAAF II and BAAF Master Fund have a six-member Board, of which four members are Non-Interested Trustees.[2]

2. BAMSF, a Massachusetts business trust, is currently the sole series of Blackstone Alternative Investment Funds, and operates as a diversified, open-end management investment company. BAMSF's investment objective is to seek capital appreciation primarily through investing in non-traditional or ''alternative'' strategies. BASMF has a six-member Board, of which four members are Non-Interested Trustees.

3. Each Adviser [3] is a subsidiary of The Blackstone Group, L.P. (''Blackstone''). Blackstone is a leading global alternative asset manager, whose alternative asset management businesses include investment vehicles focused on private equity, real estate, hedge fund solutions, non-investment grade credit, secondary private equity funds of funds and multi-asset class strategies. Blackstone's four business segments are (1) private equity, (2) real estate, (3) hedge fund solutions and (4) credit.

4. The BAAM Advisers operate as a self-contained advisory business within Blackstone's hedge fund solutions group. Each BAAM Adviser is under common control with BAAM and BAIA, the Adviser to each of the BAAM Regulated Funds, and collectively the BAAM Advisers conduct a single advisory business for purposes of the requested Order. The BAAM Advisers are each either separately registered as investment advisers with the Commission, or are relying advisers that rely on the registration of another BAAM Adviser. No BAAM Adviser is a relying adviser of any Blackstone-affiliated investment adviser from outside of the self-contained group.

5. Applicants seek an order to permit one or more Regulated Funds [4] to be able to participate with one or more other Regulated Funds and/or one or more Affiliated Investors [5] in the same investment opportunities through a proposed co-investment program where such participation would otherwise be prohibited under sections 17(d) and 57(a)(4) of the Act and rule 17d–1 thereunder (the ''Co-Investment Program'').

6. For purposes of the requested Order, ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or one or more Wholly-Owned Investment Subsidiaries, as defined below) participates together with one or more other Regulated Funds (or one or more Wholly-Owned Investment Subsidiaries, as defined below) and/or one or more Affiliated Investors in reliance on the requested Order. ''Potential Co-Investment Transaction'' [6] means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Subsidiary, as defined below) could not participate together with one or more Affiliated Investors and/or one or more other Regulated Funds without obtaining and relying on the requested Order.[7] Funds that are advised or sub-advised by affiliates of Blackstone other than an Adviser or Primary Adviser will not participate in the Co-Investment Program. No Primary Adviser will be the source of any Potential Co-Investment Transactions under the requested Order. Potential Co-Investment Transactions will not be shared outside of the Co-Investment Program.

7. Applicants state that a Regulated Fund may, from time to time, form a special purpose subsidiary (a ''Wholly-Owned Investment Subsidiary'').[8] A

[2] ''Board'' means the board of trustees (or equivalent) of the BAAM Regulated Funds and any other Regulated Fund (as defined below).

''Non-Interested Trustees'' means the Non-Interested Trustees of the BAAM Regulated Funds and any other Regulated Fund who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act.

[3] The term ''Adviser'' means (i) the BAAM Advisers and (ii) any future investment adviser that controls, is controlled by or is under common control with a BAAM Adviser and is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') that intends to participate in the Co-Investment Program (as defined below).

The term ''Primary Adviser'' means any future investment adviser that (i) controls, is controlled by or is under common control with an Adviser, (ii) is registered as an investment adviser under the Advisers Act, and (iii) is not an Adviser. For the avoidance of doubt, a Primary Adviser will not be treated as an Adviser under the requested Order, but will be subject to conditions 2(c)(iv) and 15 of the requested Order. A Primary Adviser will not rely on the requested Order with respect to any investment vehicles it manages other than to the extent those vehicles are sub-advised by an Adviser.

[4] ''Regulated Fund'' means any of the BAAM Regulated Funds and any future closed-end management or future open-end management investment company or future series of an open-end investment company (i) that has elected to be regulated as a business development company (''BDC'') or is registered under the Act, (ii) whose investment adviser is an Adviser and (iii) who intends to participate in the Co-Investment Program.

Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[5] ''Affiliated Investor'' means (i) the Existing Affiliated Investors, (ii) any Affiliated Proprietary Account and (iii) any Future Affiliated Investor.

''Future Affiliated Investor'' means an entity (i)(A) whose investment adviser is an Adviser or (B) whose investment adviser is a Primary Adviser and whose sub-adviser is an Adviser (a ''Sub-Advised Affiliated Investor''), and (ii) that either (A) would be an investment company but for an exemption in section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (B) relies on the rule 3a–7 exemption thereunder from investment company status, and (iii) that intends to participate in the Co-Investment Program.

''Affiliated Proprietary Account'' means any account of an Adviser or its affiliates or any company that is an indirect, wholly- or majority-owned subsidiary of an Adviser or its affiliates, which, from time to time, may hold various financial assets in a principal capacity. For the avoidance of doubt, none of the Regulated Funds, the Existing Affiliated Investors or any Future Affiliated Investors shall be deemed to be Affiliated Proprietary Accounts for purposes of the requested Order.

[6] Investment opportunities that are sourced by sub-advisers that are not BAAM Advisers are excluded from the definition of Potential Co-Investment Transactions. Only investments that are sourced by BAAM Advisers will be considered Potential Co-Investment Transactions that are subject to condition 1 of the requested Order.

[7] All existing entities that currently intend to rely upon the requested Order have been named as applicants. Any other existing or future entity that subsequently relies on the Order will comply with the terms and conditions of the application.

[8] ''Wholly-Owned Investment Subsidiary'' means an (i) whose sole business purpose is to hold one or more investments on behalf of a Regulated Fund (and, in the case of an SBIC Subsidiary (as defined below), maintain a license under the SBA Act (as defined below) and issue debentures guaranteed by the SBA (as defined below)); (ii) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (iii) with respect to which the Board of the Regulated Fund has the sole authority to make all determinations with respect to the Wholly-Owned Investment Subsidiary's participation under the conditions of the requested Order; and (iv) that is

Wholly-Owned Investment Subsidiary would be prohibited from investing in a Co-Investment Transaction with another Regulated Fund or any Affiliated Investor because it would be a company controlled by its parent Regulated Fund for purposes of sections 17(d) and 57(a)(4) of the Act and rule 17d–1 thereunder. Applicants request that a Wholly-Owned Investment Subsidiary be permitted to participate in Co-Investment Transactions in lieu of the applicable Regulated Fund and that the Wholly-Owned Investment Subsidiary's participation in any such transaction be treated, for purposes of the requested Order, as though the parent Regulated Fund were participating directly.

8. When considering Potential Co-Investment Transactions for any Regulated Fund, an Adviser will consider only the Objectives and Strategies,[9] Board-Established Criteria,[10] investment policies, investment positions, capital available for investment, and other pertinent factors applicable to that Regulated Fund. The participation of a Regulated Fund in a Potential Co-Investment Transaction may only be approved by a Required Majority, as defined in section 57(o) of the Act (a ''Required Majority''), of the trustees of the Board eligible to vote on that Co-Investment Transaction under section 57(o) of the Act (the ''Eligible Trustees'').[11] When selecting investments for the Affiliated Investors, an Adviser will select investments separately for each Affiliated Investor, considering, in each case, only the investment objective, investment policies, investment position, capital available for investment, and other pertinent factors applicable to that particular Affiliated Investor.

9. With respect to participation in a Potential Co-Investment Transaction by a Regulated Fund, the applicable Adviser will present each Potential Co-Investment Transaction and the proposed allocation of each investment opportunity to the Eligible Trustees. The Required Majority of a Regulated Fund will approve each Co-Investment Transaction prior to any investment by the Regulated Fund.

10. Applicants state that the majority of the BAAM Advisers' employees work on matters for Close Affiliates[12] and information about potential investment opportunities is routinely disseminated among such Adviser's employees. Other than to satisfy compliance obligations, information regarding Potential Co-Investment Transactions will not be shared with Remote Affiliates,[13] which would include other investment advisers that operate in other Blackstone business groups, except in unusual circumstances, as the Blackstone business groups each generally target different investment strategies or asset classes and there are information barrier policies in place between the Blackstone business groups. Applicants further note within the BAAM Advisers, the personnel overlap and coordination among portfolio management teams ensures that all relevant investment opportunities will be brought to the attention of each Regulated Fund managed by the respective Adviser. Applicants submit that the BAAM Advisers will receive all information regarding all investment opportunities that fall within the then-current Objectives and Strategies and Board-Established Criteria of each Regulated Fund managed by the respective Adviser.

11. Applicants submit that, in the event that a Potential Co-Investment Transaction would be within the investment objectives and strategies of the Sub-Advised Affiliated Investor, the respective Adviser shall have the primary responsibility for the investment, including making the initial investment recommendation, and day-to-day monitoring of the investment. Applicants further note that the Adviser will be responsible for complying with the conditions of the requested Order. Applicants state that if the Adviser and Primary Adviser agree that the Sub-Advised Affiliated Investor should invest in the Potential Co-Investment Transaction and at what size of investment, then the Adviser would, consistent with the conditions of the requested Order, determine an allocation for the Regulated Funds and Affiliated Investors, including such Sub-Advised Affiliated Investor.

12. Applicants acknowledge that some of the Affiliated Investors may not be funds advised by an Adviser because they are Affiliated Proprietary Accounts. Applicants do not believe the participation of these Affiliated Proprietary Accounts in Co-Investment Transactions should raise issues under the conditions of the requested Order because allocation policies and procedures of the account owners provide that investment opportunities are offered to client accounts before they are offered to Affiliated Proprietary Accounts.

13. Under condition 16, if an Adviser or its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and any Affiliated Investor (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (''Shares''), then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) all other matters under either the Act or applicable state law affecting the Board's composition, size or manner of election.

14. Applicants state that from time to time the Regulated Funds and Affiliated

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an entity that would be an investment company but for an exemption in section 3(c)(1) or 3(c)(7) of the Act.

The term ''SBIC Subsidiary'' means a Wholly-Owned Investment Subsidiary that is licensed by the Small Business Administration (the ''SBA'') to operate under the Small Business Investment Act of 1958, as amended, (the ''SBA Act'') as a small business investment company (a ''SBIC'').

[9] The term ''Objectives and Strategies'' means a Regulated Fund's investment objectives and strategies, as described in the filings made with the Commission by the Regulated Fund under the Securities Exchange Act of 1934, as amended, the Securities Act of 1933, as amended (the ''1933 Act'') and the Act, and the Regulated Fund's reports to shareholders.

[10] The term ''Board-Established Criteria'' means criteria that the Board of the applicable Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which an Adviser to the Regulated Fund should be notified under condition 1 of the requested Order. The Board-Established Criteria will be consistent with the Regulated Fund's then-current Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum earnings before interest, taxes, depreciation, and amortization of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the applicable Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Non-Interested Trustees. The Non-Interested Trustees of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[11] The defined terms Eligible Trustees and Required Majority apply as if each Regulated Fund were a BDC subject to section 57(o) of the Act.

[12] The term ''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Investors and any other person described in section 57(b) of the Act (after giving effect to rule 57b–1 thereunder) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D) of the Act.

[13] The term ''Remote Affiliate'' means any person described in section 57(e) of the Act in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

Investors may have opportunities to make Follow-On Investments [14] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Investors previously have invested.

15. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[15] If the Regulated Funds and Affiliated Investors had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 9. If the Regulated Funds and Affiliated Investors have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 10. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Investors would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

16. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 9(c) or without Board approval under Condition 9(b) if it is (i) a Pro Rata Follow-On Investment [16] or (ii) a Non-Negotiated Follow-On Investment.[17] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 11.

17. Applicants propose that Dispositions [18] would be divided into two categories. If the Regulated Funds and Affiliated Investors holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 7. If the Regulated Funds and Affiliated Investors have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 8. Subsequent Dispositions with respect to the same issuer would be governed by Condition 7 under the Standard Review Dispositions.[19]

18. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 7(d) or without Board approval under Condition 7(c) if (i) the Disposition is a Pro Rata Disposition [20] or (ii) the securities are Tradable Securities [21] and the Disposition meets the other requirements of Condition 7(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 11.

19. No Eligible Trustee will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

Applicants' Legal Analysis

1. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in joint transactions with the BDC or a company controlled by a BDC in contravention of rules as prescribed by the Commission. Under section 57(b)(2) of the Act, any person who is directly or indirectly controlling, controlled by, or under common control with a BDC is subject to section 57(a)(4) of the Act. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4) of the Act, the Commission's rules under section 17(d) of the Act

[14] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[15] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Investors and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction: (i) In transactions in which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Investor or other Regulated Fund.

[16] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Investor and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Trustees in accordance with Condition 9(c). ''Proportionality,'' as used in this context, is discussed in greater detail in footnote 29 below.

[17] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Investors and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the Joint Transaction No-Action Letters.

''Joint Transaction No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[18] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[19] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Trustees must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[20] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Investor and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Trustees. ''Proportionality,'' as used in this context, is discussed in greater detail in footnote 27 below.

[21] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the 1933 Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

applicable to registered investment companies will be deemed to apply to transactions subject to section 57(a)(4) of the Act. Because the Commission has not adopted any rules under section 57(a)(4) of the Act, rule 17d–1 thereunder applies.

2. Section 17(d) of the Act and rule 17d–1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company unless the Commission has granted an order permitting such transactions. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

3. Applicants state that certain transactions effected as part of the Co-Investment Program may be prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 thereunder without a prior exemptive order of the Commission to the extent that the Affiliated Investors fall within the category of persons described by section 17(d) or section 57(b) of the Act, as modified by rule 57b–1 thereunder with respect to a Regulated Fund. Applicants believe that the proposed terms and conditions will ensure would ensure that the conflicts of interest that section 17(d) and section 57(a)(4) of the Act were designed to prevent would be addressed and the standards for an order under rule 17d–1 under the Act are met.

Applicants' Conditions

Applicants agree that any Order granting the requested relief shall be subject to the following conditions:

1. (a) Each Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified, for each Regulated Fund the Adviser manages, of all Potential Co-Investment Transactions [22] that (i) an Adviser considers for any other Regulated Fund or Affiliated Investor and (ii) fall within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under condition 1(a), such Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. (a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Investors, collectively, in the same transaction, exceeds the amount of the investment opportunity, then the investment opportunity will be allocated among them pro rata based on each participant's Available Capital [23] up to the amount proposed to be invested by each. The applicable Adviser will provide the Eligible Trustees of each participating Regulated Fund with information concerning each participating party's Available Capital to assist the Eligible Trustees with their review of the Regulated Fund's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a), the applicable Adviser will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and Affiliated Investor) to the Eligible Trustees of each participating Regulated Fund for their consideration. A Regulated Fund will co-invest with one or more other Regulated Funds and/ or one or more Affiliated Investors only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its shareholders and do not involve overreaching in respect of the Regulated Fund or its shareholders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the shareholders of the Regulated Fund; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Funds or Affiliated Investors would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from or less advantageous than that of other Regulated Funds or Affiliated Investors; provided that, if any other Regulated Fund or Affiliated Investor, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if:

(A) The Eligible Trustees will have the right to ratify the selection of such director or board observer, if any;

(B) the applicable Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that any Affiliated Investor or any Regulated Fund or any affiliated person of any Affiliated Investor or any Regulated Fund receives in connection with the right of an Affiliated Investor or a Regulated Fund to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Affiliated Investors (who each may, in turn, share its portion with its affiliated persons), and the participating Regulated Funds in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Regulated Fund will not benefit the Advisers, the Affiliated Investors, the

[22] No Primary Adviser will be the source of any Potential Co-Investment Transactions under the requested Order.

[23] "Available Capital" means (a) for each Regulated Entity, the amount of capital available for investment determined based on the amount of cash on hand, liquidity considerations, existing commitments and reserves, if any, the targeted leverage level, targeted asset mix, risk return and target-return profile, tax implications, regulatory or contractual restrictions or consequences and other investment policies and restrictions set from time to time by the Board of the applicable Regulated Entity or imposed by applicable laws, rules, regulations or interpretations, and (b) for each Affiliated Investor, the amount of capital available for investment determined based on the amount of cash on hand, liquidity considerations, existing commitments and reserves, if any, the targeted leverage level, targeted asset mix, risk return and target-return profile, tax implications, regulatory or contractual restrictions or consequences and other investment policies and restrictions set from time to time by the Affiliated Investors' directors, general partners, or adviser or imposed by applicable laws, rules, regulations or interpretations.

other Regulated Funds or any Primary Adviser or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except

(A) to the extent permitted by condition 15;

(B) to the extent permitted by section 17(e) or 57(k) of the Act, as applicable;

(C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction; or

(D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The applicable Adviser will present to the Board of each Regulated Fund, on a quarterly basis, a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or Affiliated Investors during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board Established Criteria that were not made available to the Regulated Fund, and an explanation of why the investment opportunities were not offered to the Regulated Fund. All information presented to the Board pursuant to this condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with Condition 9 and 10,[24] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party[25] has an investment. The Adviser will maintain books and records that demonstrate compliance with this condition for each Regulated Fund.

6. A Regulated Fund will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for each participating Regulated Fund and Affiliated Investor. The grant to an Affiliated Investor or another Regulated Fund, but not the Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B) and (C) are met.

7. Standard Review Dispositions

(a) If any Regulated Fund or any Affiliated Investor elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Investors have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Investor[26] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Investors and any other Regulated Fund.

(c) A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i) (A) The participation of each Regulated Fund and Affiliated Investor in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition;[27] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Investors is price.

(d) In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests. Each Affiliated Investor and each Regulated Fund will bear its own expenses in connection with any such disposition.

8. Enhanced Review Dispositions.

(a) If any Regulated Fund or Affiliated Investor elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Investors have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Investor will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Investors, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this condition.

(b) The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv).

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by section 57 or rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) The Disposition may only be completed in reliance on the Order if:

(i) Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Investors and any other Regulated Fund;

(ii) All of the Affiliated Investors' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

[24] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[25] The term ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate.

[26] Any Affiliated Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 7(a)(i), 8(a)(i), 9(a)(i) and 10(a)(i).

[27] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Investor's outstanding investment in the security in question immediately preceding the Disposition.

(iii) Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iv) All Regulated Funds and Affiliated Investors that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Investors hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (A) Any Regulated Fund's or Affiliated Investor's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [28] in amount, including immaterial relative to the size of the issuer; and (B) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(d) The Affiliated Investors, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

9. Standard Review Follow-Ons.

(a) If any Regulated Fund or Affiliated Investor desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Investors holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Investor will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i) (A) The proposed participation of each Regulated Fund and each Affiliated Investor in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[29] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Trustees must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Investors' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) if the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Investors, collectively, in the same transaction, exceeds the amount of the investment opportunity;

then the Follow-On Investment opportunity will be allocated among them pro rata based on Available Capital (as described in greater detail in this Application) up to the amount proposed to be invested by each.

(e) The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in this application.

10. Enhanced Review Follow-Ons.

(a) If any Regulated Fund or Affiliated Investor desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Investors holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Investor will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Investors, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) The applicable Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each

[28] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[29] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Investors, proportionality will be measured by each participating Regulated Fund's and Affiliated Investor's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Investors, proportionality will be measured by each participating Regulated Fund's and Affiliated Investor's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) The Follow-On Investment may only be completed in reliance on the Order if:

(i) All of the Affiliated Investors' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) Independent counsel to the Board of each Regulated Fund that holds an investment in the issuer advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iii) All Regulated Funds and Affiliated Investors that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Investors hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (A) Any Regulated Fund's or Affiliated Investor's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (B) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) The Affiliated Investors, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d) If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Investors' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Investors, collectively, exceeds the amount of the investment opportunity,

then the Follow-On Investment opportunity will be allocated among them pro rata based on Available Capital (as described in greater detail in this application).

(e) The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

11. The Non-Interested Trustees of each Regulated Fund will be provided quarterly for review all information concerning Potential Co-Investment Transactions that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria, including investments in Potential Co-Investment Transactions made by other Regulated Funds or Affiliated Investors that the Regulated Fund considered but declined to participate in, and concerning Co-Investment Transactions in which the Regulated Fund participated, so that the Non-Interested Trustees may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those Potential Co-Investment Transactions which the Regulated Fund considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Trustees will consider at least annually: (a) The continued appropriateness for the Regulated Fund of participating in new and existing Co-Investment Transactions, and (b) the continued appropriateness of any Board-Established Criteria.

12. Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these conditions were approved by the Required Majority under section 57(f) of the Act.

13. No Non-Interested Trustee of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise an ''affiliated person'' (as defined in the Act) of any of the Affiliated Investors.

14. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the 1933 Act) will, to the extent not payable by the Advisers under their respective investment advisory agreements with Affiliated Investors and the Regulated Funds, be shared by the Regulated Funds and the Affiliated Investors in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

15. Any transaction fee [30] (including break-up, structuring, monitoring or commitment fees but excluding broker's fees contemplated by section 17(e) or 57(k) of the Act, as applicable), received in connection with a Co-Investment Transaction will be distributed to the participating Regulated Funds and Affiliated Investors on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1) of the Act, and the account will earn a competitive rate of interest that will also be divided pro rata among the participating Regulated Funds and Affiliated Investors based on the amount they invest in such Co-Investment Transaction. None of the Advisers, the Primary Advisers, the Affiliated Investors, the other Regulated Funds nor any affiliated person of the Regulated Funds or Affiliated Investors will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of the Regulated Funds and the Affiliated Investors, the pro rata transaction fees described above and fees or other compensation described in condition 2(c)(iii)(C), and (b) in the case of an Adviser or Primary Adviser, investment advisory fees paid in accordance with their respective agreements between the Advisers and the Regulated Fund or Affiliated Investor).

16. If the Holders own in the aggregate more than 25% of the Shares, then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of trustees; (2) the removal of one or more trustees; or (3) all other matters under either the Act or applicable state law affecting the Board's composition, size or manner of election.

17. Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4) under the Act, will prepare an annual report for its Board each year

[30] Applicants are not requesting and the staff is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and conditions of the application and the procedures established to achieve such compliance.

18. The Affiliated Proprietary Accounts will not be permitted to invest in a Potential Co-Investment Transaction except to the extent the aggregate demand from the Regulated Funds and the other Affiliated Investors is less than the total investment opportunity.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87643; File No. SR–Phlx–2019–50]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx Rule 507

December 2, 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 November 18, 2019, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx Rule 507, titled ''Application for Approval as an SQT, RSQT, or RSQTO and Assignment in Options.''

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Phlx Rule 507, titled ''Application for Approval as an SQT, RSQT, or RSQTO and Assignment in Options.'' Specifically, the Exchange proposes to delete Commentaries .02 (Maximum Number of Quoters (''MNQ'') in Equity Options), .03 (Increasing the MNQ in Exceptional Circumstances), and .04 (Announcing Regarding, or Changes to MNQs) to Rule 507. The term ''MNQ'' refers to the maximum number of participants that may be assigned in a particular equity option at any one time. The MNQ level for options trading on the Exchange is 30 for all equity options listed for trading on the Exchange.'' The Exchange believes that its proposal will promote liquidity on Phlx.

Background

In 2006, the Exchange filed an amendment to Phlx Rule 507 to enable the Exchange to manage its quotation traffic and bandwidth capacity by limiting the number of streaming quote market participants that may be assigned to a particular option at a given point in time.[3] Specifically, the rule change established: (i) A maximum number of quoters (''MNQ'') equity options based on each option's monthly trading volume; (ii) a process for recalculating the MNQ based upon changes in an option's monthly trading volume; (iii) an increase to the MNQ due to exceptional circumstances; (iv) the process by which the Exchange will notify market participants of changes to the MNQ; and (v) additional criteria relating to the process by which the Exchange will assign Streaming Quote Traders (''SQTs'') [4] and/or Remote Streaming Quote Trader (''RSQT'') [5] applicants in options in the event that there are more applicants for assignment in a particular option than there are positions.[6] The Exchange's filing also noted the manner in which the MNQ would be recalculated within the first five days of each month based on the previous month's trading volume (''new MNQ'') as well as the process by which the Exchange will administer a decrease in the previous month's MNQ.[7] The rule change also permitted the Exchange to increase the MNQ in exceptional circumstances.[8]

Since the adoption of this provision the Exchange has amended Phlx Rule 507 [9] to provide additional liquidity in equity options on the Exchange by increasing the MNQ in all equity options. Currently, the MNQ level is set to 30 for all equity options listed for trading on the Exchange.

The Chicago Board Options Exchange, Incorporated (''Cboe'') also had a similar limit that it imposed on its market making participants within its former Rule 8.3A, which limited the number of market participants that could quote

[3] *See* Securities Exchange Act Release No. 55114 (January 17, 2007), 72 FR 3185 (January 24, 2007) (SR–Phlx–2006–81) (Order Granting Approval to Proposed Rule Change Relating to the Establishment of a Maximum Number of Quoting Participants Permitted in a Particular Option on the Exchange).

[4] A ''Streaming Quote Trader'' or ''SQT'' is an Registered Options Trader who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned. *See* Phlx Rule 1000(b)(59).

[5] A ''Remote Streaming Quote Trader'' or ''RSQT'' is an Registered Options Trader that is a member affiliated with an Remote Streaming Quote Trader Organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. A qualified RSQT may function as a Remote Specialist upon Exchange approval. An RSQT is also known as a Remote Market Maker (''RMM'') pursuant to Rule 501. A Remote Streaming Quote Organization (''RSQTO'') or Remote Market Maker Organization (''RMO'') are Exchange member organizations that have qualified pursuant to Rule 507. *See* Phlx Rule 1000(b)(60).

[6] *See* note 3 above.

[7] *See* note 3 above.

[8] *See* note 3 above.

[9] *See* Securities Exchange Act Release Nos. 56261 (August 15, 2007), 72 FR 47112 (August 22, 2007) (SR–Phlx–2007–51); 58906 (November 6, 2008), 73 FR 67239 (November 13, 2008) (SR–Phlx–2008–76); 60688 (September 18, 2009), 74 FR 49058 (September 25, 2009) (SR–Phlx–2009–82); 65373 (September 21, 2011), 76 FR 59764 (September 27, 2011) (SR–Phlx–2011–127) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Maximum Number of Quoters (''MNQ'') Permitted To Be Assigned in Equity Options).

electronically on Cboe.[10] Cboe recently filed a non-controversial rule change to update defined terms in its Rules, delete obsolete and redundant language, and make other non-substantive changes.[11] Within that rule change Cboe eliminated its CQL limit.[12]

After careful analysis, the Exchange no longer desires to limit the number of quoters on Phlx. The Exchange believes that allowing additional market making firms to be assigned to quote in options series would foster competition. With this proposal there would be no limit on the amount of SQTs and RSQTs that would be permitted to submit quotations into Phlx. The Exchange believes that allowing any SQT or RSQT that is eligible pursuant to Rule 507 to submit quotations would increase the available liquidity on Phlx. Similar to Cboe, Phlx represents that it has capacity to handle any additional quoters due to the elimination of the MNQ. Phlx monitors System capacity in other ways, making a MNQ no longer necessary.[13]

In conjunction with the elimination of Commentary .02 to Rule 507, the Exchange proposes to eliminate Commentaries .03 and .04 of Phlx Rule 507 as these provisions, which relate to increasing the MNQ and announcing the changes to the MNQ, would be rendered irrelevant with the removal of the limit. The Exchange also proposes to amend Rule 507(b)(iii) to remove rule text which references a limitation on the number of positions available while retaining the criteria in Rule 507(b)(iii) for consideration of new applicants.

The Exchange notes that this proposal would be immediately effective. The Exchange would issue an Options Trader Alert to members noting that the Exchange is removing the limitation on the maximum number of quoters. SQTs and RSQTs would be able to apply to make markets in any options series. All new applicants for trading privileges will be subject to the process for assignment described in Rule 507. The Exchange considers all applicants for assignment in options using the objective criteria set forth in Exchange Rule 507(b). The objective criteria are used by the Exchange in determining the most beneficial assignment of options for the Exchange and the public.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest because the Exchange's elimination of the MNQ limitation will support the addition of depth and liquidity to Phlx.

Allowing additional market making firms to be assigned to quote in options series would foster competition. Removing the MNQ limitation for all equity options traded on the Exchange, is pro-competitive, because it adds depth and liquidity to the Exchange's markets by permitting additional participants to compete on the Exchange. With this proposal there would be no limit on the amount of SQTs and RSQTs that would be permitted to submit quotations into Phlx. The Exchange believes that allowing any SQT or RSQT that is eligible pursuant to Rule 507 to submit quotations would increase the available liquidity on Phlx. Finally, Phlx represents that it has capacity to handle any additional quoters due to the elimination of the MNQ. Phlx monitors System capacity in other ways, making a MNQ no longer necessary.[16]

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 does not impose a burden on intra-market competition because removing the MNQ limitation for all equity options traded on the Exchange, is pro-competitive, because it adds depth and liquidity to the Exchange's markets by permitting additional participants to compete on the Exchange. The Exchange's proposal does not impose a burden on inter-market competition because there would be no limit on the amount of SQTs and RSQTs that would be permitted to submit quotations into Phlx. The Exchange believes that allowing any SQT or RSQT that is eligible pursuant to Rule 507 to submit quotations would increase the available liquidity on Phlx to the benefit of all market participants. Phlx represents that it has capacity to handle any additional quoters due to the elimination of the MNQ. Phlx monitors System capacity in other ways, making a MNQ no longer necessary.[17]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[20] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[21] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange may immediately eliminate the maximum number of quoting participants that may apply to all options listed for trading on the Exchange. According to the Exchange, the proposed rule change will promote liquidity on the Exchange. For these reasons, 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

[10] Cboe established class quoting limits (''CQL'') for each class traded on Cboe's system. A CQL is the maximum number of quoters that may quote electronically in a given product and Rule 8.3A.

[11] See Securities Exchange Act Release No. 85657 (April 16, 2019), 84 FR 16701 (April 22, 2019) (SR–Cboe–2019–017).

[12] Id.

[13] Regulation SCI requires the Exchange to establish written policies and procedures reasonably designed to ensure that its System has levels of capacity, integrity, resiliency, availability, and security adequate to maintain its operational capability and promote the maintenance of fair and orderly markets, and that it operates in a manner that complies with the Exchange Act. *See* 17 CFR 242.1001.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *See* note 13 above.

[17] *See* note 13 above.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

designates the proposed rule change operative upon filing.[22]

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–Phlx–2019–50 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2019–50. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2019–50, and should be submitted on or before December 27, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–26307 Filed 12–5–19; 8:45 am]

BILLING CODE 8011–01–P

[22] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87645; File No. SR–NYSE–2019–65]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 71

December 2, 2019.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 18, 2019, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 71 to remove the preamble that such rule is not applicable to trading on the Pillar trading platform. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 71 (Precedence of Highest Bid and Lowest Offer) to remove the preamble that such rule is not applicable to trading on the Pillar trading platform.

Rule 71 is applicable only to manual trading on the Trading Floor[4] and governs bids and offers verbally represented by Floor brokers at the point of sale. Paragraph (a) of that rule provides that all bids made and accepted, and all offers made and accepted, in accordance with Exchange Rules shall be binding. Accordingly, if a Floor broker bids or offers at the point of sale and another member accepts that bid or offer, the original bid or offer is binding. With respect to the close of trading, because bids and offers represented orally by a Floor broker must be represented at the point of sale by the end of Core Trading Hours,[5] in accordance with Exchange rules, the last representation of verbal interest by the end of Core Trading Hours is binding on a Floor broker and cannot be modified or cancelled after the end of Core Trading Hours.[6]

In 2017, in anticipation of the transition to the Pillar trading platform, the Exchange amended Rule 71 to include a preamble that it was not applicable to trading UTP Securities[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] ''Trading Floor'' is defined as the restricted-access physical areas designated by the Exchange for the trading of securities. *See* Rule 6A.

[5] *See* Rule 7.34(a)(2)(B).

[6] Rule 7.35B(a)(1)(C) provides an exception to this requirement because, subject to Floor Official approval, electronically-entered Floor Broker Interest can be cancelled in full to correct a Legitimate Error.

[7] The term ''UTP Securities'' means a security that is listed on a national securities exchange other

Continued

on the Pillar trading platform.[8] At that time, it was contemplated that UTP Securities would not be eligible for Floor-based trading. Accordingly, it was appropriate at that time that a rule governing Floor-based trading conduct would not be applicable to trading on Pillar. The Exchange did not amend the preamble to Rule 71 when UTP Securities began trading on Pillar, which included Floor-based crossing transactions.[9]

In preparation for the transition of Exchange-listed securities to the Pillar trading platform, the Exchange amended the preambles to specified rules to provide that such rules were not applicable to trading on the Pillar trading platform.[10] In other words, the preamble is applicable to both UTP Securities and Exchange-listed securities. The Exchange inadvertently included Rule 71 in this filing, and that preamble now provides that the rule is not applicable to trading on the Pillar trading platform, which includes Exchange-listed securities.

Because on the Pillar trading platform, Exchange-listed securities continue to be eligible for manual trading on the Trading Floor and UTP Securities are eligible for crossing transactions, the Exchange proposes to amend Rule 71 to delete the preamble in its entirety. The Exchange believes that deleting the preamble will promote transparency in Exchange rules that the rules governing manual trading on the Trading Floor have not changed even with the transition to the Pillar trading platform.

To further promote transparency, the Exchange proposes to amend Rule 71 to specify that the bids and offers referenced in that Rule that are binding are ''verbal'' bids and offers. Orders entered electronically on the Exchange are governed by Rule 7P under the Pillar platform rules. The Exchange believes that this proposed amendment will promote transparency and clarity in Exchange rules that Rule 71 addresses manual trading only, and is not applicable to the electronic entry of orders.

than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges.

[8] *See* Securities Exchange Act Release No. 81225 (July 27, 2017), 82 FR 26033 (August 2, 2017) (SR–NYSE–2017–35) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change).

[9] *See* Securities Exchange Act Release No. 82945 (March 26, 2018), 83 FR 13553, 13555 (March 29, 2018) (SR–NYSE–2017–36) (Approval Order).

[10] *See* Securities Exchange Act Release No. 85962 (May 29, 2019), 84 FR 26188 (June 5, 2019) (SR–NYSE–2019–05) (Approval Order).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5),[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that deleting the preamble to Rule 71 would remove impediments to and perfect the mechanism of a free and open market and a national market system because manual trading continues on the Exchange, even after the transition to the Pillar trading platform, and Rule 71 governs such trading. Removing the preamble would therefore promote clarity and transparency in Exchange rules that the rules governing manual trading on the Trading Floor have not changed with the transition to the Pillar trading platform. The Exchange further believes that amending the rule to add the term ''verbal'' before ''bids'' and ''offers'' would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote clarity and transparency in Exchange rules that Rule 71 concerns only manual trading, and is not applicable to the electronic entry of orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change is not designed to address any competitive issues. Rather, the proposed rule change is designed to promote clarity and transparency that with the transition to the Pillar trading platform, the rules governing manual trading have not changed. Accordingly, the proposed rule change removes a preamble that was inadvertently included for securities that continue to be eligible for manual trading.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[15] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. According to the Exchange, waiver of the operative delay would clarify, without undue delay, that Rule 71 continues to be applicable to Floor-based trading. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSE–2019–65 on the subject line.

Paper Comments

• Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2019–65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2019–65 and should be submitted on or before December 27, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–26305 Filed 12–5–19; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice:10968]

Designation of Amadou Kouffa as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the person known as Amadou Kouffa, also known as Hamadou Kouffa, also known as Hamadoun Kouffa, also known as Amadou Barry, is a foreign person who is a leader of an entity whose property and interests in property are blocked pursuant to a determination by the Secretary of State pursuant to Executive Order 13224.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: July 23, 2019.

Michael R. Pompeo,

Secretary of State.

Editorial Note: The Office of the Federal Register received this document for publication on December 3, 2019.

[FR Doc. 2019–26396 Filed 12–5–19; 8:45 am]

BILLING CODE 4710–AD–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36364]

Decatur & Eastern Illinois Railroad, L.L.C.—Acquisition and Change of Operator Exemption—NRG, Inc., and Eastern Illinois Railroad Company

Decatur & Eastern Illinois Railroad, L.L.C. (DEIR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 for it to (1) acquire from NRG, Inc. (NRG), an approximately 53-mile line of railroad extending between milepost 286.0 near Metcalf, Ill., and approximately milepost 338.95 (east of Oak Avenue) in Neoga, Ill., (the Line) and (2) replace NRG's corporate subsidiary, Eastern Illinois Railroad Company (EIRC), as operator on the Line.[1]

The verified notice states that DEIR, NRG, and EIRC are in the process of completing terms of an Agreement for Sale and Purchase of Business Assets (the Agreement). Pursuant to the Agreement, ownership of the Line will transfer from NRG to DEIR, and DEIR will replace EIRC as the operator on the Line. DEIR states that EIRC, as a party to the Agreement, has consented to the proposed change in operators.

DEIR certifies that the transaction does not include an interchange commitment.[2]

DEIR further certifies that its projected annual revenues resulting from the transaction will not result in its becoming a Class I or Class II rail carrier. DEIR states, however, that its annual operating revenues will exceed $5 million. Accordingly, in compliance with 49 CFR 1150.42(e), DEIR submitted a letter on November 1, 2019, certifying that it posted the required 60-day labor notice of this transaction at the workplace of EIRC employees on the Line.[3]

Under 49 CFR 1150.42(b), a change in operator requires that notice be given to shippers. DEIR states that notice of the proposed transaction was provided to

[1] According to the verified notice, NRG is a noncarrier that acquired the assets of the Line in 1988 after the Line was abandoned by Norfolk and Western Railway Company. *See E. Ill. R.R.—Operation Exemption—Line of R.R. of NRG, Inc., in Edgar, Coles, Cumberland, & Douglas Ctys., Ill.,* FD 31860 (ICC served June 26, 1991).

[2] DEIR states that, although the transaction under which it became a common carrier involved interchange commitments in favor of the seller, *see Decatur & E. Ill. R.R.—Acquis. Exemption Containing Interchange Commitment—CSX Transp., Inc.,* FD 36206 (STB served Aug. 24, 2018), those interchange restrictions will not extend to traffic originating or terminating on the Line.

[3] DEIR states that it has been advised that no EIRC employees are represented by a labor union, and, for that reason, that portion of the advance-notice requirement is inapplicable.

shippers on the Line on November 22, 2019.

The earliest this transaction may be consummated is December 31, 2019 (60 days after the certification under 49 CFR 1150.42(e) was filed). DEIR states that it expects to consummate the transaction on that date.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 24, 2019 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36364, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on DEIR's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606.

According to DEIR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b)(1).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 2, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2019–26300 Filed 12–5–19; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36367]

Davenport Industrial Railroad, LLC—Lease & Operation Exemption—City of Davenport, Iowa

Davenport Industrial Railroad, LLC (DIR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from the City of Davenport (the City) and operate an approximately 2.8-mile rail line (the Line).[1] The Line extends west and south from a point about 75 feet from a connection with the main line of the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) near DM&E milepost 191.2 near Davenport, Iowa, to the City-owned Davenport Transload Facility. According to DIR, the Line does not have mileposts.

[1] The Board has authorized the current operator of the Line, Savage Davenport Railroad Company (SDR), to discontinue its operations effective January 1, 2020. *See Savage Davenport R.R.—Discontinuance of Service Exemption—in Scott Cty., Iowa,* AB 1277X (STB served Sept. 30, 2019 and Oct. 29, 2019).

DIR states that it is finalizing the terms of a lease with the City, under which, among other things, DIR would assume a leasehold interest in, and provide common carrier service over, the Line.

DIR certifies that, as a result of this transaction, its projected revenue will not exceed $5 million annually and will not result in its becoming a Class I or Class II carrier. DIR states that the agreement between the City and DIR does not include any provision or agreement that would limit future interchange with a third-party connecting carrier.

According to DIR, it anticipates consummating the transaction on January 1, 2020, to coincide with SDR's discontinuance of service. The transaction may be consummated on or after December 22, 2019, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than December 13, 2019 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36367, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on DIR's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to DIR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 2, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2019–26375 Filed 12–5–19; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2019–0009]

Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France's Digital Services Tax

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of determination, request for comments, and notice of public hearing.

SUMMARY: The U.S. Trade Representative has determined that France's Digital Services Tax is unreasonable or discriminatory and burdens or restricts U.S. commerce. The U.S. Trade Representative proposes action in the form of additional duties of up to 100 percent on products of France to be drawn from the preliminary list in the Annex to this notice. The Office of the United States Trade Representative (USTR) seeks comments on this proposed action, as well as on other options including the imposition of fees or restrictions on services of France. The interagency Section 301 Committee will hold a public hearing in connection with the action to be taken under Section 301.

DATES: To be assured of consideration, the following schedule applies:

December 30, 2019: Due date for submission of a request to appear at the public hearing and a summary of testimony.

January 6, 2020: Due date for written comments.

January 7, 2020: The Section 301 Committee will convene a public hearing in the main hearing room of the U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436 beginning at 9:30 a.m.

January 14, 2020: Due date for submission of post-hearing rebuttal comments.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submissions in sections V and VI below. The docket number is USTR–2019–0009. For issues with on-line submissions, please contact the USTR Section 301 line at (202) 395–5725.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning the submission of written comments or participating in the public hearing, please contact the USTR Section 301 line at (202) 395–5725. For questions concerning the investigation, please contact Kate Hadley, Assistant General Counsel at (202) 395–4959, Robert Tanner, Director, Services and Investment at (202) 395–6125, or Michael Rogers, Director, Europe and the Middle East at (202) 395–2684.

SUPPLEMENTARY INFORMATION:

I. Proceedings in the Investigation

On March 6, 2019, the Government of France released a proposal for a 3 percent levy on revenues that certain companies generate from providing certain digital services to, or aimed at, persons in France (the Digital Services Tax, or the DST). The two houses of the French parliament passed DST bills on April 9 and May 21, 2019, and agreed on a final bill on July 4. President Emmanuel Macron signed the bill into law on July 24.

On July 10, 2019, USTR initiated an investigation of the French DST pursuant to section 302(b)(1)(A) of the Trade Act of 1974, as amended (the Trade Act). The notice of initiation (84 FR 34042) solicited written comments on, *inter alia,* the following aspects of the French DST:

1. Discrimination: Available evidence, including statements by French officials, indicates that the DST will amount to de facto discrimination against U.S. companies. For example, the revenue thresholds have the effect of subjecting to the DST larger companies, which, in the covered sectors, tend to be U.S. companies, while exempting smaller companies, particularly those that operate only in France.

2. Retroactivity: The DST would be a substantively new tax that applies retroactively to January 1, 2019. This feature calls into question the fairness of the DST. Further, since the tax is retroactive, companies covered by the DST may not track the data necessary to calculate their potential liability back to the beginning of 2019.

3. Unreasonable tax policy: The DST appears to diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These apparent departures include: Extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.

Interested persons filed 36 written submissions. USTR and the Section 301 Committee convened a public hearing on August 19, 2019, during which witnesses provided testimony and responded to questions. The public submissions and a transcript of the hearing are available on *www.regulations.gov* in docket number USTR–2019–0009.

Under Section 303 of the Trade Act, the U.S. Trade Representative requested consultations with the Government of France regarding the issues involved in the investigation. Consultations were held on November 14, 2019.

Based on information obtained during the investigation, including the public submissions and the public hearing, USTR and the Section 301 Committee have prepared a comprehensive report on the acts, policies, and practices under investigation. The report is posted on the USTR website. The report supports findings that the French DST is unreasonable or discriminatory and burdens or restricts U.S. commerce.

II. Determination on the Act, Policy, or Practice Under Investigation

Based on the information obtained during the investigation and the advice of the Section 301 Committee, and as reflected in the publicly available report on the findings in the investigation, the U.S. Trade Representative has made the following determination under sections 301(b) and 304(a) of the Trade Act (19 U.S.C. 2411(b) and 2414(a)): The act, policy, or practice covered in the investigation, namely the French DST, is unreasonable or discriminatory and burdens or restricts U.S. commerce, and is thus actionable under section 301(b) of the Trade Act. In particular:

1. The French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies, including due to the selection of services covered and the revenue thresholds.

2. The French DST's retroactive application is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies.

3. The French DST's application to revenue rather than income contravenes prevailing tax principles and is particularly burdensome for covered U.S. companies.

4. The French DST's application to revenues unconnected to a physical presence in France contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies.

5. The French DST's application to a small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment.

III. Action To Be Taken in the Investigation

Section 301(b) provides that upon determining that the acts, policies, and practices under investigation are actionable and that action is appropriate, the U.S. Trade Representative shall take all appropriate and feasible action authorized under section 301(c), subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the U.S. Trade Representative to take under section 301(b), to obtain the elimination of that act, policy, or practice.

Section 301(c)(1)(B) of the Trade Act authorizes the U.S. Trade Representative to impose duties on the goods of the foreign country subject to the investigation. Pursuant to sections 301(b) and (c), the U.S. Trade Representative proposes to determine that action is appropriate and that appropriate action would include the imposition of additional *ad valorem* duties of up to 100 percent on certain products of France.

In determining the appropriate action, the U.S. Trade Representative may take account of the level of harm to the U.S. economy caused by France's DST. USTR seeks public comments on the level of harm, including DST payments owed by U.S. companies, the annual growth rate of such payments, and other effects, such as compliance costs.

The Annex to this notice contains a preliminary list of 63 tariff subheadings, with an estimated import trade value for calendar year 2018 of approximately $2.4 billion. The U.S. Trade Representative proposes to draw a final list of products subject to additional duties from this preliminary list.

Section 301(c)(1)(B) of the Trade Act also authorizes the U.S. Trade Representative to impose fees or restrictions on the services of the goods of the foreign country subject to the investigation. In light of the fact that the actionable act, policy, or practice of France involves a tax on U.S. service providers, the U.S. Trade Representative is considering whether to impose fees or restrictions on services of France. As noted below, USTR invites public comments on this matter.

IV. Request for Public Comments

In accordance with section 304(b) of the Trade Act (19 U.S.C. 2414(b)), USTR invites comments from interested persons with respect to whether action is appropriate, and if so, the appropriate action to be taken. To be assured of consideration, you must submit written comments on the proposed action in response France's acts, policies, and practices by January 6, 2020, and post-hearing rebuttal comments by January 14, 2020.

USTR requests comments with respect to any issue related to the action to be taken in this investigation. With respect to action in the form of additional duties, USTR invites comments regarding:

- The specific products to be subject to increased duties, including whether products listed in the Annex should be retained or removed, or whether products not currently on the list should be added.
- The level of the increase, if any, in the rate of duty.
- The level of the burden or restriction on the U.S. economy resulting from the DST.
- The appropriate aggregate level of trade to be covered by additional duties.

In commenting on the inclusion or removal of particular products on the list of products subject to the proposed additional duties, USTR requests that commenters address specifically whether imposing increased duties on a particular product would be practicable or effective to obtain the elimination of France's acts, policies, and practices, and whether imposing additional duties on a particular product would cause disproportionate economic harm to U.S. interests, including small- or medium-size businesses and consumers.

With respect to action in the form of fees or restrictions on services of France, USTR seeks comments on issues such as:

- Which services would be covered by a fee or restriction.
- If a fee is imposed, the rate (flat or percentage) of the fee, and the basis upon which any fee would be applied.
- If a restriction is imposed, the form of such restriction.
- Whether imposing fees or restrictions on services of France would be practicable or effective to obtain the elimination of France's acts, policies, and practices.

V. Hearing Participation

The Section 301 Committee will convene a public hearing in the main hearing room of the U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, beginning at 9:30 a.m. on Tuesday, January 7, 2020. You must submit requests to appear at the hearing by December 30, 2019. The request to appear must include a summary of testimony, and may be accompanied by a pre-hearing submission. Remarks at the hearing may be no longer than five minutes to allow for possible questions from the Section 301 Committee.

All submissions must be in English and sent electronically via *www.regulations.gov.* To submit a request to appear at the hearing via *www.regulations.gov,* enter docket number USTR–2019–0009. In the 'type comment' field, include the name, address, email address, and telephone number of the person presenting the testimony. Attach a summary of the testimony, and a pre-hearing submission if provided, by using the 'upload file' field. The file name should include the name of the person who will be presenting the testimony. In addition, please submit a request to appear by email to *301DST@ustr.eop.gov.* In the subject line of the email, please include the name of the person who will be presenting the testimony, followed by 'Request to Appear'. Please also include the name, address, email address, and telephone number of the person presenting testimony.

VI. Procedures for Written Submissions

All submissions must be in English and sent electronically via *www.regulations.gov.* To submit comments via *www.regulations.gov,* enter docket number USTR–2019–0009 on the home page and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this Notice and click on the link entitled 'comment now! For further information on using the *www.regulations.gov* website, please consult the resources provided on the website by clicking on '''how to use regulations.gov' on the bottom of the home page. USTR will not accept hand-delivered submissions.

The *www.regulations.gov* website allows users to submit comments by filling in a 'type comment' field or by attaching a document using an 'upload file' field. USTR prefers that you submit comments in an attached document. If you attach a document, it is sufficient to type 'see attached' in the 'type comment' field. USTR strongly prefers submissions in Adobe Acrobat (.pdf). If you use an application other than Adobe Acrobat (or Word (.doc)), please indicate the name of the application in the 'type comment' field.

File names should reflect the name of the person or entity submitting the comments. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

Do not submit comments containing business confidential information (BCI) via www.regulations.gov. Instead, you should email any comments containing BCI to *301DST@ustr.eop.gov.* The file name of the business confidential version should begin with the characters 'BC'. Any page containing BCI must be clearly marked 'BUSINESS CONFIDENTIAL' on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. If you request business confidential treatment, you must certify in writing that disclosure of the information would endanger trade secrets or profitability, and that the information would not customarily be released to the public. Filers of submissions containing BCI also must submit a public version of their comments. The file name of the public version, which you must submit on *www.regulations.gov,* should begin with the character 'P'. The 'BC' and 'P' should be followed by the name of the person or entity submitting the comments or rebuttal comments. If these procedures are not sufficient to protect BCI or otherwise protect business interests, please contact the USTR Section Hotline 301 line at (202) 395–5725 to discuss whether alternative arrangements are possible.

USTR will post submissions in the docket for public inspection, except BCI. You can view submissions on the *https://www.regulations.gov* website by entering docket number USTR–2019–0009 in the search field on the home page.

Joseph Barloon,

General Counsel, Office of the U.S. Trade Representative.

Annex

Note: All products that are classified in the 8-digit subheadings of the HTS that are listed in this Annex are covered by the proposed action. The product descriptions that are contained in this Annex are provided for informational purposes only, and are not intended to delimit in any way the scope of the proposed action. Any questions regarding the scope of a particular HTS subheading should be referred to U.S. Customs and Border Protection. In the product descriptions, the abbreviation ''nesoi'' means ''not elsewhere specified or included''.

HTS subheading	Product description
0403.10.90	Yogurt, not in dry form, whether or not flavored or containing add fruit or cocoa.
0404.10.05	Whey protein concentrates.
0405.10.10	Butter subject to quota pursuant to chapter 4 additional U.S. note 6.
0405.10.20	Butter not subject to general note 15 and in excess of quota in chapter 4 additional U.S. note 6.
0405.90.10	Fats and oils derived from milk, other than butter or dairy spreads, subject to quota pursuant to chapter 4 additional U.S. note 14.
0406.10.84	Fresh cheese, and substitutes for cheese, cont. cows milk, nesoi, o/0.5% by wt. of butterfat, descr in add U.S. note 16 to Ch. 4, not GN15.
0406.10.88	Fresh cheese, and substitutes for cheese, cont. cows milk, nesoi, o/0.5% by wt. of butterfat, not descr in add U.S. note 16 to Ch. 4, not GN 15.
0406.10.95	Fresh cheese, and substitutes for cheese, not cont. cows milk, nesoi, o/0.5% by wt. of butterfat.
0406.20.10	Roquefort cheese, grated or powdered.
0406.30.48	Edam and gouda cheese, processed, not grated or powdered, not subject to gen note 15 or add. U.S. note 20 to Ch. 4.
0406.30.51	Gruyere-process cheese, processed, not grated or powdered, subject to add. U.S. note 22 to Ch. 4.
0406.30.53	Gruyere-process cheese, processed, not grated or powdered, not subject to gen note 15 or add. U.S. note 22 to Ch. 4.
0406.30.89	Processed cheese (incl. mixtures), nesoi, w/cow's milk, not grated or powdered, subject to add U.S. note 16 to Ch. 4, not GN15.
0406.40.54	Blue-veined cheese, nesoi, in original loaves, subject to add. U.S. note 17 to Ch. 4.
0406.90.08	Cheddar cheese, nesoi, subject to add. U.S. note 18 to Ch. 4.
0406.90.12	Cheddar cheese, nesoi, not subject to gen. note 15 of the HTS or to add. U.S. note 18 to Ch. 4.
0406.90.16	Edam and gouda cheese, nesoi, subject to add. U.S. note 20 to Ch. 4.
0406.90.41	Romano, Reggiano, Parmesan, Provolone, and Provoletti cheese, nesoi, from cow's milk, subject to add. U.S. note 21 to Ch. 4.
0406.90.42	Romano, Reggiano, Parmesan, Provolone, and Provoletti cheese, nesoi, from cow's milk, not subj to GN 15 or Ch. 4 U.S. note 21.
0406.90.46	Swiss or Emmentaler cheese with eye formation, nesoi, subject to add. U.S. note 25 to Ch. 4.
0406.90.48	Swiss or Emmentaler cheese with eye formation, nesoi, not subject to gen. note 15 or to add. U.S. note 25 to Ch. 4.
0406.90.56	Cheeses, nesoi, from sheep's milk in original loaves and suitable for grating.
0406.90.57	Pecorino cheese, from sheep's milk, in original loaves, not suitable for grating.
0406.90.90	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/or from swiss, emmentaler or gruyere, subj. to add. U.S. note 22 to Ch. 4, not GN15.
0406.90.95	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/cows milk, w/butterfat o/0.5% by wt, subject to Ch. 4 U.S. note 16 (quota).
0406.90.97	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/cows milk, w/butterfat o/0.5% by wt, not subject to Ch. 4 U.S. note 16, not GN15.
0406.90.99	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/o cows milk, w/butterfat o/0.5% by wt, not GN15.
2204.10.00	Sparkling wine, made from grapes.
3304.10.00	Lip make-up preparations.
3304.20.00	Eye make-up preparations.
3304.30.00	Manicure or pedicure preparations.
3304.91.00	Beauty or make-up powders, whether or not compressed.
3304.99.50	Beauty or make-up preparations & preparations for the care of the skin, excl. medicaments but incl. sunscreen or sun tan preparations, nesoi.
3401.11.10	Castile soap in the form of bars, cakes or molded pieces or shapes.
3401.11.50	Soap, nesoi; organic surface-active products used as soap, in bars, cakes, pieces, soap-impregnated paper, wadding, felt, for toilet use.
3401.19.00	Soap; organic surface-active products used as soap, in bars, cakes, pieces; soap-impregnated paper, wadding, felt, not for toilet use.
3401.20.00	Soap, not in the form of bars, cakes, molded pieces or shapes.
3401.30.10	Organic surface-active products for wash skin, in liquid or cream, contain any aromatic/mod aromatic surface-active agent, put up for retail.
3401.30.50	Organic surface-active products and preparations for washing the skin, in liquid or cream form, put up for retail sale, nesoi.
4202.21.30	Handbags, with or without shoulder strap or without handle, with outer surface of reptile leather.
4202.21.60	Handbags, with or without shoulder strap or without handle, with outer surface of leather, composition or patent leather, nesoi, n/o $20 ea.
4202.21.90	Handbags, with or without shoulder strap or without handle, with outer surface of leather, composition or patent leather, nesoi, over $20 ea.
4202.22.15	Handbags, with or without shoulder straps or without handle, with outer surface of sheeting of plastics.
4202.22.40	Handbags with or without shoulder strap or without handle, with outer surface of textile materials, wholly or in part of braid, nesoi.
4202.22.45	Handbags with or without shoulder strap or without handle, with outer surface of cotton, not of pile or tufted construction or braid.
4202.22.60	Handbags with or w/o shoulder strap or w/o handle, outer surface of veg. fibers, exc. cotton, not of pile or tufted construction or braid.
4202.22.70	Handbags with or w/o shoulder strap or w/o handle, with outer surface containing 85% or more of silk, not braided.
4202.22.81	Handbags with or without shoulder strap or without handle, with outer surface of MMF materials.
4202.22.89	Handbags with or without shoulder strap or without handle, with outer surface of textile materials nesoi.
6911.10.10	Porcelain or china hotel, restaurant & nonhousehold table and kitchenware.
6911.10.15	Bone china household table & kitchenware valued n/o $31.50/doz. pcs.
6911.10.25	Bone china household table & kitchenware valued o/$31.50/doz. pcs.
6911.10.35	Porcelain or china (o/than bone china) househld tabl. & kitch.ware in sets in which aggregate val. of arts./U.S. note 6(b) n/o $56.
6911.10.37	Porcelain or china (o/than bone china) househld tabl. & kitch.ware in sets in which aggregate val. of arts./U.S. note 6(b) o/$56 n/o $200.

HTS subheading	Product description
6911.10.38	Porcelain or china (o/than bone china) househld tabl. & kitch.ware in sets in which aggregate val. of arts./U.S. note 6(b) o/ $200.
6911.10.41	Porcelain or china (o/than bone china) hsehld steins w/pewter lids, decanters, punch bowls, spoons & rests, salt/pepper sets, etc.
6911.10.45	Porcelain or china (o/than bone china) household mugs and steins w/o attached pewter lids.
6911.10.52	Porcelain or china (o/than bone china) hsehld tabl/kit.ware n/in specif.sets,cups o/$8 but n/o $29/dz, saucers o/$5.25 but n/o $18.75/dz, etc.
6911.10.58	Porcelain or china (o/than bone china) hsehld tabl/kit ware n/in specif. sets, cups o/$29/dz, saucers o/$18.75/dz, bowls o/ $33/dz, etc.
6911.10.60	Porcelain or china (o/than bone china) household serviette rings.
6911.10.80	Porcelain or china (o/than bone china) household tableware & kitchenware, not in specified sets, nesoi.
6911.90.00	Porcelain or china (o/than bone china) household and toilet articles (other than tableware or kitchenware), nesoi.
7323.92.00	Cast iron, table, kitchen or o/household arts. and parts thereof, enameled.

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar-Containing Products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia, and Panama

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: In accordance with the Harmonized Tariff Schedule of the United States (HTSUS), the Office of the United States Trade Representative (USTR) is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia and Panama. The level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under (i) the United States-Chile Free Trade Agreement (Chile FTA); (ii) the United States-Morocco Free Trade Agreement (Morocco FTA); (iii) the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR); (iv) the United States-Peru Trade Promotion Agreement (Peru TPA); (v) the United States-Colombia Trade Promotion Agreement (Colombia TPA); and (vi) the United States-Panama Trade Promotion Agreement (Panama TPA).

DATES: This notice is applicable on January 1, 2020.

FOR FURTHER INFORMATION CONTACT: Dylan T. Daniels, Office of Agricultural Affairs, (202) 395–6095 or *Dylan.T.Daniels@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Chile FTA

Pursuant to section 201 of the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Chile FTA.

Note 12(a) to subchapter XI of HTSUS chapter 99 requires USTR annually to publish a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in Harmonized System (HS) subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus. Proclamation 8771 of December 29, 2011 (77 FR 413) reclassified HS subheading 1701.11 as 1701.13 and 1701.14. Note 12(b) to subchapter XI of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.05 in any calendar year (CY) (beginning in CY2015) shall be the quantity of goods equal to the amount of Chile's trade surplus in subdivision (a) of the note.

During CY2018, the most recent year for which data is available, Chile's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 533,054 metric tons according to data published by its customs authority, the Servicio Nacional de Aduana. Based on this data, USTR has determined that Chile's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) to subchapter XI of HTS chapter 99, goods of Chile are not eligible to enter the United States duty-free under subheading 9911.17.05 in CY2020.

II. Morocco FTA

Pursuant to section 201 of the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Morocco FTA.

Note 12(a) to subchapter XII of HTSUS chapter 99 requires USTR annually to publish a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus. Proclamation 8771 of December 29, 2011 (77 FR 413) reclassified HS subheading 1701.11 as 1701.13 and 1701.14.

Note 12(b) to subchapter XII of HTS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.05 in an amount equal to the lesser of Morocco's trade surplus or the specific quantity set out in that note for that calendar year.

Note 12(c) to subchapter XII of HTS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.10 through 9912.17.85 in an amount equal to the amount by which Morocco's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During CY2018, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 682,067 metric tons according to data published by its customs authority, the Office des Changes. Based on this data, USTR has determined that Morocco's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XII of HTS chapter 99, goods of Morocco are not eligible to enter the United States duty-free under subheading 9912.17.05 or at preferential tariff rates under subheading 9912.17.10 through 9912.17.85 in CY2020.

III. CAFTA–DR

Pursuant to section 201 of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025), Presidential Proclamation No. 8331 of December 23, 2008 (73 FR 79585), and Presidential Proclamation No. 8536 of June 12, 2010 (75 FR 34311), implemented the CAFTA–DR on behalf of the United States and modified the HTS to reflect the tariff treatment provided for in the CAFTA–DR.

Note 25(b)(i) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of each CAFTA–DR country's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA–DR country's exports to the United States of goods classified under HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 and its imports of goods classified under HS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA–DR are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA–DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year.

A. Costa Rica

During CY2018, the most recent year for which data is available, Costa Rica's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 128,888 metric tons according to data published by the Costa Rican Customs Department, Ministry of Finance. Based on this data, USTR has determined that Costa Rica's trade surplus is 128,888 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUSUS chapter 98 for Costa Rica for CY2020 is 14,080 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Costa Rica that may be entered duty-free under subheading 9822.05.20 in CY2020 is 14,080 metric tons (*i.e.,* the amount that is the lesser of Costa Rica's trade surplus and the specific quantity set out in that note for Costa Rica for CY2020).

B. Dominican Republic

During CY2018, the most recent year for which data is available, the Dominican Republic's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 4,520 metric tons according to data published by the National Direction of Customs (DGA). Based on this data, USTR has determined that the Dominican Republic's trade surplus is 4,520 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for the Dominican Republic for CY2020 is 12,800 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of the Dominican Republic that may be entered duty-free under subheading 9822.05.20 in CY2020 is 4,520 metric tons (*i.e.,* the amount that is the lesser of the Dominican Republic's trade surplus and the specific quantity set out in that note for the Dominican Republic for CY2020).

C. El Salvador

During CY2018, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 348,974 metric tons according to data published by the Central Bank of El Salvador. Based on this data, USTR has determined that El Salvador's trade surplus is 348,974 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for El Salvador for CY2020 is 36,040 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY2020 is 36,040 metric tons (*i.e.,* the amount that is the lesser of El Salvador's trade surplus and the specific quantity set out in that note for El Salvador for CY2020).

D. Guatemala

During CY2018, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 1,332,419 metric tons according to data published by the Asociacion de Azucareros de Guatemala (ASAZGUA) and Bank of Guatemala. Based on this data, USTR has determined that Guatemala's trade surplus is 1,332,419 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Guatemala for CY2020 is 49,820 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY2020 is 49,820 metric tons (*i.e.,* the amount that is the lesser of Guatemala's trade surplus and the specific quantity set out in that note for Guatemala for CY2020).

E. Honduras

During CY2018, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 112,634 metric tons according to data published by the Central Bank of Honduras. Based on this data, USTR has determined that Honduras' trade surplus is 112,634 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Honduras for CY2020 is 10,240 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY2020 is 10,240 metric tons (*i.e.,* the amount that is the lesser of Honduras' trade surplus and the specific quantity set out in that note for Honduras for CY2020).

F. Nicaragua

During CY2018, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 321,187 metric tons according to data published by the Nicaraguan Ministry of Development, Industry, and Trade (MIFIC). Based on this data, USTR has determined that Nicaragua's trade surplus is 321,187 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Nicaragua for CY2020 is 28,160 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY2020 is 28,160 metric tons (*i.e.,* the amount that is the lesser of Nicaragua's trade surplus and the specific quantity set out in that note for Nicaragua for CY2020).

IV. Peru TPA

Pursuant to section 201 of the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138; 19 U.S.C. 3805 note), Presidential Proclamation No. 8341 of January 16, 2009 (74 FR 4105) implemented the Peru TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Peru TPA.

Note 28(c) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Peru's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that Peru's imports of U.S. goods classified under HS subheadings 1702.40 and 1702.60 that are originating goods under the Peru TPA and Peru's exports to the United States of goods classified under HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 are not included in the calculation of Peru's trade surplus.

Note 28(d) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Peru entered under subheading 9822.06.10 in an amount equal to the lesser of Peru's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2018, the most recent year for which data is available, Peru's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 264,340 metric tons according to data published by the Superintendencia Nacional de Administración Tributaria (SUNAT). Based on this data, USTR has determined that Peru's trade surplus is negative. Therefore, in accordance with U.S. Note 28(d) to subchapter XXII of HTSUS chapter 98, goods of Peru are not eligible to enter the United States duty-free under subheading 9822.06.10 in CY2020.

V. Colombia TPA

Pursuant to section 201 of the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112–42; 19 U.S.C. 3805 note), Presidential Proclamation No. 8818 of May 14, 2012 (77 FR 29519) implemented the Colombia TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Colombia TPA.

Note 32(b) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Colombia's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Colombia's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Colombia TPA and Colombia's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Colombia's trade surplus.

Note 32(c)(i) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Colombia entered under subheading 9822.08.01 in an amount equal to the lesser of Colombia's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2018, the most recent year for which data is available, Colombia's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 515,636 metric tons according to data published by Global Trade Atlas (GTA) and the Colombian Directorate of National Taxes and Customs (DIAN). Based on this data, USTR has determined that Colombia's trade surplus is 515,636 metric tons. The specific quantity set out in U.S. Note 32(c)(i) to subchapter XXII of HTSUS chapter 98 for Colombia for CY2020 is 56,000 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Colombia that may be entered duty-free under subheading 9822.08.01 in CY2020 is 56,000 metric tons (*i.e.,* the amount that is the lesser of Colombia's trade surplus and the specific quantity set out in that note for Colombia for CY2020).

VI. Panama TPA

Pursuant to section 201 of the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112–43; 19 U.S.C. 3805 note), Presidential Proclamation No. 8894 of October 29, 2012 (77 FR 66505) implemented the Panama TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Panama TPA.

Note 35(a) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Panama's trade surplus, by volume, with all sources for goods in HS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Panama's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Panama TPA and Panama's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Panama's trade surplus.

Note 35(c) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Panama entered under subheading 9822.09.17 in an amount equal to the lesser of Panama's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2018, the most recent year for which data is available, Panama's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 29,552 metric tons according to data published by the National Institute of Statistics and Census, Office of the General Comptroller of Panama. Based on this data, USTR has determined that Panama's trade surplus is 29,552 metric tons. The specific quantity set out in U.S. Note 35(c) to subchapter XXII of HTSUS chapter 98 for Panama for CY2020 is 545 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Panama that may be entered duty-free under subheading 9822.09.17 in CY2020 is 545 metric tons (*i.e.,* the amount that is the lesser of Panama's trade surplus and the specific quantity set out in that note for Panama for CY2020).

Gregory Doud,

Chief Agricultural Negotiator, Office of the United States Trade Representative.

[FR Doc. 2019–26365 Filed 12–5–19; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2019–0772]

Agency Information Collection Activities: Requests for Comments; Clearance of New Approval of Information Collection: Pilot Report (PIREP) Form

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 1, 2019. The collection involves an aircraft pilot's voluntary submission of weather conditions that were encountered while in flight. The information to be collected is necessary because Pilot Report (PIREP) Solicitation and Dissemination has been identified by the ATO as one of the Top 5 hazards in the National Airspace System (NAS). For certain weather conditions, PIREPs are the only means of confirmation that forecasted conditions are occurring. The FAA 7110–2 PIREP Form is a guide to assist pilots in submitting PIREPs into the NAS.

DATES: Written comments should be submitted by January 3, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Michael Helwig by email at: *michael.helwig@faa.gov;* phone: 202–267–1666.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–XXXX.

Title: Pilot Reports (PIREP).

Form Numbers: FAA Form 7110–2.

Type of Review: New information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 1, 2019, (84 FR 52157). The guidance for collecting PIREP information is contained in FAAO 7110. 10, Flight Service, of which System Operations Services (AJR) is the office of primary responsibility.

Respondents: Pilots. As of 9/21/19, pilots have submitted 53,976 PIREPs to be entered in the NAS.

Frequency: On occasion, depending on the weather conditions encountered.

Estimated Average Burden per Response: 2–3 minutes.

Estimated Total Annual Burden: <1 hour per respondent.

Issued in Washington, DC, on December 3, 2019.

Michael C. Artist,

Vice President, System Operations Services, Air Traffic Organization.

[FR Doc. 2019–26320 Filed 12–5–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Kirby-Whitten Parkway (Shelby Farms Parkway) Project in Tennessee

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final. The actions relate to a proposed highway project, Kirby-Whitten Parkway (Shelby Farms Parkway), from Walnut Grove Road to Macon Road in Memphis, Shelby County, Tennessee. Those actions grant licenses, permits, and approvals for the project. The FHWA's Record of Decision (ROD) provides details on the Selected Alternative for the proposed improvements.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before. If the Federal law May 4, 2020 that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA: Ms. Theresa Claxton; Program Development Team Leader; Federal Highway Administration; Tennessee Division Office; 404 BNA Drive, Building 200, Suite 508; Nashville, Tennessee 37217; Telephone (615) 781–5770; email: *Theresa.Claxton@dot.gov.* FHWA Tennessee Division Office's normal business hours are 7:30 a.m. to 4 p.m. (Central Time). You may also contact Ms. Susannah Kniazewycz, Environmental Division Director, Tennessee Department of Transportation, James K. Polk Building, Suite 900, 505 Deaderick Street, Nashville, Tennessee 37243–0334; Telephone (615) 741–3655, *Susannah.Kniazewycz@tn.gov.* The Tennessee Department of Transportation (TDOT) Environmental Division's normal business hours are 8 a.m. to 5 p.m. (Central Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions subject to 23 U.S.C. 139(*l*) by issuing licenses, permits, and approvals for the following highway project in the State of Tennessee: Kirby-Whitten Parkway (Shelby Farms Parkway), Project Number STP–M–9409(109), PIN 109182.00, Shelby County, Tennessee. The proposed action will extend and construct a new 2.5-mile section of the Kirby-Whitten Parkway (Shelby Farms Parkway). The Selected Alternative proposes a four- to five-lane highway with two travel lanes in each direction. The section from Walnut Grove Road to Mullins Station Road will contain a depressed median, while the section from Mullins Station Road to Macon Road will contain a center turn lane. The project includes a grade-separated interchange with Walnut Grove Road, approximately 1,900 feet east of the newly constructed Wolf River Bridge and 3,500 feet west of the existing signalized intersection of Walnut Grove Road and Farm Road. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Supplemental Final

Environmental Impact Statement (SFEIS) for the project, approved on January 30, 2012, in the FHWA Record of Decision (ROD) issued on November 13, 2019, and in other documents in the FHWA project records. The SFEIS, ROD, and other documents in the FHWA project records are available by contacting FHWA or TDOT at the addresses provided above. The FHWA SFEIS and ROD can be viewed and downloaded from the project website at: *https://www.tn.gov/tdot/projects/region-4/proposed-kirby-parkway.html* or viewed at the TDOT Environmental Division, James K. Polk Building, Suite 900, 505 Deaderick Street, Nashville, Tennessee 37243–0334.

This notice applies to all Federal agency decisions that are final as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303]; the Land and Water Conservation Fund Act of 1965 (LWCF), as amended; Public Law 88–578; 16 U.S.C. 4601–4 *et seq.*).

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 U.S.C. 9601–9675].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 13112 Invasive Species; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

(Authority: 23 U.S.C. 139(*l*))

Issued on: November 25, 2019.

Pamela M. Kordenbrock,

Division Administrator, Nashville, Tennessee.

[FR Doc. 2019–26180 Filed 12–5–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2019–0185]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel DRAGONFLY (Hovercraft); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2019–0185 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2019–0185 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2019–0185, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel DRAGONFLY is:

—*Intended Commercial Use of Vessel:* ‘‘Carrying passengers for hire on San Francisco Bay.’’

—*Geographic Region Including Base of Operations:* ‘‘California’’ (Base of Operations: San Francisco)

—*Vessel Length and Type:* 36’ hovercraft

The complete application is available for review identified in the DOT docket as MARAD–2019–0185 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2019–0185 or visit the Docket

Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

Dated: December 2, 2019.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2019–26311 Filed 12–5–19; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2019–0186]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel LALA (Sailboat); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirements of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 6, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2019–0186 by any one of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2019–0186 and follow the instructions for submitting comments.

• *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2019–0186, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel LALA is:

—Intended Commercial Use of Vessel: ‘‘Private Vessel Charters, Passengers Only’’
—Geographic Region Including Base of Operations: ‘‘California’’ (Base of Operations: Costa Mesa, CA)
—Vessel Length and Type: 36′ sailboat

The complete application is available for review identified in the DOT docket as MARAD–2019–0186 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the vessel name, state the commenter's interest in the waiver application, and address the waiver criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2019–0186 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121.

* * * * *

Dated: December 2, 2019.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2019–26312 Filed 12–5–19; 8:45 am]

BILLING CODE 4910–81–P

FEDERAL REGISTER

Vol. 84 Friday,

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Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Base Erosion and Anti-Abuse Tax and Additional Rules Regarding Base Erosion and Anti-Abuse Tax; Final Rule and Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9885]

RIN 1545–BO56

Base Erosion and Anti-Abuse Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations implementing the base erosion and anti-abuse tax, designed to prevent the reduction of tax liability by certain large corporate taxpayers through certain payments made to foreign related parties and certain tax credits. These final regulations also provide reporting requirements related to this tax. This tax was added to the Internal Revenue Code (the ''Code'') as part of the Tax Cuts and Jobs Act. This document finalizes the proposed regulations published on December 21, 2018. The final regulations affect corporations with substantial gross receipts that make payments to foreign related parties. The final regulations also affect any reporting corporations required to furnish information relating to certain related-party transactions and information relating to a trade or business conducted within the United States by a foreign corporation.

DATES: *Effective date:* The final regulations are effective on December 6, 2019. *Applicability dates:* For dates of applicability, see §§ 1.59A–10, 1.1502–2(d), 1.1502–59A(h), and 1.6038A–2(g).

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.59A–1 through 1.59A–10, Azeka J. Abramoff, Sheila Ramaswamy, or Karen Walny at (202) 317–6938; concerning the services cost method exception, L. Ulysses Chatman at (202) 317–6939; concerning §§ 1.383–1, 1.1502–2, 1.1502–4, 1.1502–43, 1.1502–47, 1.1502–59A, 1.1502–100, and 1.6655–5, Julie Wang at (202) 317–6975 or John P. Stemwedel at (202) 317–5024; concerning §§ 1.6038A–1, 1.6038A–2, and 1.6038A–4, Brad McCormack or Anand Desai at (202) 317–6939 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On December 21, 2018, the Department of the Treasury (''Treasury Department'') and the IRS published proposed regulations (REG–104259–18) under section 59A, and proposed amendments to 26 CFR part 1 under sections 383, 1502, 6038A, and 6655 in the **Federal Register** (83 FR 65956) (the ''proposed regulations''). The base erosion and anti-abuse tax (''BEAT'') in section 59A was added to the Code by the Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the ''Act''), which was enacted on December 22, 2017. The Act also added reporting obligations regarding this tax for 25-percent foreign-owned corporations subject to section 6038A and foreign corporations subject to section 6038C.

A public hearing was held on March 25, 2019. The Treasury Department and the IRS also received written comments with respect to the proposed regulations. Comments outside the scope of this rulemaking are generally not addressed but may be considered in connection with future guidance projects. All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations, with certain revisions. This Summary of Comments and Explanation of Revisions discusses those revisions as well as comments received in response to the solicitation of comments in the notice of proposed rulemaking accompanying the proposed regulations.

II. Comments and Changes to Proposed § 1.59A–1—Overview and Definitions

Proposed § 1.59A–1 provides general definitions under section 59A. Proposed § 1.59A–1(b)(17) provides a definition of the term ''related party.'' The proposed regulations generally define a related party with respect to an applicable taxpayer as (a) any 25-percent owner of the taxpayer, (b) any person related (within the meaning of section 267(b) or 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer, or (c) a controlled taxpayer within the meaning of § 1.482–1(i)(5).

The proposed regulations' definition of ''related party'' is identical to the definition provided by section 59A(g), except with respect to the relatedness standard under section 482. Specifically, the proposed regulations provide a more precise citation to the section 482 regulations (''a controlled taxpayer within the meaning of § 1.482–1(i)(5)'') than the general cross-reference that is provided in section 59A(g)(1)(C) (''any other person who is related (within the meaning of section 482) to the taxpayer'').

Comments recommended that the final regulations modify the definition of ''related party'' to exclude related publicly traded companies or otherwise provide an exception for payments between publicly traded companies. These comments suggested that payments between related publicly traded companies do not result in base erosion. The comments explained that the boards of directors of publicly traded companies generally have fiduciary obligations to shareholders to act in the best interest of the company and are subject to regulatory oversight. On this basis, the comments asserted that a domestic corporation cannot artificially shift profits to a foreign corporation in this situation. Comments also noted that the Treasury Department and the IRS have provided relief for publicly traded companies in circumstances where there is no explicit legislative history or statutory authority to do so, such as where minority shareholders of publicly traded companies must be identified. *See* § 1.367(e)–1(d)(3) and § 1.382–2T(j).

The Treasury Department and the IRS have determined that it is not appropriate to modify the statutory definition of a related party to exclude publicly traded companies because this recommendation is inconsistent with the statutory language of section 59A(g). Section 59A(g) sets forth specific limits on the definition of a ''related party'' that include a corporation and its 25-percent owner. Under the proposal recommended by the comments, section 59A would not apply to any less than 100 percent owned affiliate, so long as other ''public'' shareholders owned some interest in the corporation. The corporate laws of a state of the United States or a foreign jurisdiction may, and often do, impose certain duties on the board of directors of a company, including obligations with respect to the interests of minority shareholders. These companies are also subject to securities laws in the United States. Notwithstanding this regulatory environment, the Code includes many provisions that apply to related parties, and none of those provisions are limited to corporations that are 100 percent related.

For example, section 267(a) generally applies to transactions among greater than 50 percent controlled parties. Section 482 provides a test that can be satisfied by a quantitative measure of ownership or a qualitative test of control (''two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests''), that, as interpreted by regulations, can apply at well below a 100 percent relatedness standard. *See* § 1.482–1(i)(5). Other sections of the

Code apply based on a relatedness standard of 80 percent. *See, generally,* section 1504; section 351(a). In section 59A, Congress adopted, disjunctively, both the 50 percent relatedness-test from section 267(a) and the relatedness-test from section 482. Moreover, Congress also added, disjunctively, a lower objective standard for determining relatedness for a 25-percent owner.

Finally, the Treasury Department and IRS concluded that a rule that confers special status on payments to a publicly traded foreign corporation that is related (using a 25 percent or greater standard) to the payor would not be analogous to the rules in § 1.367(e)–1(d)(3) or § 1.382–2T(j), which provide special rules that pertain to shareholders that own less than 5 percent of publicly traded corporations, in light of challenges in determining the identity of such shareholders.

For these reasons, the final regulations do not modify the relatedness thresholds that are set forth in section 59A and the proposed regulations.

III. Comments and Changes to Proposed § 1.59A–2—Applicable Taxpayer, Aggregation Rules, Gross Receipts Test, and Base Erosion Percentage Test

Proposed § 1.59A–2 contains rules for determining whether a taxpayer is an applicable taxpayer on which the BEAT may be imposed, including rules relating to the gross receipts test, base erosion percentage test, and the determination of the aggregate group for purposes of applying these tests.

A. Determining the Gross Receipts and Base Erosion Percentage of an Aggregate Group That Includes a RIC, a REIT, or an Entity Treated as a Corporation by Section 892

Section 59A(e)(1)(A) excludes corporations that are (1) regulated investment companies (''RICs''), (2) real estate investment trusts (''REITs''), or (3) S corporations from the definition of an applicable taxpayer. A comment requested that the final regulations clarify that controlled RICs and REITs are similarly excluded from the aggregate group for purposes of the gross receipts test and base erosion percentage test. The comment implied that the Treasury Department and the IRS did not intend for RICs and REITs to be part of an aggregate group because RICs and REITs are not subject to the BEAT as separate taxpayers. The proposed regulations do not exclude RICs and REITs from membership in an aggregate group. A corporation is an applicable taxpayer if it is not one of the excluded categories of corporations (RIC, REIT, or S corporation), it satisfies the gross receipts test in section 59A(e)(1)(B), and it satisfies the base erosion percentage test in section 59A(e)(1)(C). The proposed regulations provide that when applying the gross receipts test and the base erosion percentage test with respect to a particular corporation for purposes of section 59A, those tests are applied on the basis of that corporation and members of that corporation's aggregate group. The proposed regulations define an aggregate group by reference to section 1563(a) in a manner consistent with section 59A(e)(3), which references section 1563(a) indirectly. The section 1563(a) definition refers to controlled groups of corporations, whether brother-sister groups or parent-subsidiary groups. Section 1563(c) provides special rules excluding certain categories of stock in a corporation from the aggregation rules in section 1563(a) (for example, certain stock held by an organization to which section 501 applies). None of those provisions exclude the stock of, or held by, a RIC or REIT. Moreover, just as the gross receipts and deductions of non-applicable taxpayers (such as partnerships) can inure to the benefit of an applicable taxpayer (such as a domestic corporation that is a partner in a partnership), so too can the gross receipts and deductions of a controlled RIC or REIT that is a member of a corporation's aggregate group inure to the benefit of that corporation. Because of these considerations, the final regulations do not adopt this recommendation.

Similarly, another comment requested that the final regulations exclude from the aggregate group foreign government owners of stock of corporations when the foreign government is treated as a corporation under section 892 and the regulations thereunder. The comment cited the exclusion from section 1563(a) of certain stock held by an organization to which section 501 applies, and suggested that a foreign government should be provided similar treatment because a foreign government, like a section 501 organization, does not have private shareholders. In addition, the comment asserted that it cannot be engaged in direct commercial activities with respect to its portfolio companies and that its investment managers consist of separate teams.

The Treasury Department and the IRS have determined that it is not appropriate to provide a regulatory exception from the aggregate group rules for entities that are commonly controlled by a foreign government shareholder and that are treated as corporations under section 892. Congress provided that the activities of an aggregate group are fully taken into account when applying the gross receipts test and the base erosion percentage test to a corporation. The fact that a common shareholder of a different chain of corporations may be more passive than other common shareholders, or that the common shareholder's investment teams are within different lines of a management structure does not change the fact the common shareholder has economic interests in the subsidiary corporation that is within the statutory aggregate group definition adopted for section 59A. Accordingly, the final regulations do not adopt this recommendation.

B. Gross Receipts From Certain Inventory and Similar Transactions

To determine gross receipts, section 59A(e)(2)(B) provides for ''rules similar to the rules'' of section 448(c)(3)(B), (C), and (D). Accordingly, these final regulations provide rules that are similar to, but not necessarily the same as, the rules of section 448(c)(3) and the implementing regulations. Proposed § 1.59A–1(b)(13) defines the term ''gross receipts'' for purposes of section 59A by reference to § 1.448–1T(f)(2)(iv), which provides that gross receipts include total sales, net of returns and allowances, and all amounts received for services. Section 1.448–1T(f)(2)(iv) further provides that gross receipts are not reduced by cost of goods sold (''COGS'') or reduced by the cost of property sold if such property is described in section 1221(a)(1), (3), (4), or (5) (types of property excluded from the definition of a capital asset). Separately, § 1.448–1T(f)(2)(iv) provides that gross receipts from the sale of capital assets or a sale of property described in section 1221(a)(2) (relating to property used in a trade or business) are reduced by the adjusted basis of the property sold. Section 1.448–1T(f)(2)(iv) further provides that gross receipts include income from investments, but not the repayment of a loan or similar instrument.

Comments observed that, pursuant to the definition of gross receipts in the proposed regulations, banks that originate and then sell loans are required to include the gross proceeds from the sale of the loan in their gross receipts because banks generally treat loans originated in the ordinary course of business as ordinary assets under section 1221(a)(4). These comments contrasted a situation where a bank originates and holds a loan to maturity, in which case the proceeds the bank receives upon repayment are not included in gross receipts due to the express exclusion of these amounts contained in § 1.448–1T(f)(2)(iv). The comments recommended that the regulations provide for a separate reduction of gross receipts from the sale of a loan for the basis in loans originated by a bank. Another comment recommended a similar exception for a bank or broker-dealer that holds stocks and bonds in inventory. This comment proposed that final regulations permit banks and broker-dealers to reduce gross receipts from ordinary course sales of stocks and bonds by the basis of these instruments. The comment also observed that the gains or losses recognized with respect to the stocks and bonds are from sales in the ordinary course and may be small relative to the cost basis in the property.

The final regulations do not adopt the approach suggested by these comments. The final regulations continue to define the term ''gross receipts'' by cross-referencing to § 1.448–1T(f)(2)(iv), and those rules are used to determine how an item is included in gross receipts. The rules in section 59A for implementing the gross receipts test are similar to the rules described in section 448(c). *See* section 59A(e)(3) (adopting an aggregation rule similar to that in section 448(c)(2)); section 59A(e)(2)(B) (specifically cross-referencing rules similar to section 448(c)(3)(B), (C), and (D) for the treatment of short taxable years, reductions for returns and allowances, and predecessors, respectively); and section 59A(e)(2)(A) (adopting a broad concept of gross receipts, narrowed to exclude gross receipts of a foreign person that are not taken into account in determining income that is effectively connected with the conduct of a trade or business within the United States). Because of this statutory link between section 59A(e)(2) and section 448, the final regulations adopt the definition of gross receipts for purposes of section 59A that is used for section 448 purposes—that is, the definition in § 1.448–1T(f)(2)(iv). Because the Act includes other new rules that cross-reference section 448, the Treasury Department and the IRS are studying section 448 generally and whether changes should be made to the regulations under section 448 to take into account the Act.

C. Determining the Aggregate Group for Purposes of Applying the Gross Receipts Test and Base Erosion Percentage Test

Section 59A determines the status of a corporation as an applicable taxpayer on the basis of the aggregate group rules by taking into account the gross receipts and base erosion payments of each member of the aggregate group. However, each taxpayer must compute the amount of gross receipts and base erosion payments for its aggregate group using its own taxable year and based on those corporations that are members of the aggregate group at the end of the taxable year. *See* section 59(e)(3). Therefore, members with different taxable years may have different base erosion percentages.

1. Members of an Aggregate Group With Different Taxable Years

The proposed regulations provide rules for determining whether the gross receipts test and base erosion percentage test are satisfied for purposes of section 59A with respect to a specific taxpayer when other members of its aggregate group have different taxable years. *See* proposed § 1.59A–2(e)(3)(vii). In general, the proposed regulations provide that, for purposes of section 59A only, each taxpayer determines its gross receipts and base erosion percentage by reference to its own taxable year, taking into account the results of other members of its aggregate group during that taxable year. In other words, the gross receipts, base erosion tax benefits, and deductions of the aggregate group for a taxable year are determined by reference to the taxpayer's own taxable year, without regard to the taxable year of the other member. This rule applies regardless of whether the taxable year of the member begins before January 1, 2018; as a result, a taxpayer includes gross receipts, base erosion tax benefits, and deductions of the member even if that member is not subject to section 59A for that taxable year. The proposed regulations adopted this approach to reduce compliance burden through providing certainty for taxpayers and avoid the complexity of a rule that identifies a single taxable year for an aggregate group for purposes of section 59A that may differ from a particular member of the aggregate group's taxable year. As a result, under the proposed regulations, two related taxpayers with different taxable years may compute their respective gross receipts and base erosion percentages for purposes of section 59A by reference to different periods, even though each taxpayer calculates these amounts on an aggregate group basis that takes into account other members of the controlled group. The preamble to the proposed regulations explains that taxpayers may use a reasonable method to determine the gross receipts and base erosion percentage information with regard to the taxable year of the taxpayer when members of the aggregate group of the taxpayer have a different taxable year. REG–104259–18, 83 FR 65956, 65959 (December 21, 2018).

Comments expressed concern regarding the potential administrative burdens of treating all members of a taxpayer's aggregate group as having the same taxable year as the taxpayer. These comments argued that, in many cases, companies do not maintain monthly accounting records as detailed as they do on a quarterly basis (for publicly traded companies) or an annual basis (for privately held companies). Also, comments noted that this rule does not take into account the effect of deductions that are determined on a yearly basis or subject to annual limitations, such as under section 163(j).

Comments requested that the determination of gross receipts and the base erosion percentage of a taxpayer's aggregate group be made on the basis of the taxpayer's taxable year and the taxable year of each member of its aggregate group that ends with or within the applicable taxpayer's taxable year (the ''with-or-within method''). With respect to members of an aggregate group with different taxable years, the Treasury Department and the IRS appreciate the concerns raised regarding the potential administrative burden of proposed § 1.59A–2(e)(3)(vii) and believe that the approach described in the comments represents a reasonable approach. The final regulations, therefore, adopt the with-or-within method, for purposes of section 59A only, to determine the gross receipts and the base erosion percentage of an aggregate group. *See* § 1.59A–2(c)(3). In addition, the Treasury Department and the IRS are issuing a notice of proposed rulemaking (the ''2019 proposed regulations'') published in the same issue of the **Federal Register** as these final regulations that proposes rules to further address how to implement the with-or-within method, and how to take into account the changing composition of the aggregate group with respect to a particular taxpayer during the relevant periods for applying the gross receipts test and the base erosion percentage test. The final regulations do not include rules on predecessors or short taxable years. Instead, rules relating to these situations have been re-proposed in the 2019 proposed regulations. Until final rules are applicable relating to predecessors or short taxable years, taxpayers must take a reasonable approach consistent with section 59A(e)(2)(B) to determine gross receipts and base erosion benefits in these situations.

2. Time for Determining That Transactions Occurred Between Members of the Aggregate Group

The proposed regulations provide that, for purposes of section 59A, transactions that occur between members of the aggregate group that were members of the aggregate group at the time of the transaction are not taken into account for purposes of determining the gross receipts and base erosion percentage of an aggregate group. *See* proposed § 1.59A–2(c). In the case of a foreign corporation that is a member of an aggregate group, only transactions that relate to income effectively connected with the conduct of a trade or business in the United States are disregarded for this purpose. The preamble to the proposed regulations explains that this limitation on the extent to which foreign corporations are included in the aggregate group is intended to prevent payments from a domestic corporation, or a foreign corporation with respect to effectively connected income, to a foreign related person, from being inappropriately excluded from the base erosion percentage test. REG–104259–18, 83 FR 65956, 65957 (December 21, 2018).

A comment requested clarity on determining whether transactions between members of an aggregate group are disregarded. Specifically, the comment requested clarity on whether a transaction is disregarded when both parties to the transaction are members of the aggregate group at the time of the transaction, or whether it is also a condition that both parties to the transaction must also be members of the aggregate group on the last day of the taxpayer's taxable year.

As requested by the comment, the final regulations clarify that a transaction between parties is disregarded for purposes of section 59A when determining the gross receipts and base erosion percentage of an aggregate group if both parties were members of the aggregate group at the time of the transaction, without regard to whether the parties were members of the aggregate group on the last day of the taxpayer's taxable year. *See* § 1.59A–2(c)(1).

3. Base Erosion Tax Benefits and Deductions of a Member of an Aggregate Group With a Taxable Year Beginning Before January 1, 2018

For purposes of determining the base erosion percentage, comments also expressed concern about including the base erosion tax benefits and deductions of a member when the taxable year of the member begins before January 1, 2018. The comments noted that this taxable year of the member is not otherwise subject to section 59A because of the effective date in section 14401(e) of the Act. However, one comment agreed with including these base erosion tax benefits and deductions in the aggregate group of a taxpayer for a taxable year of the taxpayer to which section 59A applies.

The Treasury Department and the IRS agree with comments that it is not appropriate for a taxpayer to include base erosion tax benefits and deductions attributable to a taxable year of a member of its aggregate group that begins before the effective date of section 59A when determining the base erosion percentage of the aggregate group. Accordingly, when determining the base erosion percentage of an aggregate group, the final regulations exclude the base erosion tax benefits and deductions attributable to the taxable year of a member of the aggregate group that begins before January 1, 2018. *See* § 1.59A–2(c)(8). This rule avoids requiring members of an aggregate group to calculate their hypothetical base erosion tax benefits for a year in which the base erosion tax benefit rules do not apply.

4. Other Comments Regarding the Aggregate Group Rules

Comments also addressed the following issues with respect to the aggregate group rules in the proposed regulations: (1) How to take into account transactions when a member joins or leaves an aggregate group, (2) the treatment of predecessors of a taxpayer, (3) the determination of the aggregate group of a consolidated group, and (4) the treatment of short taxable years. The Treasury Department and the IRS continue to study the recommendations provided in several comments relating to these issues. Therefore, the Treasury Department and the IRS are issuing the 2019 proposed regulations to further address aggregate group issues.

D. Mark-to-Market Deductions

To determine the base erosion percentage for the year, the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, the aggregate group) must determine the amount of base erosion tax benefits in the numerator and the total amount of certain deductions, including base erosion tax benefits, in the denominator. The proposed regulations provide rules for determining the total amount of the deductions that are included in the denominator of the base erosion percentage computation in the case of transactions that are marked to market. In determining the amount of the deduction that is used for purposes of the base erosion percentage test, the proposed regulations require the combination of all items of income, deduction, gain, or loss on each marked transaction for the year (''the BEAT Netting Rule''), such as from a payment, accrual, or mark. *See* proposed § 1.59A–2(e)(3)(vi). The BEAT Netting Rule was adopted to ensure that only a single deduction is claimed with respect to each marked transaction and to prevent distortions in deductions from being included in the denominator of the base erosion percentage, including as a result of the use of an accounting method that values a position more frequently than annually.

A comment requested guidance clarifying whether the BEAT Netting Rule applies to physical securities such as stocks, bonds, repurchase agreements, and securities loans with respect to which a taxpayer applies a mark-to-market method of accounting. The comment questioned whether the BEAT Netting Rule should apply to these types of positions. The comment acknowledged that the BEAT Netting Rule produces an appropriate result with respect to derivatives by avoiding double-counting of both a current mark-to-market loss as well as a future payment to which the current loss relates. Unlike in the case of many derivatives, the comment observed that transactions involving stocks, bonds, repurchase agreements, and securities loans generally do not result in a loss of value to the holder of the relevant instrument that is subsequently realized in the form of a payment made by the holder and that effectively gives rise to an offsetting mark-up of the instrument.

To illustrate this observation, the comment provided the following example. On January 1, 2018, a dealer buys one share of stock in Company XYZ for $100. Then, during 2018, Company XYZ pays dividends of $1 with respect to the share. On December 31, 2018, the share price of Company XYZ is $90. Finally, on January 1, 2019, the dealer sells the share of Company XYZ stock for $90. The comment noted that in the absence of the BEAT Netting Rule, the amount of the dealer's deduction after marking the stock to market on December 31, 2018, would be $10. With the application of the BEAT Netting Rule, however, the comment noted that the amount of the deduction that will be included in the base erosion percentage denominator is $9. According to this comment, the BEAT Netting Rule may not be necessary to avoid the double-counting of deductions in these transactions, and could result in the netting of amounts that would not be netted under section 475 and that are not duplicative of other inclusions or deductions by the taxpayer.

Proposed § 1.59A–2(e)(3)(vi) applies to any position with respect to which the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, a member of the aggregate group) applies a mark-to-market method of accounting. Therefore, the BEAT Netting Rule in the proposed regulations applies to stocks, bonds, repurchase agreements, and securities lending transactions that the taxpayer marks to market, rendering further clarification unnecessary. The Treasury Department and the IRS have determined that the applicability of the BEAT Netting Rule should not be limited in the manner suggested by the comment. In addition to avoiding the double counting that the comment acknowledged, the proposed regulations adopt the BEAT Netting Rule to enhance administrability and reduce compliance burden. That is, having a single rule apply to all transactions that are marked to market will enhance administrability, especially given the challenges in (a) distinguishing the specific financial transactions that should qualify for exclusion; (b) determining whether a distribution or payment received on an excluded instrument is duplicative of other inclusions or deductions; and (c) determining the extent to which a payment ultimately gives rise to an offsetting decline in the value of the instrument. For these reasons, the BEAT Netting Rule in the final regulations does not exclude physical securities.

Another comment recommended that the BEAT Netting Rule should not be mandatory and should instead be included in the final regulations as only a safe harbor. The comment reasoned that section 59A is generally applied on a gross basis and that requiring taxpayers to offset deductions and losses with income and gain when determining the base erosion percentage is inconsistent with a gross approach. The BEAT Netting Rule was adopted to ensure that taxpayers do not overstate the amount of deductions includible in the denominator with respect to transactions subject to a mark-to-market method of accounting. If the BEAT Netting Rule were provided as a safe harbor in the final regulations, as this comment requested, taxpayers could inappropriately inflate the denominator of the base erosion percentage by treating multiple marks as separate deductions. Therefore, the final regulations do not adopt this comment.

As discussed in Part III.D of this Summary of Comments and Explanation of Revisions, the taxpayer must also determine the amount of base erosion tax benefits in the numerator to determine the base erosion percentage for the year. Proposed § 1.59A–3(b)(2)(iii) also applies the BEAT Netting Rule for purposes of determining the amount of base erosion payments that result from transactions that are marked to market. A comment expressed concern that this rule could result in mark-to-market losses being treated as base erosion payments and recommended the withdrawal of proposed § 1.59A–3(b)(2)(iii), although the comment observed that if the Treasury Department and the IRS were to adopt the comment to make the qualified derivative payments (''QDP'') exception available to securities loans (which is discussed in Part VII of this Summary of Comments and Explanation of Revisions), that change would make this issue moot. The Treasury Department and the IRS do not view this concern to be valid, considering that a mark-to-market loss arising from a deemed sale or disposition of a third-party security held by a taxpayer is not within the general definition of a base erosion payment because the loss is not attributable to any payment made to a foreign related party. Rather, the mark-to-market loss is attributable to a decline in the market value of the security. The Treasury Department and the IRS also note that the BEAT Netting Rule will apply primarily for purposes of determining the amount of deductions that are taken into account in the denominator of the base erosion percentage. The Treasury Department and the IRS agree with the comment that the QDP exception of § 1.59A–3(b)(3)(ii) eliminates most mark-to-market transactions from characterization as a base erosion payment, including as a result of the expansion of the QDP exception to apply to the securities leg of a securities loan. See Part VII of this Summary of Comments and Explanation of Revisions for a discussion of the qualification of the securities leg of a securities loan for the QDP exception. Thus, the BEAT Netting Rule will apply only in limited circumstances such as when the taxpayer fails to properly report a QDP. The final regulations therefore continue to apply the BEAT Netting Rule for purposes of determining the amount of base erosion payments that result from transactions that are marked to market.

IV. Comments and Changes to Proposed § 1.59A–3—Base Erosion Payments and Base Erosion Tax Benefits

Proposed § 1.59A–3 contains rules for determining whether a payment or accrual gives rise to a base erosion payment and the base erosion tax benefits that arise from base erosion payments.

A. How Base Erosion Payments Are Determined in General

Proposed § 1.59A–3(b)(1) defines a base erosion payment as a payment or accrual by the taxpayer to a foreign related party that is described in one of four categories: (1) A payment with respect to which a deduction is allowable; (2) a payment made in connection with the acquisition of depreciable or amortizable property; (3) premiums or other consideration paid or accrued for reinsurance that is taken into account under section 803(a)(1)(B) or 832(b)(4)(A); or (4) a payment resulting in a reduction of the gross receipts of the taxpayer that is with respect to certain surrogate foreign corporations or related foreign persons.

The Conference Report to the Act states that base erosion payments do not include any amounts that constitute reductions to determine gross income including payments for COGS (except for reductions to determine gross income for certain surrogate foreign corporations). Conf. Rep. at 657. The proposed regulations do not contain a provision that expressly provides that amounts paid or accrued to a related foreign person that result in reductions to determine gross income are not treated as base erosion payments (except in the case of certain surrogate foreign corporations). A comment requested that, in order to provide more certainty to taxpayers, the final regulations expressly reflect that payments that result in reductions to determine gross income are not subject to section 59A. In response to this comment, § 1.59A–3(b) has been modified to explicitly clarify that payments resulting in a reduction to determine gross income, including COGS, are not treated as base erosion payments within the meaning of section 59A(d)(1) or (2). *See* § 1.59A–3(b)(2)(viii).

The proposed regulations do not establish any specific rules for determining whether a payment is treated as a deductible payment. However, the preamble to the proposed regulations states that, except as otherwise provided in the proposed regulations, the determination of whether a payment or accrual by the taxpayer to a foreign related party is described in one of the four categories is made under general U.S. federal income tax law. REG–104259–18, 83 FR 65956, 65959 (December 21, 2018). The preamble to the proposed regulations refers specifically to agency principles, reimbursement doctrine, case law conduit principles, and assignment of income as examples of principles of generally applicable tax law. *Id.* A comment noted the potential for ambiguity that could result by failing to reflect in the text of the proposed regulations the language contained in the preamble to the proposed regulations and requested that the final regulations provide more specific guidance on how the determination of whether a payment is a base erosion payment is made. In response to this comment, the final regulations include in the regulatory text a rule that the determination of whether a payment or accrual is a base erosion payment is made under general U.S. federal income tax law. *See* § 1.59A–3(b)(2)(i).

Similarly, because existing tax law generally applies, the amounts of income and deduction for purposes of section 59A are generally determined on a gross basis under the Code and regulations. The proposed regulations generally do not permit netting of income and expense in determining amounts of base erosion payments. Comments to the proposed regulations requested guidance regarding (1) transactions involving a middle-man or a passthrough payment, (2) divisions of revenues in connection with global service arrangements, and (3) the general netting of income and expense.

1. Transactions Involving a ''Middle-Man'' or ''Passthrough Payments''

Several comments requested additional guidance relating to transactions or arrangements in which a taxpayer serves as a so-called middle-man for a payment to a foreign related party or makes a so-called passthrough payment to a foreign related party that may frequently arise in connection with global services and similar businesses. Broadly, the comments considered situations where a domestic corporation makes a deductible payment to a foreign related party, and that foreign related party in turn makes corresponding payments to unrelated third parties. Comments that addressed this concern arose in a variety of industries and business models. In some situations, the comments observed that business exigencies require the domestic corporation to make payments to the foreign related party. For example, in a business involving the physical delivery of goods within a foreign jurisdiction, a domestic corporation may subcontract with its foreign related party to perform the foreign in-country delivery function. Another example involves global service contracts that may be entered into by a domestic corporation and a client that does business in multiple jurisdictions, and may require services in connection with the client's global operations that are also subcontracted to foreign related parties. Some more specific comments observed that this global services situation may arise in connection with U.S.-based manufacturers that sell manufactured products to unrelated global customers and simultaneously enter into contracts to provide services for the product in multiple jurisdictions in connection with the sale of equipment. The comments observed that these service contracts, like other global services contracts, frequently involve subcontracting with a foreign related party to perform the services in foreign jurisdictions.

Multiple comments requested that the final regulations provide that the definition of a base erosion payment does not include payments made pursuant to a contract when a taxpayer makes a corresponding payment to a foreign related party for third party costs. Other comments requested that the final regulations more specifically exempt the types of business models discussed in the comment letters. For example, some comments recommended that the final regulations provide an exception to the term ''base erosion payment'' for payments made by a taxpayer to a foreign related party with respect to services performed for an unrelated party, provided that the foreign related party performs the services outside of the United States. Other comments recommended a similar exception that would apply only to services that are performed in connection with tangible property produced or manufactured by the taxpayer (or a related party). These comments observed that Congress intended to exclude manufacturers from the BEAT because it effectively created an exception for COGS, and that this exception should be carried through to services in connection with manufacturing.

Other comments recommended an exception to the definition of base erosion payment for payments to foreign related parties that are mandated under regulatory requirements. In other situations, comments observed that regulatory considerations affect the decision by the domestic corporation to make a payment to the foreign related party. An example includes a global dealing operation where a U.S. securities dealer has a client who wants to trade its securities on a foreign securities exchange that requires a locally registered dealer; for those trades, a foreign related party of the U.S. securities dealer conducts those trades. Other examples involving regulatory considerations include U.S. life sciences companies that, in connection with obtaining food and drug approval to sell a product in a foreign market, use a foreign related party to conduct clinical trials in that market because foreign regulators require testing on local patients.

The final regulations do not adopt a general exception to the definition of a base erosion payment in situations when the foreign related payee also makes payments to unrelated persons. The BEAT statute and the legislative history contain no indication of such an exception. Moreover, this recommended exception is inconsistent with the statutory framework of the BEAT. If traced to the ultimate recipient, most expenses of a taxpayer could be linked to a payment to an unrelated party, through direct tracing or otherwise, leaving a residual of profit associated with the payment. Accordingly, adopting such an exception would have the effect of eliminating a significant portion of service payments to foreign related parties from the BEAT because it would impose the BEAT on the net rather than the gross amount of the payment. The only net income based concept included in the BEAT statute is the treatment of payments covered by the services cost method (''SCM'') exception. For a further discussion of the SCM exception, see Part IV.C.1 of this Summary of Comments and Explanation of Revisions.

The final regulations also do not adopt a narrower regulatory exception for payments that arise in similar circumstances but that are also associated with manufacturing or the production of tangible property. The Treasury Department and the IRS do not view the presence or absence of manufacturing as bearing on the statutory definition of a base erosion payment for services. Further, the Treasury Department and the IRS do not view the fact that payments that reduce gross receipts, such as COGS, are not base erosion payments under section 59A(d)(1) as demonstrating Congressional intent to exclude services that do not qualify as COGS from the definition of a base erosion payment under section 59A(d)(1) if those services have a connection to manufacturing operations. Congress included a single specific exception for services—the SCM exception. For a further discussion of that exception, see Part IV.C.1 of this Summary of Comments and Explanation of Revisions.

The final regulations do not adopt a narrower exception for payments to foreign related parties that arise because of non-tax business considerations, including a non-tax foreign regulatory requirement. The Treasury Department and the IRS recognize that there may be non-tax reasons that compel a taxpayer to perform a particular global service outside the United States. For example, an international delivery service may need to engage a foreign related party in the destination country to deliver goods in a foreign jurisdiction.

The final regulations do not adopt this recommended exception because it would require rules to distinguish between the conditions under which a domestic corporation is compelled to operate through a foreign related party and the conditions under which a domestic corporation operates through a foreign related party as a result of a business choice. This distinction would be inherently subjective. For example, in a global service business that provides services to a global client that has operations around the world, the decision to provide personnel on-site in a foreign location may or may not be compelled by the business needs of its client. Similarly, in the case of the back-office functions of a global services business, those functions may be performed in the United States or in a location outside of the United States; the location of those services may or may not be compelled by the business needs of their client. Moreover, even if there is a compelling reason to operate the activities outside the United States, a base erosion payment exists only if a taxpayer makes a payment to a foreign related party. Thus, if a foreign branch of the domestic corporation performs services in the foreign jurisdiction, there will be no payment or accrual to a foreign related party. Finally, there is no indication that Congress intended to create a broad services exception, outside of the SCM exception, even though these global services conditions are common in the modern economy.

2. Division of Revenues From Global Services

Comments requested that final regulations provide an exception from the term ''base erosion payment'' for revenue sharing payments or arrangements, including allocations with respect to global dealing operations. Specifically, some comments recommended that the final regulations provide that a payment is not a base erosion payment in a situation where the domestic corporation records revenue from transactions with third party customers, and in turn the domestic corporation makes payments to a foreign related party. Other comments recommended that payments by the domestic corporation to foreign related parties should not be base erosion payments if the parties have adopted a profit split as their best method of pricing the related-party transactions for purposes of section 482. Some of these comments asserted that parties to such payments could be viewed as splitting the customer revenue for purposes of section 59A. Under this view, the payments received by the foreign related party would be treated as received directly from the third-party customer, with the result that there would be no corresponding deductible payment from the domestic corporation to the foreign related party.

Other comments more specifically addressed this issue in the narrower context of a global dealing operation within the meaning of proposed § 1.482–8(a)(2)(i). These comments requested that payments made pursuant to a global dealing operation not be treated as base erosion payments.

The final regulations do not adopt the recommendations to specifically exclude from the definition of a base erosion payment transactions that are priced based on the profit split or similar transfer pricing method that is used for purposes of section 482. Under section 482, the parties to a controlled transaction apply the best method to determine if the parties are compensated at arm's length. However, the use of a particular method, whether the profit split method or another method, does not change the contractual relationship between the parties. Accordingly, the final regulations do not adopt this recommendation because the proper characterization depends on the underlying facts and the relationships between the parties. *See* § 1.59A–3(b)(2).

Similarly, with respect to a global dealing operation, the final regulations do not adopt the comment to provide that global dealing operations do not give rise to base erosion payments because the proper characterization depends on the underlying facts. Under general tax principles, and consistent with proposed § 1.863–3(h), a global dealing operation in which participants manage a single book of assets, bear risk, and share in trading profits may be viewed as co-ownership of the trading positions or similar arrangement, with no deductible payments made by any participants for purposes of section 59A. In contrast, where non-U.S. participants are compensated for services performed, the arrangement may be more properly characterized as trading income to the U.S. participant and a deductible payment to the foreign participant for purposes of section 59A.

To the extent that an amount is treated under general U.S. federal income tax law as received by a U.S. person as an agent for, and is remitted to, a foreign related party, see also Part IV.A (How Base Erosion Payments are Determined in General) of this Summary of Comments and Explanation of Revisions, which discusses the addition of § 1.59A–3(b)(2)(i) to clarify that the determination of whether a payment or accrual by the taxpayer to a foreign related party is described in one of four categories of a base erosion payment is made under general U.S. federal income tax law, including agency principles.

3. Netting of Income and Expense

Proposed § 1.59A–3(b)(ii) generally states that the amount of any base erosion payment is determined on a gross basis, regardless of any contractual or legal right to make or receive payments on a net basis, except as otherwise provided in paragraph (b)(2)(iii) of that section, which addresses mark-to-market positions, or as permitted by the Code or regulations. As explained in the preamble to the proposed regulations, the BEAT statutory framework is based on including the gross amount of base erosion payments in the BEAT's expanded modified taxable income base. REG–104259–18, 83 FR 65956, 65968 (December 21, 2018).

a. In General

Numerous comments recommended that the final regulations permit netting for purposes of section 59A. Generally, netting would allow a taxpayer to determine the amount of a base erosion payment by reducing the amount of that payment by the amount of another corresponding obligation.

A comment asserted that netting should be permitted for all base erosion payments other than with respect to reinsurance payments. The comment explained that the plain language of section 59A(d)(1) provides that only amounts paid or accrued are taken into account; this comment interpreted this language to mean the net amount paid or accrued. Because section 59A(d)(3) refers to gross premiums in the reinsurance context, the comment maintained that netting is permitted for other base erosion payments. This comment also noted that netting was provided under proposed section 4491, an inbound base erosion provision included in section 4303 of the House version of H.R. 1, before the Senate amended H.R.1 to include the BEAT in place of proposed section 4491. This comment also recommended that netting be permitted because other sections of the Code or regulations include netting concepts, such as sections 163(j), 250 and 951A, and the aggregation rule in § 1.482–1T(f)(2)(i)(B).

Some comments recommended that the final regulations permit netting when the foreign related party payee has a corresponding obligation to make payments to an unrelated third party payee. Some of these comments asserted that base erosion payments arise because of commercial and regulatory efficiency and expediency, rather than because of tax planning. These comments recommended that netting be permitted in ordinary course transactions. Other comments recommended that the final regulations permit netting for deductible amounts owed by a domestic corporation to a foreign related party if the foreign related party also owes amounts to the domestic corporation and the obligations are settled on a net basis.

The Treasury Department and the IRS have determined that it is appropriate to retain the approach in the proposed regulations that the amount of a base erosion payment is determined on a gross basis, except as provided in the BEAT Netting Rule and to the extent permitted by the Code or regulations. See part III.D of this Summary of Comments and Explanation of Revisions (Mark-to-market deductions). As explained in the preamble to the proposed regulations, amounts of income and deduction are generally determined on a gross basis under the Code. REG–104259–18, 83 FR 65956, 65968 (December 21, 2018). For example, whether the amount of income or deductions with respect to financial contracts that provide for offsetting payments is taken into account on a gross or net basis is determined under generally applicable federal income tax law. Section 59A does not change that result.

The final regulations are consistent with the statutory framework of section 59A. Section 59A specifically addresses deductible payments and other statutorily defined base erosion payments, and imposes tax on an increased base of modified taxable income, but at a lower tax rate than the corporate income tax rate set forth in section 11. If regulations provided that statutorily defined base erosion payments could be reduced by offsetting amounts received, then the regulations would substantially limit the scope of section 59A. Section 11 imposes a tax on a corporation's taxable income. Taxable income is defined as gross income minus the deductions allowed by chapter 1 of the Code. Section 63. Gross income is generally defined as income from whatever source derived. Section 61. The amount of income and deductions are generally determined on a gross basis under the Code. Nothing in section 59A evidences Congressional intent to alter this framework. In fact, section 59A(c) determines modified taxable income from the starting point of taxable income as defined in section 63.

A netting rule would have the same effect as allowing a deduction from gross income because it would reduce the amount of a taxpayer's modified taxable income, and in that sense would conflict with section 59A(c)(1) (disallowing a deduction for base erosion tax benefits). Congress determined that certain deductions, namely those that are within the statutory definition of a base erosion payment, should not be allowed for purposes of the tax imposed under section 59A, and therefore, limited the availability of these deductions. Permitting netting of items of gross income and deductions to determine the amount of a base erosion payment would frustrate Congress' purpose in enacting section 59A.

In addition, the other provisions of the Code and regulations that are cited by comments are irrelevant to the analysis of section 59A and do not provide support for adopting a netting rule for purposes of section 59A. Whereas sections 163(j) and 951A refer explicitly to net amounts, section 59A explicitly refers to a deduction allowable under Chapter 1 of the Code. Section 250 provides rules for determining whether services are for ''foreign use'' by contemplating services provided to and from a related party that are substantially similar. This destination-based rule is entirely different from the construct of section 59A, and, moreover, section 59A contains no similar language contemplating payments to and from a related party. Proposed section 4491 would have operated through the regular income tax system and would have represented a fundamentally different approach to inbound base erosion than section 59A; therefore, that proposed revision to the Code is not relevant here. The aggregation rule in § 1.482–1T(f)(2)(i)(B) does not involve the treatment of payments to foreign related parties, and thus is not relevant for purposes of analyzing the meaning of section 59A.

Some comments also cited the heading to section 59A(h) (exception for certain payments made in the ordinary course of trade or business) as support for a regulatory exception for ordinary course transactions for which a taxpayer has not adopted a mark-to-market method of accounting. Specifically, these comments suggested that Congress did not intend for section 59A(h)(2)(A)(i) to limit the QDP exception to only transactions that are marked-to-market. The citations to the heading to section 59A(h) are inconsistent with the statutory rule in section 59A(h), which provides a narrowly defined exception applicable to derivative payments under specific circumstances.

b. Hedging Transactions

Another comment recommended that the final regulations permit netting in the narrow context of related-party hedging transactions. The comment observed that the QDP exception applies to related-party hedging transactions when the taxpayer uses a mark-to-market method of accounting. The comment asserted that there is no policy rationale for limiting netting relief to taxpayers that use a mark-to-market method of accounting; therefore, the comment requested that the QDP exception be expanded to also apply to taxpayers that apply the mark-to-market method for financial accounting purposes. Alternatively, the comment recommended that taxpayers engaged in related- party hedging transactions be permitted to net income items against deduction items.

The final regulations do not provide for a netting rule for related-party hedging transactions. As discussed in Part IV.A.3.a of this Summary of Comments and Explanation of Revisions, permitting netting for related-party hedging transactions would be inconsistent with the statutory framework of section 59A. Furthermore, this recommendation would eliminate or substantially modify one of the three statutory requirements for the QDP exception (that is, use of the mark-to-market accounting method).

c. Clarification of Netting Under Current Law

Finally, some comments recommended that the final regulations clarify when netting is permitted under the Code and regulations, including confirming that netting is permitted for notional principal contracts and for cost sharing transaction payments under § 1.482–7(j)(3)(i). The Treasury Department and the IRS decline to provide such specific guidance because it is beyond the scope of the final regulations; however, the Treasury Department and the IRS are cognizant that section 59A may place more significance on some sections of the Code than was the case before the Act. The Treasury Department and the IRS intend to study the effect of these provisions on the BEAT and whether changes should be made to the regulations thereunder to better take into account new considerations under the BEAT.

B. Treatment of Certain Specific Types of Payments

1. Losses Recognized With Respect to the Sale or Transfer of Property to a Foreign Related Party

Section 59A(d) defines a base erosion payment to include any amount paid or accrued by a taxpayer to a foreign related party with respect to which a deduction is allowable. Proposed § 1.59A–3(b)(1)(i) repeats this statutory language. Proposed § 1.59A–3(b)(2)(i) provides that ''an amount paid or accrued'' includes an amount paid or accrued using any form of consideration, including cash, property, stock, or the assumption of a liability. In explaining this provision, the preamble to the proposed regulations states that ''a base erosion payment also includes a payment to a foreign related party resulting in a recognized loss; for example, a loss recognized on the transfer of property to a foreign related party.'' REG–104259–18, 83 FR 65956, 65960 (December 21, 2018).

This principle would apply if, for example, a taxpayer transfers to a foreign related party (a) built-in-loss property as payment for a deductible service provided by the foreign related party to the taxpayer (the latter of which may also be a base erosion payment), (b) built-in-loss property as payment for a good or service that the taxpayer is required to capitalize (for example, COGS) such that the payment is not deductible to the taxpayer (the latter of which is not a base erosion payment), or (c) depreciated nonfunctional currency as a payment for a nonfunctional currency denominated amount owed by a taxpayer.

Comments requested that the final regulations revise the definition of a base erosion payment to exclude losses recognized on the sale or exchange of property by a taxpayer to a foreign related party. According to these comments, a payment made with, or a sale of, built-in-loss property is not encompassed within the statutory definition of a base erosion payment. Comments stated that both the statutory and proposed regulations' definition contain two requirements for a payment to be a base erosion payment: There must be (i) an amount paid or accrued by the taxpayer to a foreign person that is a related party of the taxpayer; and (ii) a deduction must be allowable with respect to that amount.

Regarding the first requirement—that there must be an amount paid or accrued by the taxpayer to a foreign related party—when a U.S. taxpayer sells property to a foreign related party for cash, the comments noted that no payment or accrual has taken place by the U.S. taxpayer for purposes of section 59A; rather, the U.S. taxpayer is receiving a cash payment in exchange for the transferred property, and is not making a payment. Thus, the comments argued, the first requirement for a base erosion payment, that a payment or accrual exists, has not been met.

Regarding the second requirement—that a deduction must be allowable with respect to that amount—comments argued that even if a payment is found to have been made to the foreign related party, the deduction for the loss on the built-in-loss property is not with respect to this payment. That is, the comments argued that the loss deduction is not attributable to any ''payment'' made to the foreign related party (the form of consideration in the transaction); rather, the loss is attributable to the taxpayer's basis in the built-in loss property. Although that built-in-loss is recognized in connection with the transfer to a foreign related party, and thus could meet the statutory requirement as allowed ''with respect to'' the payment, the comments recommended a narrower interpretation that views the recognized loss as arising independently from the payment, that is viewed as merely a corollary consequence unrelated to the payment being made to the foreign related party.

The final regulations adopt the recommendation provided in these comments. The final regulations clarify the definition of a base erosion payment in § 1.59A–3(b)(1)(i) and (b)(2)(ix) to provide that a loss realized from the form of consideration provided to the foreign related party is not itself a base erosion payment. For the reasons described in the comments and discussed in this Part of the Summary of Comments and Explanation of Revisions, this treatment aligns the definition of base erosion payment with the economics of the payment made by the applicable taxpayer to the foreign related party. That is, the term ''base erosion payment'' does not include the amount of built-in-loss because that built-in-loss is unrelated to the payment made to the foreign related party. This rule applies regardless of whether the loss realized from the form of consideration provided to the foreign related party is itself consideration for an underlying base erosion payment. To the extent that a transfer of built-in-loss property results in a deductible payment to a foreign related party that is a base erosion payment, the final regulations clarify that the amount of the base erosion payment is limited to the fair market value of that property.

2. Transfers of Property Between Related Taxpayers

The proposed regulations limit the ability of a taxpayer to eliminate base erosion tax benefits by transferring depreciable or amortizable property to another member of the taxpayer's aggregate group. Specifically, proposed § 1.59A–3(b)(2)(vii) provides that if a taxpayer holds depreciable or amortizable property that produces depreciation or amortization deductions that are base erosion tax benefits to the taxpayer, those depreciation or amortization deductions will continue to be treated as a base erosion tax benefit for the acquirer if the taxpayer transfers the property to another member of its aggregate group.

The Treasury Department and the IRS are aware of similar transactions involving a domestic corporation that ordinarily acquires, from a foreign related party, property that is subject to an allowance for depreciation or amortization in the hands of the domestic corporation. In the transaction, the domestic corporation inserts into its supply chain a second domestic corporation, with a principal purpose of avoiding base erosion payments. Specifically, the second domestic corporation, a dealer in property that avails itself of the exclusion of COGS from the definition of a base erosion payment in section 59A(d)(1) and (2), acquires the property from the foreign related party and in turn resells the property to the first domestic corporation. The Treasury Department and the IRS view this type of transaction as already within the scope of the anti-abuse rule set forth in proposed § 1.59A–9(b)(1) (transactions involving unrelated persons, conduits, or intermediaries), and have added an example to the final regulations clarifying the application of this anti-abuse rule to similar fact patterns.

3. Corporate Transactions

The proposed regulations provide that a payment or accrual by a taxpayer to a foreign related party may be a base erosion payment regardless of whether the payment is in cash or in any form of non-cash consideration. *See* proposed § 1.59A–3(b)(2)(i). There may be situations where a taxpayer incurs a non-cash payment or accrual to a foreign related party in a transaction that meets one of the definitions of a base erosion payment, and that transaction may also qualify under certain nonrecognition provisions of the Code. Examples of these transactions include a domestic corporation's acquisition of depreciable assets from a foreign related party in an exchange described in section 351, a liquidation described in section 332, and a reorganization described in section 368.

The proposed regulations do not include any specific exceptions for these types of transactions even though (a) the transferor of the assets acquired by the domestic corporation may not recognize gain or loss, (b) the acquiring domestic corporation may take a carryover basis in the depreciable or amortizable assets, and (c) the importation of depreciable or amortizable assets into the United States in these transactions may increase the regular income tax base as compared to the non-importation of those assets. In the preamble to the proposed regulations, the Treasury Department and the IRS also note that for transactions in which a taxpayer that owns stock in a foreign related party receives depreciable property from the foreign related party as an in-kind distribution subject to section 301, there is no base erosion payment because there is no consideration provided by the taxpayer to the foreign related party in exchange for the property. REG–104259–18, 83 FR 65956, 65960 (December 21, 2018). Thus, there is no payment or accrual in that transaction.

The preamble to the proposed regulations requests comments about the treatment of payments or accruals that consist of non-cash consideration. REG–104259–18, 83 FR 65956, 65960 (December 21, 2018). Comments have suggested that corporate nonrecognition transactions or transactions in which U.S. taxpayers do not obtain a step-up in the tax basis of an acquired asset should not be treated as a base erosion payment. They argued that these nonrecognition transactions should not be treated as a payment or accrual. Based on this position, some comments argued either that the Treasury Department and the IRS do not have the authority to treat nonrecognition transactions as base erosion payments or that the better policy is to exclude nonrecognition transactions from the definition of base erosion payments. Furthermore, comments argued that nonrecognition provisions such as sections 332, 351, and 368 reflect the judgment of Congress that certain corporate transactions such as the formation and dissolution of businesses and the readjustment of continuing interests in property do not warrant the imposition of tax. They also argued that the legislative history of section 59A does not suggest that Congress intended for it to apply to nonrecognition transactions.

With regard to section 332 liquidations, comments argued that a section 332 liquidation should not be treated as a base erosion payment when a section 301 distribution is not. Furthermore, comments argued that transactions in which stock is merely deemed to be exchanged, like certain section 351 transactions or section 332 liquidations, should not be treated as base erosion payments since there is no actual transfer of shares.

Comments also argued that nonrecognition transactions are not base eroding. Comments asserted that inbound nonrecognition transactions are often used in post-acquisition restructurings, as well as in other internal restructurings to better align a multinational organization's legal structure with its commercial operations. Comments also argued that treating these transactions as base erosion payments would provide a disincentive to move intangible property and other income-producing property into the United States, contrary to the goals of the Act.

Furthermore, comments argued that amortization of a carryover tax basis of an asset acquired by a U.S. taxpayer from a related party in a nonrecognition transaction would not create the same base erosion concerns as other types of deductions. However, comments acknowledged that, if final regulations adopted a broad exception for nonrecognition transactions, taxpayers could abuse that exception by engaging in certain basis step-up transactions immediately before an inbound nonrecognition transfer. Comments suggested that augmenting the conduit anti-abuse rule of proposed § 1.59A–9 may be sufficient to prevent these types of transactions. Alternatively, comments also suggested that, to delineate cases of potential abuse, a rule similar to the 5-year active trade or business rules in § 1.355–3 could apply to specify instances when assets would qualify as not being ''recently stepped up assets.''

Comments generally supported the statement in the preamble to the proposed regulations that a section 301 distribution is not treated as a base erosion payment because there is no exchange, and requested that the exclusion be included in the final regulations as well as the preamble. Comments also requested that the definition of a base erosion payment also exclude exchanges (including section 302 and 304 transactions) that are treated as section 301 distributions pursuant to section 302(d).

Comments have generally acknowledged that the taxable transfer of depreciable or amortizable property in exchange for stock should be subject to the BEAT. For example, comments stated that the transfer of assets to a corporation that is partially taxable to the transferor pursuant to section 351(b) or 356 as a result of the receipt of ''boot'' by the transferor is appropriately treated as a base erosion payment. The amount of the base erosion payment could be determined based on the gain or increase in basis of the property, the amount of boot allocated to the property, or by treating all of the boot as paid for depreciable or amortizable property first, to the extent thereof. Comments also requested clarity on the treatment of the assumption of liabilities pursuant to a nonrecognition transaction. One comment requested that the assumption of liabilities in a nonrecognition transaction be excluded from the definition of a base erosion payment to the extent that the assumption is not treated as money or other property. This comment suggested that, if the Treasury Department and the IRS are concerned about abusive transactions, an anti-abuse rule could be designed to treat certain liabilities as base erosion payments.

Similarly, comments stated that the taxable transfer of assets to a domestic corporation in exchange for stock, such as in a so-called ''busted section 351 transaction,'' should be subject to the BEAT. Comments also discussed whether a taxable distribution to a domestic corporation in a section 331 liquidation of a foreign corporation should be subject to the BEAT. These comments acknowledged that taxable transactions generally give rise to base erosion payments and did not take a view on whether section 331 liquidations should be subject to the BEAT. Accordingly, comments requested that nonrecognition transactions be excluded from the definition of a base erosion payment only to the extent that the U.S. taxpayer obtains a carryover basis in the acquired asset. Alternatively, comments have requested a safe harbor that would exclude nonrecognition transactions that are part of post-acquisition restructuring to allow taxpayers to transfer into the United States intellectual property that was recently acquired from a third party. Comments have also requested that final regulations clarify that nonrecognition transactions that occurred before the effective date of the BEAT will not be treated as base erosion payments.

Finally, comments have noted that a nonrecognition transaction involving a U.S. branch of a foreign corporation may not qualify for the ECI exception under proposed § 1.59A–3(b)(3)(iii) for payments that are treated as effectively connected income in the hands of the payee, because the ECI exception under proposed § 1.59A–3(b)(3)(iii) is predicated on the payment or accrual being subject to U.S. federal income taxation, which cannot occur when the transaction is not taxable.

Consistent with these comments, the final regulations generally exclude amounts transferred to, or exchanged with, a foreign related party in a transaction described in sections 332, 351, and 368 (''corporate nonrecognition transaction'') from the definition of a base erosion payment. In light of the comments, the Treasury Department and the IRS have determined a limited exclusion of corporate nonrecognition transactions is consistent with the underlying anti-base erosion purpose of the BEAT, tends to reduce disincentives for taxpayers to move intangible property and other income-producing property into the United States in corporate nonrecognition treatment transactions, and is consistent with the general treatment of corporate nonrecognition transactions under other sections of the Code. However, the Treasury Department and the IRS have determined that it is not appropriate to apply this exception to the transfer of other property, or property transferred in exchange for other property, in a corporate nonrecognition transaction. Solely for purposes of determining what is a base erosion payment, ''other property'' has the meaning of other property or money, as used in sections 351(b), 356(a)(1)(B), and 361(b), as applicable, including liabilities described in section 357(b). However, other property does not include the sum of any money and the fair market value of any property to which section 361(b)(3) applies. Other property also includes liabilities that are assumed by the taxpayer in a corporate nonrecognition transaction, but only to the extent of the amount of gain recognized under section 357(c).

For example, if a foreign corporation transfers depreciable property to its wholly owned domestic subsidiary in a transaction to which section 351 applies, and if the foreign corporation receives subsidiary common stock and cash in exchange, the cash may be treated as a base erosion payment, while the common stock is not. Similarly, property transferred in a section 351 or 368 transaction in exchange, in whole or in part, for other property may be a base erosion payment if it otherwise meets the definition of a base erosion payment. For example, if a domestic corporation transfers property to its wholly-owned foreign subsidiary in a transaction to which section 351 applies, and if the domestic corporation receives common stock in the foreign corporation and other property consisting of depreciable property, the property transferred by the domestic corporation may be a base erosion payment. These rules apply without regard to whether or not gain or loss is recognized in the transaction.

When a taxpayer transfers other property to a foreign related party, or transfers property to a foreign related party in exchange for other property, the determination of the amount of property that is treated as received from the foreign related party in exchange for the property transferred to the foreign related party is based on U.S. federal income tax law. See, for example, Rev. Rul. 68–55, 1968–1 C.B. 140.

Consistent with concerns raised by comments, the Treasury Department and the IRS are concerned that the exclusion of nonrecognition transactions could lead to inappropriate results in certain situations. An example of an inappropriate result is the sale of depreciable property between foreign related parties shortly before a nonrecognition transaction, which could step up the taxpayer's basis in the property and increase depreciation or amortization deductions of the domestic corporation after the nonrecognition transaction relative to the alternative in which the step-up basis transactions did not occur. Accordingly, the Treasury Department and the IRS have determined that it is appropriate to specifically address these transactions with an anti-abuse rule. *See* § 1.59A–9(b)(4). The anti-abuse rule applies in addition to, and in conjunction with, section 357(b). In addition, the Treasury Department and the IRS observe that, because the BEAT is applied after the application of general U.S. federal income tax law, other doctrines—including the step transaction doctrine and economic substance doctrine—also may apply.

Because the final regulations provide an exception for corporate nonrecognition transactions, it is not necessary for the final regulations to include other suggested modifications, such as (i) modifying the ECI exception for nonrecognition transactions involving U.S. branches, (ii) providing a safe harbor that would exclude nonrecognition transactions that are part of a post-acquisition restructuring, or (iii) clarifying that nonrecognition transactions that occurred before the effective date of the BEAT are not treated as base erosion payments.

The final regulations also clarify the treatment of distribution transactions, such as distributions described in section 301, and redemption transactions, such as redemptions described in section 302. A distribution with respect to stock for which there is no consideration (a ''pure distribution'') is not treated as an exchange. Accordingly, the final regulations provide that a pure distribution of property made by a corporation to a shareholder with respect to its stock is not an amount paid or accrued by the shareholder to the corporation. These pure distributions include distributions under section 301, without regard to the application of section 301(c) to the shareholder (addressing distributions in excess of earnings and profits). § 1.59A–3(b)(2)(ii). However, unlike a pure distribution, a redemption of stock in exchange for property constitutes an exchange. Accordingly, the final regulations provide that a redemption of stock by a corporation within the meaning of section 317(b) (such as a redemption described in section 302(a) and (d) or section 306(a)(2)), or an exchange of stock described in section 304 or section 331, is an amount paid or accrued by the shareholder to the corporation (or by the acquiring corporation to the transferor in a section 304 transaction).

4. Interest Expense Allocable to a Foreign Corporation's Effectively Connected Income

a. In General

Section 59A applies to foreign corporations that have income that is subject to net income taxation as effectively connected with the conduct of a trade or business in the United States, taking into account any applicable income tax treaty of the United States. The proposed regulations generally provide that a foreign corporation that has interest expense allocable under section 882(c) to income that is effectively connected with the conduct of a trade or business within the United States will have a base erosion payment to the extent the interest expense results from a payment or accrual to a foreign related party. The amount of interest that will be treated as a base erosion payment depends on the method used under § 1.882–5.

If a foreign corporation uses the three-step method described in § 1.882–5(b) through (d), the proposed regulations provide that interest on direct allocations and on U.S.-booked liabilities that is paid or accrued to a foreign related party will be a base erosion payment.[1] *See* proposed § 1.59A–3(b)(4)(i)(A). If U.S.-booked liabilities exceed U.S.-connected liabilities, the proposed regulations provide that a foreign corporation computing its interest expense under this method must apply the scaling ratio to all of its interest expense on a pro-rata basis to determine the amount that is a base erosion payment. The amount of interest on excess U.S.-connected liabilities that is a base erosion payment is equal to the interest on excess U.S.-connected liabilities multiplied by the foreign corporation's ratio of average foreign related-party liabilities over average total liabilities. *See* proposed § 1.59A–3(b)(4)(i)(A)(*2*).

If a foreign corporation determines its interest expense under the separate currency pools method described in § 1.882–5(e), the proposed regulations provide that the amount of interest expense that is a base erosion payment is equal to the sum of (1) the interest expense on direct allocations paid or accrued to a foreign related party and (2) the interest expense in each currency pool multiplied by the ratio of average foreign related-party liabilities over average total liabilities for that pool. *See* proposed § 1.59A–3(b)(4)(i)(B).

Comments requested that a consistent method apply to determine the portion of interest allocated to a U.S. branch that is treated as paid to a foreign related party. The comments noted that the methods in the proposed regulations may produce meaningfully different amounts of base erosion payments depending on which method the taxpayer uses to determine its branch interest expense. Comments noted that a branch that uses the method described in § 1.882–5(b) through (d) may have a lower amount of base erosion payments than a branch using the method described in § 1.882–5(e) or a permanent establishment applying a U.S. tax treaty, although those differences will ultimately depend on the composition of the counterparties of the U.S.-booked liabilities and the excess U.S.-connected liabilities (as foreign related parties or not foreign related parties). See also Part IV.B.5 of this Summary of Comments and Explanation of Revisions for a discussion of interest allowed to permanent establishments applying a U.S. tax treaty. The comments argued that these differences are not supported by tax policy.

Comments generally requested a rule permitting or requiring foreign corporations to use U.S.-booked liabilities to determine the portion of U.S. branch interest expense that is treated as paid to foreign related parties, consistent with the method described in the proposed regulations for corporations that determine U.S. branch interest expense using the method described in § 1.882–5(b) through (d), even if the U.S. branch uses a different method to determine its interest expense. The comments argued that U.S. assets are used to determine the amount of leverage that is properly allocable to a U.S. branch, and, as a result, U.S.-booked liabilities should determine the amount of interest treated as a base erosion payment. Specifically with regard to banks, a comment argued that banks are highly regulated with limited or no ability to manipulate U.S.-booked liabilities, and, as a result, should be permitted to use U.S.-booked liabilities to determine the amount of U.S. branch interest expense treated as paid to foreign related parties.

The Treasury Department and the IRS agree that the rules for determining the portion of U.S. branch interest paid to foreign related parties should be consistent, regardless of whether taxpayers apply the method described in § 1.882–5(b) through (d) or § 1.882–5(e). For purposes of section 59A, the Treasury Department and the IRS agree that the starting point for determining the identity of the recipient should be the U.S. booked liabilities of the U.S. branch. The final regulations, therefore, provide that the amount of U.S. branch interest expense treated as paid to a foreign related party is the sum of: (1) The directly allocated interest expense that is paid or accrued to a foreign related party, (2) the interest expense on U.S.-booked liabilities that is paid or accrued to a foreign related party, and (3) the interest expense on U.S.-connected liabilities in excess of interest expense on U.S.-booked liabilities multiplied by the ratio of average foreign related-party interest over average total interest (excluding from this ratio interest expense on U.S. booked liabilities and interest expense directly allocated). *See* § 1.59A–3(b)(4)(i)(A); *see also* Part IV.B.4.b.i of this Summary of Comments and Explanation of Revisions (discussing the change from a worldwide liability ratio to a worldwide interest ratio). In adopting a consistent approach, the final regulations use the same ratio to determine whether the interest expense on U.S.-connected liabilities is paid to a foreign related party regardless of whether a taxpayer applies the method described in § 1.882–5(b) through (d) or § 1.882–5(e). *See* § 1.59A–3(b)(4)(i)(A)(3).

b. Simplifying Conventions

The Treasury Department and the IRS recognize that § 1.882–5 provides certain simplifying elections for determining the interest deduction of a foreign corporation. The proposed regulations request comments about similar simplifying elections for determining the portion of U.S.-connected liabilities that are paid to a foreign related party for purposes of section 59A. REG–104259–18, 83 FR 65956, 65960 (December 21, 2018).

Comments, in response to the request for comments on simplifying conventions, indicated that it may be difficult for foreign corporations to determine their worldwide ratio of liabilities owed to foreign related parties over total liabilities (''worldwide liabilities ratio''). For example, they argued that U.S. branches of foreign banks typically do not have full access to information about the bank's global operations and funding arrangements. These comments argued that even if a U.S. branch does have that information, U.S. tax law may treat some transactions as debt that non-U.S. tax law does not, or may integrate some hedging costs that are not integrated for non-U.S. tax purposes, or vice-versa. These comments further observed that if the taxpayer is using the fixed ratio election for purposes of § 1.882–5, the taxpayer would not be required to obtain that information or reconcile the home office balance sheet to U.S. tax law principles for purposes of § 1.882–5. Thus, the comments argued that attempting to reconstruct a global balance sheet and payments under U.S. tax principles for purposes of proposed § 1.59A–3 is burdensome and should not be required.

The comments also requested various simplifying elections for determining the amount of U.S. branch interest treated as paid to foreign related parties, including (a) computing the worldwide ratio by reference to interest expense rather than worldwide liabilities (''worldwide interest ratio''), (b) using financial accounting books and records rather than U.S. tax principles to determine a worldwide ratio, or (c)

[1] For purposes of § 1.882–5, direct allocations generally refer to the requirement that a foreign corporation allocate interest expense to income from particular assets; these circumstances generally arise with respect to (i) certain assets that are subject to qualified nonrecourse indebtedness or (ii) certain assets that are acquired in an integrated financial transaction.

providing a fixed ratio for purposes of determining the minimum amount of interest treated as paid to third parties (such as 85 percent).

i. Worldwide Interest Ratio

The final regulations adopt the comment recommending that taxpayers apply the worldwide ratio to determine the amount of a U.S. branch's interest expense paid to foreign related parties by reference to a worldwide ratio of interest expense, rather than a worldwide ratio of liabilities. *See* § 1.59A–3(b)(4)(i)(A)(3). The final regulations adopt this approach as a rule, rather than as an election, because the Treasury Department and the IRS agree with the comments that a worldwide ratio based on interest expense, rather than liabilities, is the appropriate measurement for determining a U.S. branch's base erosion payments. Section 59A determines the amount of interest that is a base erosion payment based on the amount of interest paid or accrued to foreign related parties, rather than the amount of liabilities owed to foreign related parties. Accordingly, the final regulations determine the amount of a U.S. branch's interest expense treated as a base erosion payment based on the foreign corporation's worldwide interest ratio.

ii. Use of Applicable Financial Statements

The Treasury Department and the IRS recognize that it may be difficult for foreign corporations to determine their worldwide interest ratio under U.S. tax principles, as indicated by the comments. Accordingly, for simplicity and to reduce the administrative burden on taxpayers, the final regulations adopt the comment to allow taxpayers to elect to determine their worldwide interest ratio using their applicable financial statements as described in section 451(b)(3). *See* § 1.59A–3(b)(4)(i)(D). The final regulations also clarify that the applicable financial statement must be the applicable financial statement of the taxpayer, not a consolidated applicable financial statement, because a consolidated applicable financial statement may eliminate inter-company liabilities. The final regulations provide that a taxpayer makes this election on Form 8991 or a successor form. Until the Form 8991 is revised to incorporate the election, a taxpayer should attach a statement with that form to make this election as provided in forms and instructions.

iii. Fixed Ratio or Safe Harbor for the Worldwide Interest Ratio

The final regulations do not adopt a fixed ratio or safe harbor for the worldwide interest ratio as suggested in comments because the actual worldwide interest ratio of an enterprise may vary significantly from one industry to another and from one taxpayer to another. As a result, it is not possible to establish a single safe harbor that appropriately takes into account the differing position of industries and taxpayers while protecting the interests of the government. The Treasury Department and the IRS recognize that § 1.882–5 provides other safe harbors, such as the fixed ratio safe harbor for determining the ratio of liabilities to assets of 95 percent for banks and 50 percent for other taxpayers. § 1.882–5(c)(4). In the context of determining the portion of a U.S. branch's interest expense that is deemed attributed to foreign related parties (versus other persons), the Treasury Department and the IRS determined that there is not a sufficient basis to establish a safe harbor because different taxpayers could have different internal capital structures.

One comment suggested that a U.S. branch of a bank should be permitted to assume that 85 percent of its funding is from unrelated lenders because regulations under section 884 provide a safe harbor assumption that 85 percent of a bank's capital can be deemed to come from deposits (and thus eligible for the bank deposit interest exemption from the tax imposed by section 881(a)). *See* § 1.884–4(a)(2)(iii). The section 884 safe harbor, however, is not relevant to the determination of the ratio of funding from foreign related parties because the bank deposit exception is available for both related and unrelated depositors/lenders. Thus, this section 884 safe harbor does not reflect the expected percentage of the lenders who are not foreign related parties. *See* section 871(i)(2) and section 881(d).

c. Other Coordinating Rules

The final regulations also revise § 1.59A–3(b)(4)(1) to take into account the expansion of the exception for certain total loss-absorbing capacity securities to include foreign issuers. See Part IV.C.5 of this Summary of Comments and Explanation of Revisions (Exception for Interest on Certain Instruments Issued by Globally Systemically Important Banking Organizations).

Finally, a comment recommended that the final regulations revise proposed § 1.59A–3(b)(4)(i)(D), which provides that to the extent that a taxpayer makes an election to reduce its U.S.-connected liabilities pursuant to § 1.884–1(e)(3), the reduction is treated as proportionally reducing all liabilities for purposes of determining the amount of allocable interest expense that is treated as a base erosion payment. The comment argued that § 1.59A–3(b)(4)(i)(D) is inconsistent with § 1.884–1(e)(3), which applies for all purposes of the Code, and which the comment asserted does not require proportionate reduction. In response to this comment, the final regulations do not include the rule in proposed § 1.59A–3(b)(4)(i)(D). The Treasury Department and the IRS are considering § 1.884–1(e)(3) for possible future guidance.

5. Allocations of Interest and Other Expenses Pursuant to Income Tax Treaties

The proposed regulations provide a specific rule for determining the amount of base erosion payments attributable to interest and deductions allocated to a permanent establishment under a U.S. income tax treaty. Certain U.S. income tax treaties provide alternative approaches for the allocation or attribution of business profits of an enterprise of one contracting state to its permanent establishment in the other contracting state on the basis of assets used, risks assumed, and functions performed by the permanent establishment. These treaties allow notional payments that take into account interbranch transactions and value the interbranch transactions using the most appropriate arm's length method for those transactions. A treaty-based expense allocation or attribution method does not itself create legal obligations between the U.S. permanent establishment and the rest of the enterprise. The proposed regulations reflect that under a treaty-based expense allocation or attribution method, amounts equivalent to deductible payments may be allowed in computing the business profits of an enterprise with respect to transactions between the permanent establishment and the home office or other branches of the foreign corporation (''internal dealings''). The deductions from internal dealings would not be allowed under the Code and regulations. The proposed regulations provide that deductions from internal dealings allowed in computing the business profits of the permanent establishment are base erosion payments.

The proposed regulations distinguish between the allocations of expenses and internal dealings. The allocation and apportionment of expenses of the enterprise to the branch or permanent establishment is not a base erosion payment because the allocation represents a division of the expenses of the enterprise, rather than a payment between the branch or permanent establishment and the rest of the enterprise. Internal dealings, however, are not mere divisions of enterprise expenses; rather, internal dealings are priced on the basis of assets used, risks assumed, and functions performed by the permanent establishment in a manner consistent with the arm's length principle. The proposed regulations create parity between deductions for actual regarded payments between two separate corporations (which are subject to section 482), and internal dealings (which are generally priced in a manner consistent with the applicable treaty and, if applicable, the OECD Transfer Pricing Guidelines). The proposed regulations apply only to deductions attributable to internal dealings, and not to payments to entities outside of the enterprise, which are subject to the general base erosion payment rules as provided in proposed § 1.59A–3(b)(4)(v)(A).

Comments noted that internal dealings are a fiction and do not involve an actual payment or accrual under general U.S. tax principles. The comments suggested that internal dealings should be relevant only for purposes of determining the profit attributable to the permanent establishment and should not be recognized for other purposes. They noted that the OECD 2010 Report on the Attribution to Profits to Permanent Establishments (''2010 OECD Report'') states that recognizing internal dealings by a permanent establishment ''is relevant only for the attribution of profits'' and ''does not carry wider implications as regards, for example, withholding taxes.'' 2010 OECD Report (July 22, 2010), Part IV, C–1(iii)(f), section 166. Thus, comments suggested that internal dealings should not be relevant for BEAT purposes.

The Treasury Department and the IRS disagree that internal dealings are not relevant for purposes of determining a foreign corporation's base erosion payments. Unlike the allocation of a foreign corporation's deductions to a U.S. branch under the Code and regulations, internal dealings are not a mere allocation of expenses, but rather are determined on the basis of assets used, risks assumed, and functions performed by the permanent establishment in a manner consistent with the arm's length principle. Deductions determined under internal dealings, like deductions determined under the Code and regulations, reduce the U.S. income tax base of the permanent establishment. Because internal dealings are not an allocation of expenses, the foreign corporation's worldwide ratio may not be an appropriate measure of related party payments. Instead, in the proposed regulations, the Treasury Department and the IRS determined that it is appropriate to look to the internal dealings, rather than the foreign corporation's worldwide expenses, for purposes of determining base erosion payments.

However, the Treasury Department and the IRS recognize that interest expense allowed to a permanent establishment as internal dealings often represents interest expense on back-to-back loans between (1) the permanent establishment and the home office, and (2) the home office and another entity. Furthermore, unlike other deductions that are often based on payments to the home office or to another branch for goods or services or the use of intellectual property unique to the home office or branch, money is fungible. A permanent establishment may be indifferent to whether its capital comes from the home office or a loan from another entity.

The Treasury Department and the IRS have determined that interest expense determined under § 1.882–5 generally provides a reasonable estimate of the amount of interest of the foreign corporation that should be allocated to the permanent establishment based on the assets of the permanent establishment. Accordingly, it is appropriate to treat interest expense determined in accordance with a U.S. tax treaty (including interest expense determined by internal dealings) in a manner consistent with the treatment of interest expense determined under § 1.882–5, to the extent it would have been allocated to the permanent establishment under § 1.882–5. In effect, the internal dealing permits the permanent establishment to replace an external borrowing with an internal dealing, and this internal dealing should be treated as creating additional interest expense paid to the home office, and thus treated as a base erosion payment to a foreign payee. Accordingly, interest expense determined in accordance with a U.S. tax treaty (including interest expense determined by internal dealings) that is in excess of the amount that would have been allocated to the permanent establishment under § 1.882–5 is treated as interest expense paid by the permanent establishment to the home office or another branch of the foreign corporation.

Specifically, the final regulations treat interest expense determined in accordance with a U.S. tax treaty (including interest expense determined by internal dealings) in a manner consistent with the treatment of interest expense determined under § 1.882–5, to the extent of the hypothetical amount of interest expense that would have been allocated to the permanent establishment under § 1.882–5 (the ''hypothetical § 1.882–5 interest expense''). For purposes of this calculation, the hypothetical § 1.882–5 interest expense cannot exceed the amount of interest expense determined under the U.S. tax treaty. Interest expense in excess of the hypothetical § 1.882–5 interest expense is treated as interest expense paid by the permanent establishment to the home office or another branch of the foreign corporation, and therefore is treated as a base erosion payment. *See* § 1.59A–3(b)(4)(i)(E).

Accordingly, under the final regulations, a foreign corporation determines its hypothetical § 1.882–5 interest expense by calculating the amount of interest that would have been allocated to effectively connected income if the foreign corporation determined its interest expense under § 1.882–5. *See* § 1.59A–3(b)(4)(i)(E)(2). Therefore, a foreign corporation will use the method provided in § 1.59A–3(b)(4)(i)(A), as described in Part IV.B.4.a in this Summary of Comments and Explanation of Provisions, to determine its hypothetical § 1.882–5 interest expense.

In this regard, the Treasury Department and the IRS observe that corporations eligible for benefits under a U.S. income tax treaty are permitted to choose whether to apply the treaty or the Code and regulations to calculate interest expense allocable to a permanent establishment or U.S. branch, and understand that many corporations eligible for treaty benefits calculate interest expense allocated to a U.S. branch or permanent establishment under both § 1.882–5 and the applicable treaty to determine whether to claim treaty benefits. Additionally, the Treasury Department and the IRS also understand that corporations that determine interest expense allowed to a permanent establishment under a U.S. income tax treaty may nonetheless be required to allocate interest to the permanent establishment under § 1.882–5 for state or local tax purposes.

6. Related-Party Hedging Payments

Comments requested that the final regulations provide relief from the application of the BEAT for hedging payments made by domestic corporations to foreign related parties, specifically in the context of the energy industry. The comments described a scenario in the energy industry where large multinational groups designate one or more members of their worldwide group to act as a hedging center to manage price risk associated with commodities that the group produces or sells through the execution of commodities derivatives. The comments indicated that under prevailing industry practice and applicable financial accounting standards, income, gain, loss, or expense on commodity derivatives are often accounted for as items of COGS or as a reduction to determine gross income for book accounting purposes. These items, however, are not treated as COGS or as another form of reduction to determine gross income for tax purposes; the items are deductions for tax purposes and potentially within the scope of section 59A(d)(1) and proposed § 1.59A–3(b)(1)(i). The payments described in these comments are not eligible for the QDP exception in section 59A(h) and proposed § 1.59A–6. The comments requested that the final regulations include a rule that related-party hedging payments are not base erosion payments.

The final regulations do not adopt this recommendation. The status of an item as a deduction is determined under U.S. federal income tax law, not industry practice or financial accounting treatment. Although the legislative history of section 59A states that base erosion payments do not include any amount that constitutes reductions to determine gross income, including payments for COGS, these statements are in the context of U.S. federal income tax law, which sets forth the tax law for deductions. In addition, section 59A(d)(1) refers to ''deductions allowable under this chapter,'' that is, chapter 1 (normal taxes and surtaxes) of Subtitle A (income taxes) of the Code, which includes section 1 through section 1440Z–2. Congress did not indicate that the definition of a reduction to determine gross income or COGS for purposes of section 59A should be derived from financial accounting principles. In the absence of clear Congressional intent otherwise, the Treasury Department and the IRS believe that whether an amount constitutes a reduction to determine gross income or COGS must be determined under established principles of U.S. federal income tax law. Consequently, if related-party hedging payments are not properly treated as reductions to determine gross income for tax purposes, these payments are not excluded from the definition of base erosion payments. See also Part IV.A.3.b of this Summary of Comments and Explanation of Revisions (Netting of income and expense; Hedging transactions).

7. Captive Finance Subsidiaries

Comments addressed the impact of the BEAT on domestic corporate captive finance subsidiaries that purchase property (business equipment) from a foreign related party and then lease the property to unrelated third party end users. The comments requested that the final regulations permit taxpayers using this type of business model to treat the depreciation deductions attributable to the leased property as COGS for purposes of the BEAT. The comments premised this requested treatment on the theory that the cost of the leased property and its associated depreciation deductions are directly correlated with the rental income generated from leasing the property and on the unique nature of this particular business model.

The final regulations do not include an exception from the definition of base erosion payments for the transactions described in these comments. Under section 59A(d)(2), the deduction allowed for depreciation with respect to property acquired from a foreign related party is a base erosion tax benefit, notwithstanding that the property acquired by the taxpayer is used in an income-generating business in the United States, such as the leasing of the business equipment to unrelated third party lessees of the property or operating the business equipment itself as a service for unrelated third parties.

8. Capitalization and Amortization of Research and Experimental Expenditures

One comment recommended that the final regulations clarify the treatment of research and experimental (''R&E'') expenditures after such costs are required to be amortized in taxable years beginning after December 31, 2021, under section 174. The comment recommended clarification that after the change to section 174 is in effect, the BEAT payment associated with R&E expenses is limited to the amount of amortization. The final regulations do not adopt this comment because the Treasury Department and the IRS view § 1.59A–3(b)(1)(i) and § 1.59A–3(c)(1)(i) as sufficiently clear in setting forth that a base erosion payment to a foreign related party does not result in a base erosion tax benefit until the deduction is ''allowed under chapter 1 of subtitle A of the [Code].''

C. Other Exceptions From the Base Erosion Payment Definition Contained in the Proposed Regulations

1. Exception for Certain Amounts With Respect to Services and the Services Cost Method

Proposed § 1.59A–3(b)(3)(i) provides that a base erosion payment does not result from amounts paid or accrued to a foreign related party for services that are eligible for the SCM exception described in proposed § 1.59A–3(b)(3)(i)(B), but only to the extent of the total services cost of those services. Any amount paid or accrued to a foreign related party in excess of the total services cost of services eligible for the SCM exception (the mark-up component) remains a base erosion payment. Proposed § 1.59A–3(b)(3)(i)(B) provides that the SCM exception applies if all of the requirements of § 1.482–9(b), which describes the SCM, are satisfied, with two exceptions. First, the requirements of § 1.482–9(b)(5), commonly referred to as the business judgment rule, do not apply. Second, the books and records requirement described in § 1.482–9(b)(6) is replaced with the requirements of proposed § 1.59A–3(b)(3)(i)(C). Section 1.482–9(b)(4) provides that certain activities, including research, development, and experimentation, are not eligible for the SCM. As a result, payments for these services do not qualify for the SCM exception described in proposed § 1.59A–3(b)(3)(i)(B).

Comments supported the SCM exception and recommended that final regulations adopt this approach. The final regulations continue to provide that the SCM exception is available for the cost portion of a payment that otherwise meets the requirements for the SCM exception. A comment recommended that the final regulations provide examples or clarification as to the requirement in proposed § 1.59A–3(b)(3)(i)(C) that taxpayers' books and records provide sufficient documentation to allow verification of the methods used to allocate and apportion the costs to the services in question in accordance with § 1.482–9(k). The final regulations include additional detail on the documentation required to satisfy this requirement. § 1.59A–3(b)(3)(i)(C).

Comments also recommended that the final regulations extend the SCM exception to the cost element of payments for other types of services that are not eligible for the SCM. Some comments suggested that an exception should be available for all services. Some comments suggested that an exception should be available for services that are excluded under § 1.482–9(b)(4) (excluded activities) but that otherwise would be eligible for the SCM exception described in proposed § 1.59A–3(b)(3)(i)(B). Some comments suggested that an exception should be available for research and experimentation services.

Comments suggested that applying the SCM exception to only some services will lead to inequitable results for services companies as compared to similarly situated U.S. manufacturers and distributors because the definition of base erosion payments does not include payments included in COGS, but there is not a similar rule for the costs in a services business. Comments also claimed that, relative to manufacturers or distributors, service companies are more constrained in where they operate. Comments also asserted that no base erosion could result from an expansion of the SCM exception because only the cost element of the service fee would be subject to the exception.

The comments suggesting that an exception should be available for excluded activities that otherwise would be eligible for the SCM also asserted that the list of excluded activities serves a similar purpose as the business judgment rule, which is to identify services for which total services costs can constitute an inappropriate reference point for determining profitability or that should be subject to a more robust transfer pricing analysis. Comments suggested that § 1.482–9(b)(4) is essentially a list of specific activities for which the SCM is unavailable because they are deemed to contribute significantly to key competitive advantages, core capabilities, or fundamental risks of success or failure of the business. These comments suggested that when section 59A(d) states that the exception therein is based on compliance with the services cost exception in section 482 ''(determined without regard to the requirement that the services not contribute significantly to fundamental risks of business success or failure)'', that language was intended to disregard the list of excluded activities.

The comments requesting an expansion of the SCM exception for research and experimentation services also asserted that extending the SCM exception to these services would reduce the incentive to move intangible property offshore and would broaden the U.S. tax base by encouraging U.S. ownership and exploitation of newly created intangible property.

Section 59A(d)(5)(A) sets forth the parameters under which certain services—those that are eligible for the SCM without regard to the business judgment rule—are eligible for the SCM exception. The Treasury Department and IRS have considered the policy considerations that the comments raised for expanding the SCM exception, but have determined that the recommendation to expand the SCM exception is inconsistent with the parameters that Congress set forth in section 59A(d)(5). Further, the Treasury Department and IRS disagree with the premise in the comments that the list of excluded activities serves the same purpose as the business judgment rule. While certain services that are ineligible for the SCM as a result of being on the list of excluded activities also may be ineligible for the SCM as a result of failing the business judgment rule, the list of excluded activities from the SCM provides an objective list of categories that tend to be high margin or for which the cost of the services tends to be an inappropriate reference point for the price of those services. *See* 71 FR 44466, 44467–68 (Aug. 4, 2006). By contrast, the business judgment rule also excludes from the SCM services that tend to be low margin as a general matter, but in the context of a particular business are a core competency of the business. *See* 71 FR 44466, 44467 (Aug. 4, 2006). The parenthetical language in section 59A(d)(5)(A) indicates unambiguously that Congress intended the SCM exception to be available for all services that are typically low margin even if, in the context of a particular business, the service is a core competency of a business that may not satisfy the criteria in § 1.482–9(b)(5). Accordingly, the Treasury Department and the IRS have determined that the SCM exception should continue to follow the statute, and the rule is unchanged from the proposed regulations.

2. Qualified Derivatives Payments

For a discussion of QDPs, see Part VII of this Summary of Comments and Explanation of Revisions.

3. Exception to Base Erosion Payment Status for Payments the Recipient of Which Is Subject to U.S. Tax

Proposed § 1.59A–3(b)(3)(iii) generally provides that a base erosion payment does not result from amounts paid or accrued to a foreign related party that are subject to tax as income effectively connected with the conduct of a trade or business in the United States (ECI). Comments recommended that final regulations adopt this rule. Accordingly, this rule is unchanged in the final regulations.

Several comments recommended that final regulations include a similar exception from the definition of a base erosion payment for payments made by a domestic corporation to a controlled foreign corporation (CFC) that result in a subpart F or global intangible low tax income (GILTI) inclusion. Another comment requested that this exception be extended to apply to payments made to a passive foreign investment company (PFIC) when a U.S. person has made a qualified electing fund (QEF) election, and the payment is included in the electing U.S. person's gross income. The comments asserted that payments that give rise to a subpart F or GILTI inclusion do not erode the U.S. tax base, and accordingly, warrant a base erosion payment exception under the same policy rationale for granting this type of exception in the proposed regulations for ECI, section 988 losses, and interest paid with respect to total loss-absorbing capacity (TLAC) securities. Finally, comments noted that proposed regulations under section 267A provide an exception for certain payments that result in income inclusions under section 951 and section 951A and suggested equivalent treatment was justified in the case of the BEAT.

The final regulations do not include a subpart F, GILTI, or PFIC exception to base erosion payment status. The Treasury Department and the IRS have determined that the reasons for adopting the other exceptions cited in the comments (such as the ECI exception and the exception under section 267A) do not warrant a subpart F, GILTI, or QEF exception from base erosion payment status.

First, comments have misinterpreted the underlying policy rationale for providing an ECI exception in the proposed regulations. The proposed regulations' ECI exception was adopted in part based upon the determination that it would be appropriate in defining a base erosion payment to consider the U.S. federal tax treatment of the foreign recipient—particularly, whether a payment received by a foreign related party was subject to tax on a net basis in substantially the same manner as amounts paid to a U.S. person. In contrast to the tax directly imposed on a foreign person with respect to its ECI under sections 871(b) and 882(a), a CFC receiving a base erosion payment is not directly subject to U.S. taxation. Rather, the U.S. shareholder is subject to tax under the subpart F or GILTI regime (or the PFIC rules). Thus, the CFC recipient (or PFIC recipient) of a payment is not itself subject to tax on a net basis in substantially the same manner as a U.S. person.

In addition, a foreign corporation that is engaged in a U.S. trade or business is itself subject to section 59A. In contrast, because neither a CFC nor a PFIC is subject to section 59A, the CFC or PFIC can make payments to a foreign related party without any BEAT consequences.

The ECI exception was also adopted to achieve symmetry with proposed § 1.59A–2(c), which treats foreign corporations as outside of the controlled group, except to the extent that the foreign corporation has ECI. Because foreign corporations with ECI are treated as part of the aggregate group in determining whether a taxpayer will ultimately be subject to the BEAT, the ECI exception to base erosion payment status is necessary to ensure that the foreign corporation is treated equivalently to a domestic member of its aggregate group receiving deductible payments.

The Treasury Department and the IRS further disagree with the premise that the approaches in the proposed regulations with respect to TLAC interest and section 988 losses support an exception for subpart F or GILTI income in the final regulations. With respect to TLAC, the preamble to the proposed regulations notes that the TLAC exception is appropriate because of the special status of TLAC as part of a global system to address bank solvency and the precise limits that regulations place on the terms of TLAC securities. REG–104259–18, 83 FR 65956, 65963 (December 21, 2018).

With respect to section 988, the preamble to the proposed regulations states that the exception is based on a determination that the losses did not present the same base erosion concerns as other types of losses that arise in connection with payments to a foreign related party. *See* REG–104259–18, 83 FR 65956, 65963 (December 21, 2018).

The Treasury Department and the IRS also disagree with the premise that the approach in the proposed hybrid regulations under section 267A provides support for a regulatory exception. Section 267A(b)(1) expressly provides that the disqualified related-party amount does not include any payment to the extent that the payment is included in the gross income of a United States shareholder under section 951(a). Whereas Congress expressly provided an exception for subpart F in section 267A, Congress did not provide a similar exception for purposes of section 59A. The Treasury Department and the IRS have determined that the inclusion of a similar exception in another section of the Act, but not in section 59A, reflects Congressional intent to not provide a GILTI or subpart F exception for purposes of section 59A. In addition, section 59A(c)(4)(B) provides that a deduction under section 250 (providing a domestic corporation a deduction for a portion of its GILTI amount) is not included in the denominator for purposes of the base erosion percentage; this shows that Congress considered the interaction between section 59A and GILTI, but did not provide an exception from the term base erosion payment for payments subject to tax under section 951A.

Finally, with respect to the suggested GILTI exception, the Treasury Department and the IRS are concerned that a GILTI exception would be difficult to administer because it would require a determination of whether a particular payment to a CFC is included in the taxpayer's GILTI inclusion, but a taxpayer's GILTI inclusion often cannot be traced to particular payments to a CFC because a taxpayer's GILTI inclusion amount depends on multiple factors. A GILTI exception would also need to take into account differences in effective and marginal tax rates under GILTI, BEAT, and regular corporate income tax.

For the foregoing reasons, the final regulations do not provide a regulatory exception to the definition of a base erosion payment for a payment that may give rise to subpart F, GILTI, or PFIC inclusions.

4. Exchange Loss From a Section 988 Transaction

Proposed § 1.59A–3(b)(3)(iv) provides that exchange losses from section 988 transactions described in § 1.988–1(a)(1) are excluded from the definition of base erosion payments. Proposed § 1.59A–2(e)(3)(ii)(D) provides that an exchange loss from a section 988 transaction (including with respect to transactions with persons other than foreign related parties) is not included in the denominator when calculating the base erosion percentage. The preamble to the proposed regulations requests comments on whether the denominator should exclude only section 988 losses with respect to foreign related-party transactions. REG–104259–18, 83 FR 65956, 65963 (December 21, 2018). Comments recommended that section 988 losses should not be excluded from the denominator of the base erosion percentage because excluding all section 988 losses is not consistent with the statute. Some comments, however, recommended that section 988 losses with respect to transactions with foreign related parties that are also excluded from the numerator should continue to be excluded from the denominator, and that this approach would be symmetrical with the approach in the statute for deductions for qualified derivative payments and for amounts eligible for the SCM exception. The final regulations adopt this recommendation. *See* § 1.59A–2(e)(3)(ii)(D). This approach is also consistent with the treatment of amounts paid to foreign related parties with respect to TLAC securities, which are excluded from the denominator only if the deductions arise from foreign related-party transactions.

5. Exception for Interest on Certain Instruments Issued by Globally Systemically Important Banking Organizations (GSIBs)

Proposed § 1.59A–3(b)(3)(v) provides that the amount paid or accrued to a foreign related party with respect to total loss-absorbing capacity (''TLAC'') securities is not a base erosion payment, but only to the extent of the amount of TLAC securities required by the Board of Governors of the Federal Reserve (Federal Reserve Board) under subpart P of 12 CFR part 252. *See* proposed § 1.59A–1(b)(18) and (20). Specifically, proposed § 1.59A–3(b)(3)(v) provides that the amount excluded is no greater than the amount paid to foreign related parties multiplied by the scaling ratio, which is the average TLAC long-term debt required over the average TLAC security amount. The preamble to the proposed regulations requests comments regarding whether the TLAC exception should also apply to similar instruments issued by foreign corporations that are required by law to issue a similar type of loss-absorbing instruments. These instruments issued by foreign corporations would be relevant for section 59A if interest expense from those instruments is deducted by the U.S. branch or permanent establishment of the foreign corporation. Comments generally supported the exception for amounts paid to a foreign related party with respect to TLAC and suggested that the final regulations expand the exception to foreign issuers.

a. TLAC Issued in Compliance With Foreign Law

Comments requested that the TLAC exception be expanded to include TLAC issued to comply with foreign laws and regulations that are similar to the TLAC requirements prescribed by the Federal Reserve Board. One comment observed that an exception for interest on TLAC that is issued to comply with foreign law and allocated to a U.S. branch or permanent establishment would provide branch parity, by excluding interest from base erosion payment status to the same extent, whether that internal TLAC debt is issued by a U.S. subsidiary or branch. See generally Rev. Proc. 2017–12, 2017–3 I.R.B. 424, for the definition of internal TLAC.

The Treasury Department and the IRS generally agree with comments that the special status of TLAC as part of the global system to address bank solvency applies equally to TLAC securities whether issued pursuant to U.S. law or foreign law. Consistent with comments, the final regulations expand the scope of the TLAC exception to include internal securities issued by GSIBs pursuant to laws of a foreign country that are comparable to the rules established by the Federal Reserve Board (''foreign TLAC''), where those securities are properly treated as indebtedness for U.S. federal income tax purposes.[2] In order to provide consistency between interest deductions on TLAC of a domestic subsidiary and a U.S. branch or permanent establishment, the final regulations limit the foreign TLAC exception to interest expense of GSIBs, and determine the limitation on the exception by reference to the specified minimum amount of TLAC debt that would be required pursuant to rules established by the Federal Reserve Board for TLAC if the branch or permanent establishment were a domestic subsidiary that is subject to Federal Reserve Board requirements. In addition, to ensure that the limitation is not greater than the amount required under foreign law, the final regulations express the limitation as the lesser of the hypothetical Federal Reserve Board limitation described in the preceding sentence and the specified minimum amount of TLAC debt that is required pursuant to bank regulatory requirements of a foreign country that are comparable to the requirements established by the Federal Reserve Board. Further, the Treasury Department and the IRS understand that in some jurisdictions, foreign TLAC may apply in a more discretionary manner than the framework established in the proposed regulations that references the specified minimum amount of TLAC debt that is required pursuant to rules established by the Federal Reserve Board for TLAC of U.S. issuers, for example, with no specified minimum amount. For that reason, if the bank regulatory requirements of a foreign country do not specify a minimum amount, the limitation is determined by reference solely to the hypothetical Federal Reserve Board limitation. The second prong serves to provide general consistency with TLAC of a domestic subsidiary, by limiting the foreign TLAC exception to no more than the amount of TLAC that would be required by the Federal Reserve Board if the branch were a subsidiary (subject to the modification for a buffer that is also discussed in this Part IV.C.5.b). These rules tend to support the systemic bank solvency goals of TLAC by reducing the tax cost of issuing such securities via foreign related parties. The Treasury Department and the IRS understand that information necessary to determine this amount is generally knowable to banks with U.S. operations. The Treasury Department and the IRS also understand that in some foreign jurisdictions, the foreign TLAC requirements may apply to organizations other than GSIBs; however, to provide general consistency with interest deductions on TLAC of a domestic subsidiary, the final regulations limit the foreign TLAC exception to only GSIBs.

b. Buffer Amount Above Specified Minimum Amount

Comments also recommended that the final regulations increase the specified minimum amount of interest eligible for the TLAC exception to permit an additional ''buffer'' amount of TLAC that exceeds the minimum amount required to satisfy regulatory requirements (such as 115 percent of the specified minimum amount or a buffer equal to 1 to 1.5 percent of the risk-weighted assets). Comments explained that the inputs used to determine the minimum amount of TLAC needed to satisfy regulatory requirements change on a daily basis; as a result, the amount of TLAC securities needed also may change on a daily basis. The comments also noted that market issues dictate a certain lead time to issue TLAC securities. As a result, comments stated that it is the market expectation and practice that GSIBs operate with a buffer, which helps to ensure that TLAC does not fall below the minimum amount when risk-weighted assets or total leverage increase. Finally, the comments asserted that because the cost of issuing TLAC securities significantly exceeds the cost of issuing non-loss absorbing securities, banks are commercially incentivized to issue no more TLAC securities than necessary.

Because of the special status of TLAC as part of a global system to address bank solvency and the specific requirements established by the Board and other regulators, the Treasury Department and the IRS recognize that it is necessary and appropriate to take into account the market practices that have been adopted to prevent TLAC from falling below the specified minimum amount as required by regulations. For these reasons, the final regulations adopt the recommendation to provide a 15 percent buffer on the specified minimum amount of interest eligible for the exception. This buffer applies for both TLAC and foreign TLAC.

c. Requests To Extend the TLAC Exception To Include Other Regulatory Capital Requirements

The Treasury Department and the IRS decline to expand the TLAC exception to cover interest payments on debt to foreign related parties that may satisfy regulatory capital requirements other than TLAC. The TLAC exception was adopted because of the unique role of TLAC securities in the global banking system for GSIBs; while other regulatory capital requirements may also serve an important role in bank regulation, the Treasury Department and the IRS are cognizant that the BEAT applies as a general matter to interest paid to foreign related parties, and have thus limited this regulatory exception to only those specific securities that are issued as part of the integrated international financial regulation and supervision system.

d. TLAC Issued During Transition Period

Comments recommended that the final regulations increase the specified minimum amount of interest eligible for the TLAC exception to permit interest with respect to TLAC debt in place during a three-year transition period before the year in which a corporation is required to have issued TLAC. The final regulations do not extend the TLAC exception to cover TLAC issued during a pre-effective date or transition period before being required to comply with the regulations prescribed by the Federal Reserve Board, because in that situation all of the debt is discretionary rather than mandatory. Further, there is no clear objective metric to scope discretionary issuances during a pre-effective period.

[2] While final regulations adopt the comment recommending similar treatment as between TLAC that is required under Federal Reserve Board regulations and similar foreign TLAC instruments, the final regulations do not address, and provide no inference, on whether those instruments issued pursuant to foreign law are treated as debt for U.S. federal income tax purposes. *See* Rev. Proc. 2017–12, 2017–3 I.R.B. 424 (providing generally that the IRS will treat as indebtedness internal TLAC that is issued by an intermediate holding company of a foreign GSIB pursuant to the Federal Reserve Board regulations, and that ''[n]o inference should be drawn about the federal tax characterization of an instrument that is outside the scope of [Rev. Proc. 2017–12].'').

e. Other Operational Elements of the TLAC Exception

A comment recommended modifying the limitation on the exclusion for internal TLAC when a portion of the internal TLAC is held by the U.S. branch of a foreign person such that interest payments on the internal TLAC is also eligible for the ECI exception. The comment recommended that interest on the internal TLAC be first attributed to TLAC held by the U.S. branch of a foreign person, and thus excluded from the definition of a base erosion payment on the basis of the interest being ECI; and then only the incremental interest expense in excess of the amount payable to that branch would be subject to the TLAC scaling ratio limitation. The final regulations do not further expand the TLAC exception through such a rule, so as to retain the narrow scope of the TLAC exception to those securities that are required to be in place because of Federal Reserve Board requirements (taking into account the buffer described in this Part IV.C.5.b). The final regulations clarify the definition of TLAC securities amount to confirm that the TLAC scaling ratio applies without regard to whether TLAC interest is also eligible for another exclusion from base erosion payment status, and thus that the TLAC scaling ratio applies pro-rata to all internal TLAC. *See* § 1.59A–1(b)(19).

Another comment recommended that the final regulations modify the definition of the ''TLAC long term debt minimum amount'' to reflect international standards, rather than Federal Reserve Board requirements because the comment asserted that the Federal Reserve Board may, in the future, eliminate the minimum requirement in the Federal Reserve Board regulations. Comments also recommended expanding the TLAC exception to apply to other intercompany debt that is issued to comply with other bank regulatory capital requirements. The Treasury Department and the IRS have determined that it is appropriate to limit the amount of the TLAC exception by reference to Federal Reserve Board requirements, notwithstanding comments suggesting that in the future the Federal Reserve Board may eliminate its minimum required amount. If there are meaningful changes in the total loss absorbing capacity systems in the future, the Treasury Department and the IRS would be able to reassess the section 59A regulations.

Finally, a comment recommended that the final regulations should not exclude interest on TLAC borrowing from the denominator of the base erosion percentage calculation, which is discussed in Part III of this Summary of Comments and Explanation of Revisions. The proposed regulations exclude from the denominator of the base erosion percentage amounts excluded under certain of the specific exceptions to base erosion payment status in § 1.59A–3(b) for SCM, QDP, and TLAC. This is in contrast to those amounts that are not base erosion payments because they are not within the main definition of a base erosion payment, for example, a payment to an unrelated third party, which remain in the denominator. The comment suggested that interest expense that is excluded from the definition of a base erosion payment under the TLAC exception should be viewed as like a payment to an unrelated third party, that is, the interest expense should remain in the denominator of the base erosion percentage. The comment premised this position on the view that internal TLAC should be viewed as issued to the holders of external TLAC (that is, to unrelated third party investors) under a theory that the issuer of internal TLAC is an intermediary or conduit for the issuer of the external TLAC securities. Therefore, there would be no underlying base erosion payment by the U.S. borrower on the internal TLAC, and thus the internal TLAC interest expense would remain in the denominator of the base erosion percentage calculation like interest paid to unrelated third parties. The proposed regulations and the final regulations provide a regulatory exception for internal TLAC on the basis of the special status of TLAC issued by GSIBs as part of the global system to address bank solvency. That is, the rationale for the TLAC exception in the proposed regulations and final regulations is not that the internal TLAC is a conduit for the external TLAC. For this reason, the final regulations (consistent with the proposed regulations) exclude from the denominator the TLAC interest in a manner consistent with the treatment of deductions covered by the SCM and QDP exceptions.

D. Base Erosion Tax Benefits

1. Withholding Tax on Payments

The proposed regulations provide that if tax is imposed by section 871 or 881, and the tax is deducted and withheld under section 1441 or 1442 without reduction by an applicable income tax treaty on a base erosion payment, the base erosion payment is treated as having a base erosion tax benefit of zero for purposes of calculating a taxpayer's modified taxable income and base erosion percentage. If an income tax treaty reduces the amount of withholding imposed on the base erosion payment, the amount of the base erosion payment that is treated as a base erosion tax benefit is reduced in proportion to the reduction in withholding. In the regulation section pertaining to base erosion tax benefits, the final regulations include a technical correction to the fraction used to determine the amount of a base erosion payment that is treated as a base erosion tax benefit when the rate of withholding imposed on that payment is reduced by an income tax treaty. § 1.59A–3(c)(3)(i). To avoid duplication, the final regulation section pertaining to the base erosion percentage replaces a similar operating rule with a cross reference to the rule for determining base erosion tax benefits. See § 1.59A–2(e)(3)(iii).

Under section 884(f) and § 1.884–4, a portion of interest expense allocated to income of a foreign corporation that is, or is treated as, effectively connected with the conduct of a trade or business in the United States (''excess interest'') is treated as interest paid by a wholly-owned domestic corporation to the foreign corporation. The foreign corporation is subject to tax under section 881 on the excess interest and is required to report the excess interest on its income tax return, subject to the exemption provided in section 881 for bank deposit interest and reduction or elimination under applicable tax treaties. However, no withholding is required under section 1441 and 1442. *See* § 1.884–4(a)(2)(iv). Because no withholding is required, excess interest is not excluded from treatment as a base erosion tax benefit under the proposed regulations.

A comment suggested that because excess interest is subject to tax under section 881(a) as if it were interest paid to a foreign corporation by a wholly-owned domestic corporation, the exclusion from base erosion tax benefits that applies to payments subject to full withholding should also apply to excess interest. The comment suggested that the exclusion from treatment as a base erosion tax benefit might apply to excess interest under the proposed regulations, but requested clarification. While excess interest would not be excluded from treatment as a base erosion tax benefit under the proposed regulations because it is not subject to withholding, the Treasury Department and the IRS have determined that it is appropriate to expand the general exclusion from base erosion tax benefits to include excess interest. Accordingly, the final regulations reduce any base erosion tax benefit attributable to interest in excess of interest on U.S.-connected liabilities by excess interest to the extent that tax is imposed on the foreign corporation with respect to the excess interest under section 884(f) and § 1.884–4, and the tax is properly reported on the foreign corporation's income tax return and paid in accordance with § 1.884–4(a)(2)(iv). § 1.59A–3(c)(2)(ii). If an income tax treaty reduces the amount of tax imposed on the excess interest, the amount of base erosion tax benefit under this rule is reduced in proportion to the reduction in tax.

The final regulations also provide a coordination rule to clarify the interaction between the withholding tax exception and the rules determining the portion of interest expense attributable to ECI that is treated as paid to a foreign related party. As discussed in part IV.B.4. of this Summary of Comments Explanation of Revisions, interest expense attributable to ECI that is in excess of direct allocations and interest expense on U.S.-booked liabilities is treated as paid to a foreign related party in proportion to the foreign corporation's average worldwide ratio of interest expense paid to a foreign related party over total interest expense. This coordination rule provides that any interest, including branch interest under § 1.884–4(b)(1), on which tax is imposed under 871 or 881 and tax has been deducted and withheld under section 1441 or 1442 but which is not attributable to direct allocations or interest expense on U.S.-booked liabilities is treated as not paid to a foreign related party for purposes of determining the foreign corporation's average worldwide ratio.

2. Rule for Classifying Interest for Which a Deduction Is Allowed When Section 163(j) or Another Provision of the Code Limits Deductions

Section 59A(c)(3) provides a stacking rule in cases in which section 163(j) applies to a taxpayer, under which the reduction in the amount of deductible interest is treated as allocable first to interest paid or accrued to persons who are not related parties with respect to the taxpayer and then to related parties. The statute does not provide a rule for determining which portion of the interest treated as paid to related parties (and thus potentially treated as a base erosion payment) is treated as paid to a foreign related party as opposed to a domestic related party. Proposed § 1.59A–3(c)(4) provides rules coordinating section 163(j) with the determination of the amount of base erosion tax benefits. This rule provides, consistent with section 59A(c)(3), that where section 163(j) applies to limit the amount of a taxpayer's business interest expense that is deductible in the taxable year, a taxpayer is required to treat all disallowed business interest first as interest paid or accrued to persons who are not related parties, and then as interest paid or accrued to related parties for purposes of section 59A. More specifically, with respect to interest paid to related parties, the proposed regulations provide that the amount of allowed business interest expense is treated first as the business interest expense paid to related parties, proportionately between foreign and domestic related parties. Conversely, the amount of a disallowed business interest expense carryforward is treated first as business interest expense paid to unrelated parties, and then as business interest expense paid to related parties, proportionately between foreign and domestic related-party business interest expense.

Proposed § 1.59A–3(c)(4)(i)(C) provides that business interest expense paid or accrued to a foreign related party to which the ECI exception in proposed § 1.59A–3(b)(3)(iii) applies is classified as domestic related business interest expense. One comment observed that the proposed regulations do not expressly provide similar rules for business interest expense paid to foreign related parties that is excluded from the definition of a base erosion payment under the TLAC exception or excluded from the definition of a base erosion tax benefit under the exception for payments subject to withholding tax. The final regulations confirm that those categories of interest expense retain their classification as payments to foreign related parties, but also that the foreign related business interest expense category is treated as consisting of interest that is eligible for these exceptions and interest that is not eligible for these exceptions, on a pro-rata basis. *See* § 1.59A–3(c)(4)(i)(C)(*2*).

E. Election To Waive Allowable Deductions

See the 2019 proposed regulations for a proposal to provide an election (and certain procedural safeguards) by which a taxpayer may permanently forego a deduction for all U.S. federal tax purposes, with the result that the foregone deduction will not be treated as a base erosion tax benefit.

V. Comments and Changes To Proposed § 1.59A–4—Modified Taxable Income

Proposed § 1.59A–4 contains rules relating to the determination of modified taxable income.

A. Method of Computing Modified Taxable Income

Section 59A(c)(1) defines modified taxable income as "the taxable income of the taxpayer computed under this chapter for the taxable year, determined without regard to—(A) any base erosion tax benefit with respect to any base erosion payment, or (B) the base erosion percentage of any net operating loss deduction allowed under section 172 for the taxable year." Proposed § 1.59A–4(b)(2) clarifies that modified taxable income is computed by adding back the base erosion tax benefits and base erosion percentage of any net operating loss deductions (the "add-back method"). In addition, to prevent net operating loss benefits from being duplicated, proposed § 1.59A–4(b)(1) provides that taxable income may not be reduced below zero as a result of a net operating loss deduction.

Comments generally recommended one of three approaches to calculate modified taxable income: (1) The add-back method, (2) the "recomputation method," and (3) the "limited recomputation method."

1. The Add-Back Method

Some comments recommended that the final regulations retain the add-back method because it would be simpler and easier to administer this method than a recomputation method. See Part V.A.2 of this Summary of Comments and Explanation of Revisions for a description of the recomputation method. Comments highlighted that the add-back method does not require attributes to be separately computed and tracked for regular income tax purposes and the BEAT. In addition, a comment asserted that this method more closely follows the statute, observing that the statutory language in section 59A(c) is substantially different from the recomputation-like language that was in section 59(a)(1)(B) relating to the foreign tax credit determination for alternative minimum tax purposes, which is now repealed for corporations. *See* section 59(a)(1)(B) (providing explicit language referencing computing the alternative minimum tax foreign tax credit as if section 904 were applied on the basis of alternative minimum taxable income instead of taxable income); *see also* the Act, § 12001(a) (repealing the alternative minimum tax for corporations and rendering section 59(a)(1)(B) inapplicable to corporations). Another comment noted that the add-back method is harmonious with the language of section 59A(c)(1)(B) because that section includes the base erosion percentage of net operating loss deductions as an item included in modified taxable income as the method for determining which portion of net operating loss carryovers from prior years resulted from base erosion tax benefits. (Under a recomputation method with a net operating loss carryover that is computed on a BEAT basis, base erosion tax benefits would already be excluded from the net operating loss carryover, so it would be anomalous to also apply section 59A(c)(1)(B) to the net operating loss deduction.) In support of the add-back method, one comment asserted that applying a recomputation approach would exceed statutory authority.

2. The Recomputation Method

Some comments recommended that the final regulations determine modified taxable income by using the recomputation method that is described in the preamble to the proposed regulations whereby the taxpayer's taxable income is recomputed without the excluded items, or a variation of that method. *See* REG–104259–18, 83 FR 65965 (December 21, 2018) (describing a recomputation approach as requiring attributes that are limited based on taxable income to be recomputed for purposes of section 59A). For example, some comments recommended making the recomputation method elective. One comment requested a recomputation method with a special rule for net operating loss deductions, which is discussed in Part V.A.3 of this Summary of Comments and Explanation of Revisions (limited recomputation method). While comments acknowledged that the add-back method is less complex, comments asserted that the add-back method may result in greater BEAT liability. Comments claimed that the recomputation method more accurately computes the base erosion minimum tax amount (''BEMTA''). Comments also asserted that the language in section 59A(c)—specifically the clause ''computed without regard to''—is more consistent with the recomputation method. Another comment noted that nothing in section 59A or its legislative history mandates the use of the add-back method and that taxpayers familiar with the prior corporate alternative minimum tax would have anticipated using the recomputation method.

Additionally, some comments requested a recomputation method with a separate tracking of attributes such as net operating loss carryovers, while others requested a recomputation method without a separate tracking of attributes. Some comments acknowledged that the recomputation method could give taxpayers a double benefit from non-base eroding deductions unless it required separate tracking of attributes for purposes of the BEAT. For example, one comment noted that the recomputation method would generally allow net operating loss carryovers to be used more rapidly for purposes of modified taxable income than for regular tax purposes because the taxable income limitation under section 172 on net operating loss deductions would be lower for regular tax purposes. As a result, the comment noted that if net operating loss carryovers are not separately tracked for purposes of the BEAT, a taxpayer may receive a double benefit from the non-base eroding deductions because those attributes reduce modified taxable income in the loss year, but if the attributes do not reduce the taxpayer's regular tax liability, the attributes would remain available to reduce modified taxable income in a future year. In contrast, another comment asserted that attributes should not be separately tracked because section 59A requires a snapshot of relative tax attributes that are applied independently to calculate taxable income and modified taxable income.

3. The Limited Recomputation Method

Some comments recommended that the final regulations permit a taxpayer to elect to recompute its taxable income with respect to pre-2018 net operating loss carryovers (the ''limited recomputation method''). Under this approach, comments generally suggested the taxpayer would use the add-back method except with respect to pre-2018 net operating loss carryovers, which would be separately used and tracked for purposes of the BEAT. One comment suggested that this approach should apply to net operating losses generally, not only pre-2018 net operating loss carryovers. Comments asserted that the proposed regulations have the effect of denying some taxpayers the economic benefit of their pre-2018 net operating loss carryovers because they do not allow pre-2018 net operating loss carryovers to offset full tax liability of taxpayers. Some comments acknowledged that using net operating loss carryovers under any of the three methods discussed in this Part V.A of the Summary of Comments and Explanation of Revisions are timing differences (rather than permanent differences that would deny economic benefit) because pre-2018 net operating loss carryovers are allowed against modified taxable income as and when those net operating loss carryovers are deducted for regular tax purposes. Comments generally asserted that limiting the utilization of net operating loss carryovers is arguably retroactive in nature because it limits the tax benefit of pre-2018 net operating loss carryovers and is unduly harsh because it may cause a taxpayer to pay tax on an amount greater than its economic income. Some comments also asserted that the limited recomputation approach is more consistent with pre-Act section 172 and the policies supporting section 59A. The comments noted that the section 172 legislative history suggests that net operating loss deductions were allowed primarily to alleviate economic losses incurred by taxpayers and asserted that absent clear statutory language and expressed legislative intent to limit the use of net operating losses, taxpayers should be able to use the net operating loss carryovers without limitation in calculating their modified taxable income. However, the comment acknowledged that an attribute tracking system is required to prevent the same net operating loss carryovers from being deducted multiple times for the BEAT.

4. Add-Back Method Retained in Final Regulations

The final regulations retain the add-back method. The add-back method takes into account all the statutory language in section 59A(c)(1), which determines modified taxable income without regard to both the base erosion tax benefits and the base erosion percentage of net operating loss deductions. This approach is also consistent with the Joint Committee on Taxation's Explanation of the Act, which states that ''an applicable taxpayer's modified taxable income is its taxable income for the taxable year, *increased by* (1) any base erosion tax benefit with respect to any base erosion payment and (2) the base erosion percentage of any NOL deduction allowed under section 172 for such taxable year.'' Joint Comm. on Tax'n, General Explanation of Public Law 115–97 (''Bluebook''), at 403 (emphasis added). By contrast, the recomputation method conflicts with section 59A(c)(1). If taxable income is recomputed without any base erosion tax benefits for modified taxable income, it is a necessary premise that net operating loss carryovers would also be recomputed as BEAT-basis attributes, which, under the recomputation framework, would not include the effect of any base erosion tax benefits (because the recomputation method is without regard to base erosion tax benefits). However, that framework would make the language in section 59A(c)(1)(B) superfluous or inexplicable because section 59A(c)(1)(B) addresses the percentage of base erosion tax benefits embedded in a net operating loss carryover, whereas a recomputed BEAT-basis net operating loss carryover would already exclude all base erosion tax benefits.[3]

Further, as some comments noted, the add-back method is more consistent with the statutory framework of section 59A because the add-back method does not require additional rules regarding the treatment of separate tax attributes. The Treasury Department and the IRS have determined, and numerous comments acknowledged, that if the recomputation method were used, separate tracking of attributes would be required to avoid duplication of benefits. Unlike the alternative minimum tax that was repealed for corporations, the BEAT does not contain rules to address how a recomputation method would be implemented, including in the case of a section 381 transaction, a section 382 ownership change, or a deconsolidation. Thus, the recomputation methods would require the Treasury Department and the IRS to construct such rules by regulation. Moreover, as also identified by comments, the add-back method is simpler and easier to comply with and administer for both taxpayers and the IRS than the recomputation method or other methods (including a method by which a taxpayer could elect to apply the add-back or recomputation method) because the recomputation-based methods would require the taxpayer to calculate an entire parallel tax return and schedules to take into account iterative effects, whereas the add-back approach only requires addition, rather than iterative effects. As a result of these factors, the Treasury Department and the IRS have determined that it is not appropriate to permit the recomputation method.

These reasons for rejecting the recomputation method also apply to the limited recomputation method. Because the recomputation approach generally is not consistent with the statutory construct, it would be inappropriate to create a limited version of that approach to permit a taxpayer to use its pre-2018 net operating loss carryovers or all net operating loss carryovers. Section 59A does not provide special rules or preferences for pre-2018 net operating loss carryovers. In addition, the comments' assertions for pre-2018 net operating loss carryovers generally apply to subsequent net operating loss carryovers of certain taxpayers, and those carryovers would raise all the issues discussed.

The claim that taxpayers are losing the benefit of their net operating loss carryovers as a result of the add-back method in the proposed regulations is erroneous. Net operating loss carryovers continue to offset regular taxable income. Section 59A does not change that result, as the net operating loss deduction is allowed against modified taxable income as and when deducted for regular tax purposes. Section 172 does not provide that if a taxpayer has a net operating loss carryover then the taxpayer does not have to pay any taxes under any provision. Because the base erosion percentage of any net operating loss deduction is taken into account in determining modified taxable income, section 59A(c)(1)(B) specifically contemplates that a taxpayer may not obtain the full benefit of net operating loss carryovers even in a year in which the taxpayer uses a net operating loss deduction to fully offset taxable income for purposes of its regular tax liability.

Moreover, the statutory language in section 59A does not explicitly limit that provision to net operating loss deductions related to carryovers that originated in tax years beginning after December 31, 2017; rather, that limitation resulted from the vintage year approach adopted in proposed § 1.59A–4(b)(2)(ii). Absent that provision, or if proposed § 1.59A–4(b)(2)(ii) had adopted a current year base erosion percentage approach, the add-back provision in section 59A(c)(1)(B) could have also applied to net operating loss deductions related to carryovers that originated in pre-2018 tax years. See Part V.B of this Summary of Comments and Explanation of Revisions for a discussion of the comments related to proposed § 1.59A–4(b)(1) and limiting the net operating loss deduction for purposes of computing modified taxable income.

B. Amount of Net Operating Loss Deduction From Net Operating Loss Carryovers

Under the add-back method, section 59A(c) provides that the computation of modified taxable income starts with the taxpayer's regular taxable income for the year. Section 172(a) generally provides that for regular tax purposes a deduction is allowed for the tax year in an amount equal to the net operating loss carryover to the year. For net operating loss carryovers originating after the Act, the net operating loss deduction is generally limited for regular tax purposes to 80 percent of taxable income computed without regard to the net operating loss deduction. Section 172(a). For net operating loss carryovers originating before the Act, the net operating loss carryover deduction generally is not limited for regular tax purposes. Section 13302(e)(1) of the Act. Proposed § 1.59A–4(b)(1) provides that taxable income may not be reduced below zero as a result of net operating loss deductions. The preamble to the proposed regulations explains that the rule is necessary because section 172(a) could be read to provide that the same net operating loss carryover could reduce modified taxable income in multiple years. REG–104259–18, 83 FR 65965 (December 21, 2018).

[3] For example, assume that a domestic corporation (DC) is an applicable taxpayer that has a calendar year. In 2020, DC has gross income of $0, a deduction of $60x that is not a base erosion tax benefit, and a deduction of $40x that is a base erosion tax benefit. For regular tax purposes, DC has a net operating loss carryover within the meaning of section 172(b) of $100x. DC also has a base erosion percentage of 40 percent for the 2020 taxable year. Under the recomputation method, DC's taxable income would presumably be recomputed without regard to base erosion tax benefits, and as a result, DC would presumably have a BEAT-basis net operating loss carryover of $60x, computed as DC's excess of deductions over gross income, without regard to the $40x of deductions that are base erosion tax benefits.

Assume further that in 2021, DC has gross income of $70x, and no current year deductions. For regular tax purposes, DC is permitted a net operating loss deduction of $56x (section 172(a) limits the regular tax deduction for net operating losses that originated after the Act to 80 percent of taxable income before the net operating loss deduction), and thus DC has regular taxable income of $14x ($70x − $56x = $14x). Under the add-back method, DC's modified taxable income for 2021 would be computed as $36.4x, computed as regular taxable income of $14x, plus $0 base erosion tax benefits in 2021, plus the section 59A(c)(1)(B) base erosion percentage of the net operating loss allowed under section 172, $22.4x ($56x × 40 percent = $22.4x).

Under the recomputation method, DC would presumably need to recompute its 2021 taxable income *without regard to* its base erosion tax benefits in 2021 (there are none in the example) and also *without regard to* the base erosion percentage of the net operating loss deduction allowed under section 172 for the taxable year ($56x). Section 59A(c)(1)(B). However, the basic premise of the recomputation method is that DC has a BEAT-basis net operating loss carryover from 2020 of $60x that already excludes the 2020 base erosion tax benefits. DC's modified taxable income for 2021 might thus be computed as $14x ($70x gross income, reduced by $56x, which is the lesser of (i) the $60x BEAT-basis net operating loss carryover from 2020 or (ii) 80 percent of the taxable income ($70x) computed without regard to the section 172 deduction, or $56x). However that adaptation would render section 59A(c)(1)(B) irrelevant. If instead, section 59A(c)(1)(B) was taken into account in computing DC's modified taxable income, then DC's modified taxable income would include the erosion percentage (40 percent) of the BEAT-basis net operating loss carryover from 2020 ($60x), even though that BEAT-basis net operating loss carryover has already been stripped of any 2020 base erosion tax benefits. Thus, this adaptation that gives regard to section 59A(c)(1)(B) would seem to incongruously increase modified taxable income by $24x (40 percent of $60x = $24x). Some comments observed these anomalies, but no comments appear to provide a complete reconciliation of how the recomputation method would address the anomalies under the terms of the statute.

The preamble to the proposed regulations provides an example where a taxpayer has a net operating loss carryover of $100x that arose in a taxable year beginning before January 1, 2018. REG–104259–18, 83 FR 65965 (December 21, 2018). In a subsequent year, the taxpayer has taxable income of $5x before taking into account the $100x net operating loss carryover. Absent the rule in proposed § 1.59A–4(b)(1), the taxpayer might claim the entire $100x net operating loss carryover as a $100x deduction in that year to create a $95x taxable loss for determining modified taxable income, even though $95x of the net operating loss carryover would remain as a carryover to future years. Proposed § 1.59A–4(b)(1) ensures that a net operating loss is taken into account only once in determining a taxpayer's modified taxable income.

Some comments recognized the need for proposed § 1.59A–4(b)(1) consistent with the preamble to the proposed regulations. A comment acknowledged that if the net operating loss carryover deductions are not limited to the amount of taxable income, those net operating losses could reduce taxable income—and therefore the taxpayer's BEAT liability—multiple times. Another comment noted that, without proposed § 1.59A–4(b)(1), allowing net operating loss carryovers to be taken into account for modified taxable income to the same extent as general taxable income would give rise to certain complex questions concerning net operating loss carryovers for general tax purposes.

Other comments asserted that there is no authority in section 59A for limiting the net operating loss deduction to the amount of taxable income, that the rule in proposed § 1.59A–4(b)(1) is contrary to the statute, and that the final regulations should permit taxable income to be negative as a result of net operating loss carryovers. Comments noted that modified taxable income is determined based on taxable income, which generally is gross income minus deductions allowed under chapter 1, including the net operating loss deduction. Another comment noted that with respect to the amount of net operating loss deduction in a taxable year, when Congress wants to place a floor on a number, it does so expressly; for example, section 59A(b)(1)(B) provides that regular tax liability is ''reduced (but not below zero).'' In contrast, there is no similar language in section 59A or section 172(a) prior to the Act for net operating loss deductions.

Comments also asserted that the limitation on the use of net operating loss carryovers as deductions in a taxable year causes taxpayers to be liable for tax pursuant to the BEAT on their base erosion tax benefits even though they are not liable for regular income tax because of their net operating loss deductions that reduced regular taxable income to zero. Comments also asserted that the proposed regulations effectively reduce the extent to which the net operating loss carryforwards may be used.

Other comments requested that the final regulations provide a transition to the proposed rule preventing taxable income to be negative as a result of a net operating loss deduction. One comment requested that final regulations provide for a deferral of the effective date of proposed § 1.59A–4(b)(1) of one or two years. Another comment requested that final regulations provide that taxpayers may reduce their BEAT liability by (a) an amount equal to the pre-2018 net operating loss carryover that offset taxable income, multiplied by (b) the difference between the regular income tax rate and the BEAT rate because section 59A should not retroactively reduce the value of the pre-2018 net operating loss carryovers. These comments also highlighted a situation where a taxpayer's regular taxable income is reduced entirely by available pre-2018 net operating loss carryovers, but the taxpayer also has base erosion tax benefits that increase modified taxable income, causing a BEAT liability. The comments asserted that imposing BEAT on this modified taxable income amounts to a retroactive reduction in the value of the taxpayer's pre-2018 net operating loss carryovers, and recommended that the final regulations adopt this methodology by which pre-2018 attributes are provided a 21 percent tax rate benefit, which is similar to the limited recomputation method discussed in Part V.A of this Summary of Comments and Explanation of Revisions.

These comments are not adopted in the final regulations. First, the comments focused on a technical reading of section 172(a) as it applies to net operating loss carryovers that originated before the Act. That version of section 172(a) did not expressly limit the amount of net operating loss deduction for regular tax purposes to 100 percent of taxable income computed without regard to the net operating loss deduction. As it existed before the Act, there was no reason to limit the section 172(a) deduction in this manner because before the Act there was no consequence to claiming a net operating loss deduction greater than 100 percent of current year taxable income. For example, before the Act, a taxpayer's net operating loss carryover was only reduced by the amount of net operating loss deduction that was actually used to reduce taxable income to zero. *See* § 1.172–4(a)(3).

In addition to the technical reading of section 172(a) as it applies to net operating loss carryovers that originated before the Act, the Treasury Department and the IRS continue to believe, consistent with some of the comments received, that limiting net operating loss deductions to the amount of taxable income for purposes of computing modified taxable income is necessary and appropriate to prevent net operating loss carryovers from being used multiple times to reduce modified taxable income. If the final regulations did not limit the amount of net operating loss carryover deductions for purposes of calculating modified taxable income, a taxpayer with a large pre-2018 net operating loss carryover would be able to reduce modified taxable income in multiple years with the same net operating loss carryover, without reducing the net operating loss carryover for regular income tax purposes.

The fact that taxpayers with sufficiently large pre-2018 net operating loss carryovers may be able to avoid paying regular income tax in a taxable year does not mean that those taxpayers should be permitted to offset the entire amount of their BEAT liability in that taxable year, or in other words, not be liable for tax under the BEAT. As discussed in Part V.A. of this Summary of Comments and Explanation of Revisions, the limitation on net operating loss deductions for determining modified taxable income impacts only the BEMTA. This limitation does not prevent the use of pre-2018 net operating loss carryover to reduce regular taxable income to zero. Further, to the extent a taxpayer's pre-2018 net operating loss carryovers exceed the taxpayer's taxable income, the taxpayer continues to use those remaining net operating loss carryovers in later years to offset some or all regular taxable income; and the taxpayer continues to reduce modified taxable income by the same amount in those later years.

A comment asserted that the add-back method creates an economic disparity between similarly situated taxpayers because taxpayers without pre-2018 net operating loss carryovers can make more base erosion payments than taxpayers with pre-2018 net operating loss carryovers before being subject to BEAT liability. However, taxpayers with pre-2018 net operating loss carryovers are not similarly situated to taxpayers without pre-2018 net operating loss carryovers, as the former are paying less regular income taxes than the latter, which is a factor in determining the amount of BEAT liability.

One comment questioned why current year losses can result in negative taxable income for BEAT purposes, while net operating losses that are carried to a different year cannot result in negative taxable income in that different year. Proposed § 1.59A–4(b)(1) permits taxpayers that have current year losses to use that negative income amount as a starting point for computing modified taxable income because the Treasury Department and the IRS determined that if taxpayers were not permitted to use that negative amount as a starting point for calculating modified taxable income, the base erosion tax benefits for that year could be double counted. That is, the base erosion tax benefits for that year could be included in modified taxable income for the current year and in the year the net operating loss carryover is used because of the add-back of the base erosion percentage of the net operating loss deduction in the year used. Because of this concern, the proposed regulations expressly permit current year losses to be taken into account as the starting point for computing modified taxable income. Proposed §§ 1.59A–4(b)(1) and (c).

Section 59A(i) provides a broad grant of regulatory authority, permitting the Secretary to prescribe regulations as may be necessary or appropriate to carry out the provisions of the section. For the reasons discussed, the Treasury Department and the IRS have determined that limiting the net operating loss deduction to taxable income in computing modified taxable income is within the grant of authority, and the final regulations do not adopt the comments requesting a different rule. The final regulations also do not adopt a rule providing a fixed 21 percent tax rate benefit for all pre-2018 net operating loss carryovers. The fact that a taxpayer may have positive modified taxable income (resulting in a positive BEAT tax liability) even if the taxpayer has a lesser amount of regular taxable income because pre-2018 net operating loss carryovers reduce taxable income is a part of the statutory framework of the BEAT; that is, imposing tax on a modified taxable income base. See also, the response to the limited recomputation method discussed in Part V.A of this Summary of Comments and Explanation of Revisions.

C. Use of Aggregate Base Erosion Percentage for Net Operating Loss Deductions

Proposed § 1.59A–4(b)(1) generally defines modified taxable income as a taxpayer's taxable income computed under chapter 1, determined without regard to base erosion tax benefits and the base erosion percentage of any net operating loss deduction under section 172 for the taxable year. Under the proposed regulations, the base erosion percentage for the year that the net operating loss carryover arose (the ''vintage year'' base erosion percentage) is used to compute modified taxable income. Proposed § 1.59A–4(b)(2)(ii). Although the computation of modified taxable income is made on a taxpayer-by-taxpayer basis, the proposed regulations clarify that in computing the add-back for net operating loss deductions, the relevant base erosion percentage is the base erosion percentage for the aggregate group, which is used to determine whether the taxpayer is an applicable taxpayer.

A comment noted that an aggregate base erosion percentage could potentially take into account deductions of another aggregate group member that are not otherwise included in a taxpayer's return. The comment questioned whether a more precise determination of a taxpayer's vintage year base erosion percentage is appropriate.

The Treasury Department and the IRS have determined that the base erosion percentage that is applied to net operating loss deductions when computing modified taxable income should be computed on the basis of the taxpayer and its aggregate group in the same manner as the base erosion percentage that is computed for determining whether the taxpayer is an applicable taxpayer under section 59A(e). Section 59A(e)(3) requires aggregation for purposes of computing the base erosion percentage that is used to determine whether a taxpayer is an applicable taxpayer and to determine the portion of net operating loss deductions that are included in computing modified taxable income pursuant to section 59A(c)(1)(B). Because Congress chose to determine the base erosion percentage on an aggregate basis, it follows that one aggregate group member's deductions can affect the base erosion percentage that will apply with respect to another member of the group. For these reasons, the final regulations do not revise the rules for determining the base erosion percentage that is applied to net operating loss deductions when computing modified taxable income.

D. Operation of Vintage Approach for Net Operating Losses

Section 59A(c)(1)(B) provides that modified taxable income includes the base erosion percentage of any net operating loss deduction allowed under section 172 for the taxable year. Proposed § 1.59A–4(b)(2)(ii) provides that the base erosion percentage of the year in which the loss arose, or the ''vintage year,'' is used to compute modified taxable income rather than the base erosion percentage in the year in which the taxpayer takes the net operating loss deduction.

One comment requested guidance on how the vintage year approach is applied when in the vintage year the taxpayer has both deductions that are base erosion tax benefits and deductions that are not base erosion tax benefits. The comment stated that it is not clear how to compute or order the base erosion percentage because the proposed regulations do not provide rules for determining which type of deductions were used in that vintage year to offset gross income, and which deductions were carried forward as net operating loss carryforwards. The comment provided an example in which the taxpayer in year 1 has gross income of $800x and deductions of $1000x that consist of $250x of base erosion tax benefits and $750x of non-base erosion tax benefits, resulting in a $200x net operating loss. The comment requested clarification for determining how the deductions are ordered for determining the base erosion percentage of the year 1 $200x net operating loss carryover when that carryover is deducted in a later year.

The final regulations do not revise the vintage year rule because section 59A(c)(1)(B) and the proposed regulations already provide that the base erosion percentage used with respect to the net operating loss deduction is the base erosion percentage of the taxpayer in the relevant taxable year (in this example, $250x/$1000x = 25 percent). That is, no specific ordering rule is required because the base erosion percentage calculation for the vintage year takes into account a proportionate amount of each type of deduction (or $250x divided by $1000x in the example).

Another comment suggested that in applying the vintage year approach to net operating loss deductions, a simplifying convention should be provided to address target corporations that have net operating loss carryovers and become members of a taxpayer's aggregate group by acquisition. The comment suggested that taxpayers be permitted to elect to use their current year base erosion percentage with respect to the net operating loss deductions, rather than the vintage year base erosion percentage of the target because it may be complicated to determine the target's vintage year base erosion percentage. The comment specifically noted the difficulty in cases where the target was not an applicable taxpayer in the vintage year. The final regulations do not adopt this elective approach. Because the net operating loss carryover is an attribute of the target corporation, the target corporation is required to maintain documentation to support both the carryover amount and the other aspects of its attributes that affect the target corporation's tax liability—namely the base erosion percentage with respect to its net operating loss carryovers. Accordingly, the acquiring corporation should be able to obtain the information necessary to determine the target corporation's vintage year base erosion percentage.

VI. Comments and Changes to Proposed § 1.59A–5—BEMTA

Proposed § 1.59A–5 contains rules regarding the calculation of BEMTA and provides the base erosion and anti-abuse tax rate that applies to the taxpayer's taxable year. The proposed regulations provide that an applicable taxpayer computes its BEMTA for the taxable year to determine its liability under section 59A(a). Proposed § 1.59A–5(b). Generally, the taxpayer's BEMTA equals the excess of (1) the applicable tax rate for the taxable year (''BEAT rate'') multiplied by the taxpayer's modified taxable income for the taxable year over (2) the taxpayer's adjusted regular tax liability for that year. Proposed § 1.59A–5(b). In determining the taxpayer's adjusted regular tax liability for the taxable year, credits (including the foreign tax credit) are generally subtracted from the regular tax liability amount. Proposed § 1.59A–5(b)(2). Consistent with section 59A(b)(1)(B), the proposed regulations provide that for taxable years beginning before January 1, 2026, the credits allowed against regular tax liability (which reduce the amount of regular tax liability for purposes of calculating BEMTA) are not reduced by the research credit determined under section 41(a) or by a portion of applicable section 38 credits.

To prevent an inappropriate understatement of a taxpayer's adjusted regular tax liability, the proposed regulations provide that credits for overpayment of taxes and for taxes withheld at source are not subtracted from the taxpayer's regular tax liability because these credits relate to U.S. federal income tax paid for the current or previous year. Proposed § 1.59A–5(b)(3)(i)(C) and (ii).

A. Applicability of Aggregation Rule to BEMTA

The proposed regulations provide that the computations of modified taxable income and BEMTA are done on a taxpayer-by-taxpayer basis. That is, the aggregate group concept is used solely for determining whether a taxpayer is an applicable taxpayer, and does not apply to the computations of modified taxable income and the BEMTA. The preamble to the proposed regulations explains that if taxpayers calculated BEMTA differently depending on their differing views of the base on which the BEAT should be calculated (that is, aggregate group, consolidated group, individual company), this could lead to inequitable results across otherwise similar taxpayers. REG–104259–18, 83 FR 65974 (December 21, 2018).

The proposed regulations also explain that it is expected to be less costly for taxpayers to calculate BEMTA on a taxpayer-by-taxpayer basis because the statutory framework of section 59A applies in addition to the regular tax liability of a taxpayer. Calculating BEAT liability at an aggregate level, for example, would require any BEAT liability to be reallocated among the separate taxpayers.

Comments requested that electing taxpayers be permitted to apply the aggregation rules of section 59A(e)(3) to determine their modified taxable income and BEMTA. Electing taxpayers would effectively compute modified taxable income and BEMTA at the level of the aggregate group rather than at the level of the separate taxpayer.

The comments explained that aggregation would permit a group with multiple consolidated returns to be given full credit for the group's contributions to the U.S. tax base. Comments further explained that, in certain instances, business, legal, or regulatory reasons prevent groups with multiple taxpayers from forming an affiliated group of corporations within the meaning of section 1504 that can file a single consolidated return. However, the comments asserted that these groups still represent a single economic unit where they have a common parent and overall management, share services, and are generally treated as a single employer.

Comments also suggested that an election to apply the aggregation rules for BEMTA would prevent inequitable results in the application of the BEAT. For example, some comments suggested that it would be inequitable for a single consolidated group within an aggregate group that had a large amount of NOLs, minimal regular tax liability, and little to no base erosion payments to be subject to the BEAT as a result of a separate consolidated group's high base erosion percentage.

The comments suggested that an aggregate approach would result in an insignificant amount of additional complexity and little additional burden to taxpayers and the government. Comments also made suggestions regarding particular requirements of the election, such as requirements that each taxpayer joining the election have the same taxable year-end, agree to provide the IRS with all information needed to compute the aggregate BEAT liability, agree to be allocated a pro-rata share of the aggregate BEAT liability, and give consent for the statute of limitations to remain open until the audits of all group members with respect to the information used to determine that aggregate BEAT liability have closed.

The final regulations do not adopt the recommendations. The Treasury Department and the IRS recognize that, in determining whether a taxpayer is an applicable taxpayer, and for determining certain computational matters relating to modified taxable income and the BEMTA, section 59A applies by reference to the taxpayer and the members of its aggregate group. Section 59A does not explicitly extend that aggregate group treatment to the computation of a taxpayer's BEMTA or the resulting tax liability. The rules relating to the aggregate group concept are complex, and they produce meaningful differences from the single-entity concepts in the consolidated return regulations. See Part III of this Summary of Comments and Explanation of Revisions. Section 1502 and the regulations thereunder contain detailed rules for implementing the single taxpayer elements of the consolidated return regulations. No similar rules are expressly contemplated in section 59A with respect to BEMTA. Adding similar rules to these final regulations would add significant complexity and would require the IRS to audit a parallel BEMTA computation system. Consistent with section 1502 and the regulations thereunder, aggregate groups of taxpayers that file a consolidated return must compute BEMTA on a single-entity basis under section 59A and the final regulations. *See* § 1.1502–59A(b). Therefore, the final regulations continue to provide that BEMTA is calculated on a taxpayer-by-taxpayer basis.

B. Treatment of General Business Credits and Foreign Tax Credits

A comment noted that taxpayers may have credits generated in taxable years beginning before January 1, 2018, that carry forward to be used in taxable years beginning after December 31, 2017. In the case of net operating losses that arose in taxable years beginning before January 1, 2018, and that are deducted as carryovers in taxable years beginning after December 31, 2017, the comment also noted that proposed § 1.59A–4(b)(2)(ii) provides that those deductions are excluded from modified taxable income.

The comment requested that the final regulations exclude section 38 credits and foreign tax credits generated in pre-2018 taxable years from the definition of credits allowed under chapter 1 of the Code. As a result of this request, these credits would not be subtracted from the regular tax liability amount in determining BEMTA. Alternatively, the comment requested that the partial exclusion of section 38 credits from the calculation of BEMTA in proposed § 1.59A–5(b)(3)(i)(B) be extended to foreign tax credits.

The final regulations do not adopt this comment. With respect to net operating losses that arose in taxable years beginning before January 1, 2018, the exclusion of these deductions from the calculation of modified taxable income results from two statutory elements: (i) Section 59A(c)(1) provides that the starting point for modified taxable income is ''taxable income of the taxpayer computed under [chapter 1 of the Code] for the taxable year . . .''; that is, modified taxable income starts with taxable income, as reduced for any net operating loss deduction under section 172; and (ii) section 59A(c)(1)(B) provides that modified taxable income includes, or adds back to taxable income, the base erosion percentage of any NOL deduction under section 172 for the taxable year. This statutory framework for determining modified taxable income establishes that section 59A permits the net operating loss deduction to reduce some or all of the current year's pre-NOL taxable income, but that a portion of the tax benefit from that NOL deduction is added back to taxable income. Further, § 1.59A–4(b)(2)(ii) applies the base erosion percentage of the year in which the loss arose for this purpose, which effectively means that net operating losses incurred in taxable years ending on or before December 31, 2017, are entirely excluded from the calculation from modified taxable income when those deductions are used to reduce or eliminate regular taxable income. In contrast to this explicit statutory framework that addresses the lifecycle of the net operating loss carryforward, section 59A does not provide a similar rule for credits. Instead, section 59A(b)(1)(B) provides that all credits allowed under chapter 1 of the Code against regular taxable income for the taxable year are excluded from the calculation of BEMTA, except for specifically enumerated credits that are partially or fully allowed to reduce BEMTA. Because section 59A(b)(1) refers to all credits allowed to reduce taxable income during the taxable year and makes no distinction as between those credits that originated in the current taxable year or a prior taxable year, the Treasury Department and the IRS have determined that the proposed regulations are consistent with the statute, and the final regulations retain the same rules with respect to section 38 credits and foreign tax credits.

C. Exclusion of AMT Credits From Credits Reducing Regular Tax Liability

Generally, a taxpayer's BEMTA equals the excess of (1) the applicable tax rate for the year multiplied by the taxpayer's modified taxable income for the taxable year over (2) the taxpayer's adjusted regular tax liability for that year. In determining the taxpayer's adjusted regular tax liability for the taxable year, credits are generally subtracted from the regular tax liability amount. To prevent an inappropriate understatement of a taxpayer's adjusted regular tax liability, the proposed regulations provide that credits for overpayment of taxes and for taxes withheld at source are not subtracted from the taxpayer's regular tax liability because these credits relate to U.S. federal income tax paid for the current or previous year.

Historically, an alternative minimum tax (''AMT'') was imposed on a corporation to the extent the corporation's tentative minimum tax exceeded its regular tax. If a corporation was subject to AMT in any year, the amount of AMT was allowed as an AMT credit in any subsequent taxable year to the extent the corporation's regular tax liability exceeded its tentative minimum tax in the subsequent year. Bluebook, pp. 92, 94.

The Act repealed the corporate AMT, and allows the corporate AMT credit to offset the entire regular tax liability of the corporation for a taxable year. In addition, the AMT credit is allowable and generally refundable for a taxable year beginning after 2017 and before 2022 in an amount equal to 50 percent (100 percent in the case of taxable years beginning in 2021) of the excess (if any) of the minimum tax credit for the taxable year over the amount of the credit allowed for the year against regular tax liability. Bluebook p. 97.

Comments requested that AMT credits be excluded from the calculation of credits that reduce adjusted regular tax liability because they represent income taxes imposed in a previous tax year and allowed as credits in a subsequent tax year. The Treasury Department and the IRS agree with these comments. Accordingly, § 1.59A–5(b)(3) provides that AMT credits, like overpayment of taxes and for taxes withheld at source, do not reduce adjusted regular tax liability for purposes of section 59A.

D. Rules Relating to Banks and Registered Securities Dealers for Purposes of Computing the Base Erosion Percentage and Determining the BEAT Rate for Computing BEMTA

Generally, under proposed § 1.59A–2(e)(1), a taxpayer, or the aggregate group of which the taxpayer is a member, satisfies the base erosion percentage test to determine applicable taxpayer status if its base erosion percentage is at least three percent. However, section 59A(e)(1)(C) and proposed § 1.59A–2(e)(2)(i) provide that a lower threshold of two percent applies if the taxpayer is a member of an affiliated group (as defined in section 1504(a)(1)) that includes a domestic bank or registered securities dealer. Proposed § 1.59A–2(e)(2)(ii) applies this two-percent threshold to the aggregate group of which a taxpayer is a member that includes a bank or registered securities dealer that is a member of an affiliated group. Proposed § 1.59A–2(e)(2)(iii) provides a de minimis exception to this lower two-percent base erosion percentage threshold in the case of an aggregate group or consolidated group that has de minimis bank or registered securities dealer activities as measured by gross receipts. Specifically, proposed § 1.59A–2(e)(2)(iii) provides that an aggregate group that includes a bank or a registered securities dealer that is a member of an affiliated group is not treated as including a bank or registered securities dealer for a taxable year if the total gross receipts of the aggregate group attributable to the bank or the registered securities dealer represent less than two percent of the total gross receipts of the aggregate group (or consolidated group if there is no aggregate group). Even if a taxpayer qualifies for the de minimis exception to the lower base erosion percentage test threshold, proposed § 1.59A–5(c)(2) provides that the BEAT rate is increased by an additional one percent for any taxpayer that is a member of an affiliated group that includes a bank or registered securities dealer. *See* section 59A(b)(3) (requiring that the base erosion and anti-abuse tax rate in effect for the taxable year for these taxpayers must be increased by one percentage point).

A comment requested that the final regulations provide for a higher de minimis threshold of five percent and clarify that in characterizing the income of a corporation with a bank or securities dealer division for purposes of this threshold, only the gross receipts arising from the conduct of the banking or securities business would be taken into account. The Treasury Department and the IRS have determined that this modification to the de minimis threshold is not warranted because this de minimis exception in the proposed regulations was developed based on a qualitative assessment of a very small degree of activities to justify a regulatory-based exception to the statutory provision that applies to a bank or registered securities dealer. Accordingly, the final regulations retain the two-percent de minimis threshold.

Comments supported the proposed regulations' de minimis exception to the lower base erosion percentage threshold and suggested that a similar exception be created regarding the increased BEAT rate for a taxpayer that is a member of an affiliated group with de minimis gross receipts attributable to banking or securities dealer activities. In instances where the base erosion percentage exceeds three percent, the comments questioned the appropriateness of applying the BEAT rate add-on of one percent to the non-financial members of the affiliated group when the gross receipts of the financial members are insignificant relative to the non-financial members.

The final regulations adopt this comment by revising § 1.59A–5(c)(2) to provide that the additional one percent add-on to the BEAT rate will not apply to a taxpayer that is part of an affiliated group with de minimis banking and securities dealer activities.

A comment recommended that an additional exception to the increased BEAT rate should be provided where the bank or securities dealer members of an affiliated group make no more than a de minimis amount of base erosion payments, measured by reference to aggregate affiliated group base erosion payments. The final regulations do not adopt this recommendation because the base erosion percentage test already operates as a statutory rule that limits the BEAT to taxpayers (without regard to any particular type of business) that have a relatively low degree of base erosion payments.

A comment requested that the final regulations include a transitory ownership exception to apply where a bank or securities dealer is a member of an affiliated group for only a short period (such as 90 days) during the taxable year. The stated purpose of this request was to allow time for a taxpayer that acquires a group that includes a bank or registered securities dealer to dispose of the bank or securities dealer member of a target affiliated group without causing the entire acquiring affiliated group to become subject to the higher BEAT rate applicable to taxpayers with bank or registered securities dealer members. The Treasury Department and the IRS decline to expand the regulatory de minimis exception to include an exception based on short-term ownership, but note that a taxpayer in this situation may be eligible for the de minimis regulatory exception if the bank and securities dealer operations are relatively small. If the operations are not sufficiently small, the statutory rules that apply to banks and registered securities dealers would no longer apply in taxable years after the disposition of the bank or securities dealer.

A comment observed that the rule in the proposed regulations extending the lower base erosion percentage threshold to the entire aggregate group that includes a bank or registered securities dealer is not supported by the language of section 59A. The comment proposed that the proper application of section 59A requires that the lower base erosion percentage should be limited to only the affiliated group that includes a bank or registered securities dealer, and not the remainder of the taxpayer's aggregate group. The final regulations do not adopt this comment. The Treasury Department and the IRS note that section 59A(e)(3) specifically requires aggregation for purposes of computing the base erosion percentage. Further, the implication of the comment is that in measuring whether a particular taxpayer has a base erosion percentage that is greater than the prescribed level in section 59A(e)(3)(C), the threshold level would be blended. That is, under the approach recommended by the comment, a taxpayer with a bank or securities dealer in its aggregate group would compute a relative weighting of the bank/dealers (two percent threshold) vs. non-bank/dealers (three percent threshold) in order to compute a blended threshold that is used for the base erosion percentage test. There is no indication in the statutory language supporting this approach. Accordingly, no changes are made to the final regulations in this regard.

E. Applicability of Section 15 to the BEAT Rate

Section 59A(b)(1)(A) provides that the base erosion minimum tax amount of an applicable taxpayer for any taxable year is the excess of an amount equal to 10 percent (5 percent in the case of taxable years beginning in calendar year 2018) of the modified taxable income of the taxpayer for the taxable year. Proposed § 1.59A–5(c) provides the base erosion and anti-abuse tax rates that apply for purposes of calculating the BEMTA. The base erosion and anti-abuse tax rate is five percent for taxable years beginning in calendar year 2018 and 10 percent for taxable years beginning after December 31, 2018, and before January 1, 2026. Proposed § 1.59A–5(c)(1)(i) and (ii). Proposed § 1.59A–5(c)(3) provides that section 15 does not apply to any taxable year that includes January 1, 2018, and further provides that for a taxpayer using a taxable year other than the calendar year, section 15 applies to any taxable year beginning after January 1, 2018. In the case of taxpayers that use a taxable year other than the calendar year and that includes January 1, 2019, this proposed regulation provides that section 15 applies to the change in the section 59A tax rate from 5 percent to 10 percent, based on an effective date of January 1, 2019.

Several comments asserted that final regulations should provide that section 15 applies only to the change in tax rate set forth in section 59A(b)(2) and should not apply to the change in tax rate included in section 59A(b)(1)(A) for taxable years beginning in calendar year 2018. The final regulations adopt this comment. In adopting this comment that section 15 not apply to the change in tax rate included in section 59A(b)(1)(A) for taxable years beginning in calendar year 2018, the final regulations provide no inference as to the application of section 15 to other provisions of the Code that do not set forth an explicit effective date.

VII. Comments and Changes to Proposed § 1.59A–6—Qualified Derivative Payments

Proposed § 1.59A–6 provides guidance regarding QDPs.

A. Scope of the QDP Exception

Proposed § 1.59A–6(b) defines a QDP as a payment made by a taxpayer to a foreign related party pursuant to a derivative with respect to which the taxpayer (i) recognizes gain or loss as if the derivative were sold for its fair market value on the last business day of the taxable year (and any additional times as required by the Code or the taxpayer's method of accounting); (ii) treats any recognized gain or loss as ordinary; and (iii) treats the character of all items of income, deduction, gain, or loss with respect to a payment pursuant to the derivative as ordinary. The definition in the proposed regulations adopts the statutory definition of a QDP contained in section 59A(h)(2)(A). The QDP exception under the statute and the proposed regulations is subject to further limitations that are discussed in Parts VII.B and C of this Summary of Comments and Explanation of Revisions.

A comment requested that the scope of the QDP definition be expanded. The comment requested that the final regulations extend the scope of the QDP exception so that multinational corporations that use a centralized hedging center structure can benefit from this exception from the definition of a base erosion payment with respect to their outbound related-party hedging payments. The comment stated that taxpayers in the oil and gas sector often do not adopt a mark-to-market method of tax accounting for a variety of business and tax-related reasons. The comment recommended that the final regulations adopt a distinct QDP exception that would be applicable to oil and gas hedging centers (as well as any similarly situated hedging centers). The comment requested that this QDP exception exclude related-party hedging payments from the scope of base erosion payments, without regard to whether the taxpayer satisfies the requirement in section 59A(h)(2)(A)(i) that the taxpayer accounts for the underlying commodity derivative on a mark-to-market basis. As an alternative, the comment suggested that the final regulations could interpret the mark-to-market requirement of section 59A(h)(2)(A)(i) broadly to cover taxpayers that undertake mark-to-market accounting for derivatives for either financial accounting or tax purposes.

For a derivative payment to qualify for the QDP exception, section 59A(h)(2)(A) requires that the taxpayer recognize gain or loss with respect to the derivative as if the derivative were sold for its fair market value on the last business day of the taxable year, and ''such *additional times as required by this title* or the taxpayer's method of accounting'' (emphasis added). The Treasury Department and the IRS, therefore, interpret section 59A as excluding a derivative from the QDP exception if the taxpayer does not adopt a mark-to-market method of tax accounting. In light of the statute's clear requirement for the QDP exception that a derivative must be treated as sold for its fair market value on the last business day of the taxable year (or more frequently, if required by the Code or the taxpayer's method of accounting), the final regulations do not adopt the comment. See § 1.475(a)–4(d).

B. Sale-Repurchase Transactions and Securities Lending Transactions

Section 59A(h)(1) provides that a QDP is not treated as a base erosion payment. To qualify for the QDP exception, the payment must be made with respect to a derivative. A derivative is generally defined in section 59A(h)(4) as any contract the value of which, or any payment or other transfer with respect to which, is directly or indirectly determined by reference to one or more listed items, including any share of stock in a corporation or any evidence of indebtedness. A derivative does not include any of the listed items. Section 59A(h)(3) excludes from the QDP exception any payment that would be treated as a base erosion payment if it were not made pursuant to a derivative (for example, interest on a debt instrument). Section 59A(h)(3) also excludes any payment properly allocable to a nonderivative component of a contract that contains derivative and nonderivative components.

The preamble to the proposed regulations notes that a sale-repurchase transaction satisfying certain conditions is treated as a secured loan for U.S. federal tax purposes, and therefore, is not a derivative. REG–104259–18, 83 FR 65962 (December 21, 2018). The preamble to the proposed regulations explains that ''[b]ecause sale-repurchase transactions and securities lending transactions are economically similar to each other, the Treasury Department and the IRS have determined that these transactions should be treated similarly for purposes of section 59A(h)(4), and therefore payments on those transactions are not treated as QDPs.'' REG–104259–18, 83 FR 65963 (December 21, 2018). As a result, proposed § 1.59A–6(d)(2)(iii) provides that a derivative does not include any securities lending transaction, sale-repurchase transaction, or substantially similar transaction.

Comments generally agreed that a sale-repurchase transaction that is treated as a secured loan for U.S. federal income tax purposes is not a derivative; therefore, comments acknowledged that a sale-repurchase transaction that is treated as a secured loan for U.S. federal tax purposes is not eligible for the QDP exception under section 59A, regardless of the specific exclusion language in proposed § 1.59A–6(d)(2)(iii). Certain comments explained that the nominal seller of the securities in a sale-repurchase transaction is treated as transferring the securities as collateral of a loan. Comments interpret current federal income tax law to provide that the nominal seller remains the tax owner of the securities when a sale-repurchase transaction is treated as a secured loan for federal income tax purposes. Therefore, when the nominal buyer of the securities receives payments with respect to the collateral securities (for example, in the case of an equity security, the dividend payments), and passes those payments on to the nominal seller (or otherwise credits the seller for the amount of the payments), the comments asserted that the nominal seller is treated as having directly received those payments from the issuer of the securities.

In the context of section 59A, if the nominal seller in a sale-repurchase transaction that is treated as a loan is a domestic corporation and the nominal buyer is a foreign related party, any interest paid with respect to the secured loan from the domestic corporation to the foreign related party would be a base erosion payment, not a QDP. In a sale-repurchase transaction that is treated as a loan for which the nominal seller is instead a foreign related party and the nominal buyer is a domestic corporation, the payments with respect to the security held by the nominal buyer as collateral for that transaction are treated as received by the nominal buyer for the benefit of the nominal seller. Because there is no regarded ''substitute payment'' from the nominal buyer to the nominal seller, there cannot be a base erosion payment.

Comments asserted that securities lending transactions and sale-repurchase transactions are treated differently with respect to underlying payments or substitute payments as a result of proposed § 1.59A–6(d)(2)(iii) even though the transactions are economically similar. Comments observed that in a typical fully-collateralized securities lending transaction, the securities lender transfers the securities to the securities borrower in exchange for an obligation by the borrower to make certain payments to the securities lender and return identical securities. Unlike a sale-repurchase transaction, comments remarked that this transaction results in a transfer of beneficial ownership of the securities to the securities borrower for U.S. federal income tax purposes. Comments noted that these securities lending transactions may arise in the ordinary course of business, for example, to facilitate a short sale of the underlying security. In connection with the transfer of securities, the securities borrower provides cash or other collateral to the securities lender, typically with the same or greater value as the underlying security. Comments observed that the securities lender in these transactions can be viewed as both a lender of securities to the counterparty, and as the borrower of cash from the counterparty.

Comments suggested that the final regulations should treat a collateralized securities lending transaction as consisting of two legs: (1) A loan of securities, or a ''securities leg'', and (2) a loan of cash, or a ''cash leg.'' Comments stated that the cash leg is simply a cash borrowing by the security lender. Many comments conceded that the cash leg of a securities lending transaction should not be eligible for the QDP exception because the cash leg is properly treated as a loan and any payments should be treated as interest. Certain of these comments observed that the treatment of the cash leg of a securities lending transaction as debt giving rise to interest payments is consistent with the broadly symmetrical treatment of securities lending transactions and sale-repurchase transactions that are treated as secured loans for U.S. federal income tax purposes.

Comments, however, asserted that the securities leg of a securities lending transaction should be treated as a derivative that qualifies for the QDP exception. The comments argued that a securities leg meets the statutory requirement of a derivative because it represents a contract, which includes any short position, the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to any share of stock in a corporation. By treating a substitute payment in a securities lending transaction as eligible for the QDP exception, those payments would receive similar treatment for purposes of section 59A as in the case of a sale-repurchase transaction that is treated as a secured loan. That is, in the sale-repurchase transaction, the remittances on the collateral by the nominal buyer to the nominal seller are treated as a payment from the issuer of the security to the nominal seller for U.S. federal income tax purposes.

Some comments acknowledged that in certain circumstances, there is the potential to use a securities lending transaction as a financing. One comment described a scenario involving an uncollateralized securities borrowing by a domestic corporation of relatively risk-free debt, such as short-term Treasury bills, from a foreign related party. As a second step, the domestic corporation immediately sells the Treasury bills for cash; after a short period, the taxpayer buys even shorter-term Treasury bills and redelivers them to the lender. Comments acknowledged that in this situation, or in similar situations, the transaction may be viewed as economically equivalent to borrowing money, with the taxpayer exposed to the relatively small risk of changes in the value of the security (here, U.S. government-backed Treasury bills).

Rather than excluding all securities lending transactions from QDP status, comments generally recommended that the final regulations adopt rules to address this particular risk. Some comments recommended adopting a specific operating rule to address this concern, including (i) providing that only contracts entered into in the ordinary course of the taxpayer's trade or business can qualify for the QDP exception, (ii) providing that only fully collateralized transactions can qualify for the QDP exception, or (iii) applying different rules for securities lending transactions involving relatively low-risk securities (such as Treasury bills) than for other securities that are subject to more market risk. Regarding fully collateralized securities lending transactions, some comments asserted that under certain bank regulatory regimes, other amounts outside of the actual collateral in the transaction may effectively serve as collateral due to the securities borrower's compliance with any specific regulatory regime governing securities borrowing. Some comments recommended that the final regulations adopt an anti-abuse rule rather than an operating rule to address this concern. One comment suggested an anti-abuse rule that excludes from the QDP exception transactions with specific debt-like features that make the transaction substantially similar to a financing, while another comment noted that it would be unduly burdensome to test contracts based on certain characteristics, particularly for taxpayers that engage in a high volume of these transactions in the ordinary course. This comment instead suggested that all securities lending transactions entered into for valid non-tax business purposes should be eligible for the QDP exception.

In response to these comments, the final regulations make certain revisions to § 1.59A–6(d)(2)(iii). First, § 1.59A–6(d)(2)(iii) has been revised to more directly provide that a derivative contract as defined in section 59A(h)(4) does not include a sale-repurchase transaction or substantially similar transaction that is treated as a secured loan for U.S. federal income tax purposes. Second, § 1.59A–6(d)(2)(iii) is also revised to exclude from the definition of a derivative for purposes of section 59A(h) the cash leg of a securities lending transaction, along with cash payments pursuant to a sale-repurchase transaction, or other similar transaction. The final regulations no longer expressly exclude securities lending transactions from the definition of a derivative contract in § 1.59A–6(d)(2)(iii). As a result, payments (such as a borrow fee) made with respect to the securities leg of a securities lending transaction may qualify as a QDP.

To address the concern about securities lending transactions that have a significant financing component, the final regulations adopt the recommendation from comments to provide an anti-abuse rule. *See* § 1.59A–6(d)(2)(iii)(C). The anti-abuse rule in the final regulations includes criteria to limit the rule to situations that have been identified as presenting clear opportunities for abuse. The anti-abuse rule takes into account two factors: (a) Whether the securities lending transaction or substantially similar transaction provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing and (b) whether the transaction is part of an arrangement that has been entered into with a principal purpose of avoiding the treatment of any payment with respect to the transaction as a base erosion payment. The determination of whether a securities lending transaction or substantially similar transaction provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing takes into account arrangements that effectively serve as collateral due to the taxpayer's compliance with any U.S. regulatory requirements governing such transaction. The anti-abuse rule is based on these factors because the Treasury Department and the IRS are cognizant that an objective mechanical rule based on the level of collateralization may be difficult for both taxpayers and the IRS to apply, in particular due to the high volume of transactions issued under varying conditions.

C. QDP Reporting Requirements

Section 59A(h)(2)(B) provides that no payment is a QDP for a taxable year ''unless the taxpayer includes in the information required to be reported under section 6038B(b)(2) [4] [sic] with

[4] As enacted, section 59A(h)(2)(B) cross-references section 6038B(b)(2). This cross-reference

respect to such taxable year such information as is necessary to identify the payments to be so treated and such other information as the Secretary determines necessary to carry out the provisions of this subsection.'' Proposed § 1.59A–6(b)(2)(i) clarifies that no payment is a QDP unless the taxpayer reports the information required by the Secretary in proposed § 1.6038A–2(b)(7)(ix). Proposed § 1.6038A–2(b)(7)(ix) identifies the specific information that a taxpayer needs to report to comply with the reporting requirement of section 59A(h)(2)(B) and proposed § 1.59A–6(b)(2)(i). The proposed regulations provide that the rule for reporting QDPs applies to taxable years beginning one year after final regulations are published in the **Federal Register**. Proposed § 1.6038A–2(g). Before proposed § 1.6038A–2(b)(7)(ix) is applicable, a taxpayer is treated as complying with the QDP reporting requirement by reporting the aggregate amount of QDPs on Form 8991. *Id.*

1. Scope of QDP Reporting

Section 1.6038A–1(c) generally defines a reporting corporation as either a domestic corporation that is 25-percent foreign-owned, or a foreign corporation that is 25-percent foreign-owned and engaged in trade or business within the United States. A comment recommended that the final regulations clarify that a failure to comply with the Form 8991 reporting requirements by a taxpayer that is not a reporting corporation (within the meaning of § 1.6038A–1(c)) does not affect the QDP status of any payments made by the taxpayer. The comment also recommended that the final regulations clarify the consequences of failing to comply with the Form 8991 QDP reporting requirements.

Section 59A(h)(2)(B) requires that all taxpayers, whether or not the taxpayer is a reporting corporation within the meaning of section 6038A, report QDPs in order for the exception to apply to any particular payment. The Treasury Department and the IRS interpret the language in section 59A(h)(2)(B) referencing section 6038B(b)(2) (''the information required to be reported under section 6038B(b)(2) [sic]'') as addressing the scope of information required to be reported rather than limiting the scope of taxpayers that must report in order to qualify derivatives as QDPs under section 59A(h). The final regulations, therefore, clarify that § 1.59A–6(b)(2)(i) applies to all taxpayers (whether or not a taxpayer is a reporting corporation as defined in § 1.6038A–1(c)) and that all taxpayers must report the information required by § 1.6038A–2(b)(7)(ix) for a payment to be eligible for QDP status.

Comments also requested additional guidance regarding the consequences when a taxpayer fails to comply with the QDP reporting requirements with respect to a particular payment. The proposed regulations provide that a failure by a taxpayer to report a particular payment as a QDP disqualifies only that payment and does not affect the taxpayer's properly reported payments. The final regulations retain that rule. In addition, § 1.59A–6(b)(2)(i) provides that a taxpayer satisfies the reporting requirement by including a QDP in the aggregate amount of all QDPs (rather than the aggregate amount as determined by type of derivative contract as provided in proposed § 1.6038A–2(b)(7)(ix)(A)) on Form 8991 or a successor form.

Another comment requested a reasonable cause exception to the QDP reporting requirements because treating a payment as a base erosion payment solely when a taxpayer failed to report the payments as a QDP would unfairly penalize a taxpayer for making an error. The Treasury Department and the IRS have determined that a reasonable cause exception is inappropriate because section 59A(h)(2)(B) provides that a taxpayer must identify all base erosion payments. A taxpayer must determine that a payment is eligible for the QDP exception and, therefore, properly excluded from the base erosion percentage calculation. Similarly, a taxpayer must determine that a payment is properly characterized as a QDP to properly determine modified taxable income for purposes of section 59A. In addition, a reasonable cause exception would make it more difficult for the IRS to administer section 59A. However, as discussed in Part VII.C.3 of this Summary of Comments and Explanation of Revisions, the final regulations provide a good faith standard that applies during the QDP transition period before the reporting set forth in § 1.6038A–2(b)(7)(ix) is required. In addition, in response to comments, the transition period has been extended to 18 months.

2. Determining the Amount of QDP Payment

A comment recommended that the final regulations clarify that taxpayers may use the net amount with respect to each derivative transaction to arrive at the aggregate QDP amount that must be reported on Form 8991. The comment noted that this approach would be consistent with the BEAT Netting Rule for mark-to-market transactions. See Part III.D of Summary of Comments and Explanation of Revisions. Generally, the Treasury Department and the IRS have adopted this comment. *See* § 1.59A–6(b)(2)(iii). A taxpayer, however, must exclude from the net amount of a QDP any payment made with respect to a derivative that is either excluded from QDP status pursuant to section 59A9(h)(3) or otherwise treated as a type of payment that is not a derivative payment. *See* § 1.59A–6(b)(3)(ii).

Another comment requested excluding from QDP reporting requirements any payments with respect to securities lending transactions and sale-repurchase transactions that are not regarded under generally accepted accounting principles (GAAP). The final regulations do not adopt this recommendation. Reporting QDPs is a statutory requirement to provide the IRS with data about transactions that have been excluded under the QDP exception, and the financial accounting for these transactions is not relevant to QDP status. Furthermore, the Treasury Department and the IRS have determined that the deferred applicability date and transition period, described in Part VII.C.3 of Summary of Comments and Explanation of Revisions, will provide taxpayers with adequate time to develop systems to track the information that may not have been previously maintained in accounting systems.

3. Applicability Date and Transition Period for QDP Reporting

Comments asserted that taxpayers needed additional time before the final regulations regarding QDP reporting are applicable. Comments noted that before the enactment of section 59A, taxpayers generally were not required to separately track or account for certain transactions with foreign related parties. The Treasury Department and the IRS recognize that section 59A will require taxpayers to develop new systems to properly report QDPs; therefore, the final regulations extend the transition period for meeting the complete QDP reporting requirements until taxable years beginning Monday, June 7, 2021.

Another comment requested additional guidance regarding the QDP reporting requirements that apply before the applicability date of the final regulations for these rules (the ''QDP transition period''). Specifically,

in section 59A(h)(2)(B) is a typographical error. Section 6038B(b)(2) does not relate to section 59A. The correct cross-reference is to section 6038A(b)(2). The Act added reporting requirements for section 59A in section 6038A(b)(2). *See* Act, § 14401(b).

comments interpreted the QDP transition period as applying only to a reporting corporation as defined in § 1.6038A–1(c). They recommended that all taxpayers be permitted to report QDPs on an aggregate basis during the QDP transition period and that the good faith effort standard for reporting QDPs during the transition period should apply to all taxpayers. The final regulations adopt these comments by clarifying that § 1.6038A–2(b)(7)(ix) applies to a taxpayer whether or not the taxpayer is a reporting corporation as defined in § 6038A–1(c). *See* § 1.59A–6(b)(2)(i). In addition, the final regulations eliminate the rule in the proposed regulations requiring a taxpayer to report the aggregate amount of QDPs as determined by type of derivative contract, the identity of each counterparty, and the aggregate amount of QDPs made to each counterparty. The Treasury Department and the IRS anticipate that the aggregate amount of QDPs provides adequate information to allow the IRS to administer the QDP rules.

VIII. Comments and Changes to Proposed § 1.59A–7—Application of BEAT to Partnerships

Proposed § 1.59A–7 provides rules regarding how partnerships and their partners are treated for purposes of the BEAT. The proposed regulations generally apply an aggregate approach in addressing the treatment of payments made by a partnership or received by a partnership for purposes of section 59A.

A. Partnership Contributions and Distributions

1. Request for Contribution Exception

The proposed regulations treat a contribution to a partnership as a transaction between the partners that may result in a base erosion payment, including when a partnership with a domestic corporate partner receives a contribution of depreciable property from a foreign related party. Several comments requested a change to the approach taken in the proposed regulations. One comment asserted that the issuance of a partnership interest in exchange for a contribution to a partnership was not intended to be a base erosion payment covered by section 59A(d)(2) and that subjecting inbound nonrecognition transactions to the BEAT seems contrary to the purpose of the Act, which the comment stated was to encourage taxpayers to relocate business functions and assets to the United States and expand business activities in the United States. The comment noted that if Congress intended to subject nonrecognition transactions to the BEAT, it would have done so more explicitly.

Other comments generally asserted that nonrecognition transactions should not be subject to the BEAT. Some of these comments specifically addressed section 721 transactions and recommended that the same exception for section 351 transactions that is discussed in Part IV.B.3 of this Summary of Comments and Explanation of Revisions apply to section 721(a) transactions.

In contrast, a comment noted that applying an aggregate approach to partnerships for purposes of the BEAT was consistent with the purposes of the statute. The comment asserted that treating a contribution of property in exchange for a partnership interest as a potential base erosion payment is consistent with the concept of treating a partnership as an aggregate of its partners and with the purposes of section 59A. The comment explained that to the extent there is a base eroding transaction when property (such as depreciable property) is contributed to a partnership under section 721, it is the acquisition of a proportionate share of new property by the existing partners from a contributing partner (assuming that partner is a foreign related party). The comment also explained that the existing partners would have paid for the new property with a proportionate share of the existing assets of the partnership. In addition, the comment noted that a contributing partner (such as a domestic corporation) could be acquiring a proportionate share of the partnership's existing assets (where one or more partners of the partnership are foreign related parties).

The final regulations do not adopt the comments requesting an exception for nonrecognition transactions involving partnerships. The general premise of the aggregate approach to transactions involving partners and partnerships in both the proposed regulations and the final regulations is to treat partners as engaging in transactions directly with each other, not as engaging in transactions with the partnership as a separate entity (solely for purposes of section 59A). See § 1.59A–7(b) and (c); proposed § 1.59A–7(b)(1)–(3); REG–104259–18, 83 FR 65965 (December 21, 2018). The Treasury Department and the IRS acknowledge that the final regulations include an exception for specified corporate nonrecognition transactions that is discussed in Part IV.B.3 of the Summary of Comments and Explanation of Revisions, which presents some similarity with the types of transactions contemplated by this comment. For example, if a domestic corporation and a foreign related party each contribute depreciable property to a new domestic corporation in exchange for stock of the new domestic corporation in a transaction that qualifies under section 351(a), the new domestic corporation generally will not be treated as making a base erosion payment in exchange for the depreciable property pursuant to the new exception in the final regulations for specified corporate nonrecognition transactions that is discussed in Part IV.B.3 of the Summary of Comments and Explanation of Revisions. In contrast, if the same domestic corporation and a foreign related party each contribute depreciable property to a new partnership in exchange for interests in the partnership in a transaction that qualifies under section 721(a), the transaction is treated as a partner-to-partner exchange that may result in a base erosion payment solely for purposes of section 59A, with no specific exception adopted in the final regulations.

The final regulations do not extend the exception for specified corporate nonrecognition transactions to partnership transactions because that treatment would be generally inconsistent with the approach of treating partners in a partnership as engaging in transactions with each other. The preamble to the proposed regulations states that the Treasury Department and the IRS determined that a rule that applies the aggregate principle consistently is necessary to align the treatment of economically similar transactions. REG–104259–18, 83 FR 65956, 65967 (Dec. 21, 2018).

The adoption of a section 721(a) exception to the BEAT could permit related parties to use a partnership to avoid a transaction that would be a base erosion payment if that transaction occurred directly among the partners. The Treasury Department and the IRS acknowledge that in some respects, a similar argument could be made against adopting the exception for specified corporate nonrecognition transactions that applies to the section 351(a) example that is described in this Part VIII.A.1; however, the general tax rules that apply to corporations under subchapter C are fundamentally different from the general tax rules that apply to partnerships under subchapter K. In particular, when property is distributed by a partnership back to the partner, nonrecognition by the partnership and the partner is the general rule under subchapter K; however, when property is distributed by a corporation back to its shareholder, recognition and income by the corporation and the shareholder is the general rule under subchapter C. Compare sections 731(b) and (a) with sections 311(b) and 301(c). For these reasons, the final regulations do not extend the exception that is provided to specified corporate nonrecognition transactions to partnership nonrecognition transactions, such as contributions.

2. Amounts Paid or Accrued

Proposed § 1.59A–3(b)(2)(i) confirms that an amount ''paid or accrued,'' as those terms are used for purposes of determining whether there is a base erosion payment, includes an amount paid or accrued using any form of consideration.

A comment asserted that subchapter K of the Code contains well-developed provisions to distinguish between a sale or exchange, as opposed to a contribution, and that there should only be a ''payment or accrual'' for purposes of section 59A(d) to the extent a partner is treated as receiving proceeds from the partnership pursuant to a sale (for example, under the disguised sale rules of section 707). Similarly, a comment recommended that a distribution by a partnership described in section 731 generally not be treated as an amount paid or accrued for purposes of section 59A, except to the extent that the transaction would be treated as a deemed sale of property by the partnership.

In addition, one comment recommended that if the final regulations continue to treat certain partnership contributions and distributions as ''payments'' that could be base erosion payments, the applicability date of the provisions relating to this treatment should be modified to take into account that taxpayers have engaged in contributions to (or distributions by) partnerships between December 31, 2017, and December 21, 2018, without guidance that these transactions could be treated as base erosion payments. The comment also recommended a special rule to exclude pro-rata contributions (contributions made by each partner of the partnership in proportion to its interest in the partnership) from the definition of ''an amount paid or accrued.''

The final regulations continue to treat contributions to and distributions from partnerships as ''payments'' that could be base erosion payments under the aggregate approach. Section 59A does not contain an explicit restriction on the type of consideration that constitutes a payment. Proposed § 1.59A–3(b)(2)(i) confirms that ''an amount paid or accrued includes an amount paid or accrued using any form of consideration, including cash, property, stock, or the assumption of a liability.'' The final regulations include the same language. The Treasury Department and the IRS have determined that it is not appropriate to change the operating rule describing payment consideration or delay its application. However, in response to comments, the final regulations add partnership interests to the non-exclusive list of examples of consideration in § 1.59A–3(b)(2)(ii) to reaffirm this result.

The final regulations do not exclude pro-rata contributions from the definition of ''an amount paid or accrued'' and therefore, they are not excluded from the definition of a base erosion payment. If pro-rata contributions are made by each partner, each transaction must be separately considered, consistent with the general rule in section 59A that assesses transactions on a gross, rather than net, basis. A pro-rata contribution exclusion would be inconsistent with the aggregate approach taken in these final regulations. For example, if there was an exception, a domestic corporation could contribute cash to a new partnership and its foreign parent could contribute depreciable property, each in proportion to their interest in the partnership, and under the exception, the transaction would not be subject to section 59A even though, under the aggregate approach, the domestic corporation effectively acquired its proportionate share of the contributed depreciable property from a foreign related party in exchange for cash. *See also* Part VIII.B of this Summary of Comments and Explanation of Revisions (Netting). To clarify this point, § 1.59A–7(c)(5)(iv) provides that when both parties to a transaction use non-cash consideration, each party must separately determine its base erosion payment with respect to each property, and § 1.59A–7(d)(1) provides that base erosion tax benefits are calculated separately for each payment or accrual on a property-by-property basis and are not netted.

Consistent with the approach taken for contributions to a partnership, the Treasury Department and the IRS determined that no special rule should be provided for distributions by a partnership. The approach suggested by a comment—only treating distributions subject to the disguised sales rules as potential base erosion payments—would be inconsistent with the aggregate approach to partnerships for the reasons discussed in the context of partnership contributions.

3. Request for ECI Exception

A comment recommended that contributions of depreciable (or amortizable) property by a foreign related party to a partnership (in which an applicable taxpayer is a partner) or distributions of depreciable or amortizable property by a partnership (in which a foreign related party is a partner) to an applicable taxpayer be excluded from the definition of a base erosion payment to the extent that the foreign related party would receive (or would be expected to receive) allocations of income from that partnership interest that would be taxable to the foreign related party as effectively connected income. The final regulations do not include rules relating to these comments. In the 2019 proposed regulations, however, the Treasury Department and the IRS request comments regarding how to address a contribution by a foreign person to a partnership engaged in a U.S. trade or business, transfers of partnership interests by a foreign person, and transfers of property by the partnership with a foreign person as a partner to a related U.S. person. See Part VI.B of the Explanation of Provisions of the preamble to the 2019 proposed regulations in which the Treasury Department and the IRS request comments regarding transactions involving partners and partnerships that have effectively connected income.

B. Netting

Proposed § 1.59A–3(b)(2)(iii) provides that the amount of any base erosion payment is determined on a gross basis unless the transaction is subject to a special mark-to-market rule or the Code or regulations otherwise provide. A comment requested that a special netting rule be provided for partnerships when the base erosion tax benefits allocated by a partnership are reduced by deductions foregone as a result of the partner contributing property to the partnership.

The Treasury Department and the IRS have determined that this suggestion is inconsistent with the gross basis regime generally. See Part IV.A.3 of this Summary of Comments and Explanation of Revisions (Netting). The result addressed in the comment is the same result that would arise if the transactions had occurred outside of a partnership. For example, a taxpayer that acquired one depreciable asset from a foreign related party and sold another asset would be in a similar position: the taxpayer would treat the depreciation with respect to the acquired asset as a base erosion tax benefit and there would be no offset for deductions from the asset the taxpayer sold (even if those ''foregone'' deductions would not have been base erosion tax benefits). Section 1.59A–7(d)(1) clarifies that base erosion tax benefits are determined separately for each asset, payment, or accrual, as applicable, and are not netted with other items.

C. Aggregate Approach to Ownership of Partnership Assets

Proposed § 1.59A–7(b)(5)(i) provides that (subject to the small partner exception), for purposes of section 59A, each partner is treated as owning its share of the partnership items determined under section 704, including the assets of the partnership, using a reasonable method with respect to the assets. A comment proposed either removing the phrase ''including the assets of the partnership'' from this rule or including examples that clarify the purposes of section 59A for which the aggregate approach to the ownership of partnership assets is relevant.

In response to this comment, the final regulations remove this language from § 1.59A–7(b)(5)(i). Instead, when it is necessary for a person to determine what assets were transferred from or to a partner in a partnership, the relevant provision refers to the partner's proportionate share of the assets, as determined based on all of the facts and circumstances. *See* § 1.59A–7(c)(2), (3), and (4).

D. Determining the Base Erosion Payment

Proposed § 1.59A–7(b) generally provides that section 59A is applied at the partner level and that amounts paid or accrued by (or to) a partnership are treated as paid or accrued by (or to) the partners based on their distributive shares.

A number of comments requested clarification with respect to the aggregate approach taken in the proposed regulations. For example, a comment indicated that the proposed regulations do not address how to determine each partner's share of a payment received by a partnership if the payment results in no income or gain or results in a deduction or loss (for example, where a partnership sells depreciable or amortizable property to an applicable taxpayer and the amount realized is equal to or less than the partnership's adjusted basis in the property). The comment recommended that the final regulations provide rules for determining the extent to which a partner is treated as receiving a payment received by a partnership where the payment results in no income or a deduction or loss. The comment suggested that taxpayers be permitted to use a reasonable method to determine each partner's share of a payment received by the partnership if the payment results in no income and that, in circumstances where a payment results in a deduction or loss, the partner's share of the payment be determined by the partner's share of the deduction or loss. Additionally, the comment suggested that the final regulations permit taxpayers to use a reasonable method to determine each partner's share of the payment received by the partnership where the income or gain is recognized over multiple taxable years (such as in an installment sale).

Comments also requested that the final regulations clarify that depreciation deductions allocated to a taxpayer by a partnership that are attributable to property contributed to the partnership by a foreign related party are not treated as base erosion tax benefits if the property was contributed before the effective date of the BEAT.

One comment requested clarification regarding a scenario described in the preamble in which a foreign related party and a taxpayer form a partnership, and the foreign related party contributes depreciable property to the partnership. The preamble concludes that deductions for depreciation of the property contributed generally are base erosion tax benefits because the partnership is treated as acquiring the property in exchange for an interest in the partnership under section 721(a). REG–104259–18, 83 FR 65956, 65967 (Dec. 21, 2018). The comment requested that the final regulations clarify whether, in the scenario described in the preamble, each partner is treated as making its share of the payment (in the form of an interest in the partnership) to the foreign related party contributing the depreciable property under proposed § 1.59A–7(b)(2) in determining if there is a base erosion payment. The language in the preamble to the proposed regulations that the comment discussed was in error. Consistent with the aggregate approach, the language should have stated that the deductions for depreciation of the property contributed generally are base erosion tax benefits because the *other partners* are treated as acquiring the property in exchange for a portion of their interest in the partnership assets, and this is clarified in the final regulations. *See* § 1.59A–7(c)(3).

In response to the comments, the final regulations provide a more detailed explanation of how the aggregate approach set forth in the proposed regulations operates, including the treatment of partnership contributions and transfers of partnership interests (including issuances). In addition, § 1.59A–7(g) includes examples illustrating the application of the rules.

The final regulations clarify that if property described in § 1.59A–3(b)(1)(ii) or (iv) (depreciable or amortizable property or property that results in reductions to determine gross income) is transferred to a partnership, each partner is treated as receiving its proportionate share of the property for purposes of determining if it has a base erosion payment. Similarly, if the partnership transfers property described in § 1.59A–3(b)(1)(ii) or (iv), each partner is treated as transferring its proportionate share of the property for purposes of determining if the recipient has a base erosion payment. *See* § 1.59A–7(c)(2). If a partnership interest is transferred (other than by a partnership), the transferor generally is treated as transferring its proportionate share of the partnership's assets. When a partnership interest is transferred by a partnership, each partner whose proportionate share of assets is reduced is treated as transferring the amount of the reduction. *See* § 1.59A–7(c)(3).

In keeping with this construct, if a taxpayer was a partner in a partnership and a foreign related party contributed depreciable property to the partnership before January 1, 2018, there would be no base erosion payment. However, also consistent with this construct, if a taxpayer acquires an interest (including an increased interest) in any partnership asset (including pursuant to a transfer of a partnership interest either by the partnership or by another person) on or after January 1, 2018, from a partnership that holds depreciable property and has a foreign related party as a partner whose interest in the asset is reduced, with or without a section 754 election by the partnership, that transaction will be a base erosion payment because the property will be treated as acquired on or after January 1, 2018. *See* § 1.59A–7(c).

The final regulations also clarify that the amount of deduction resulting from a payment is not impacted by the gain or loss arising from the consideration used to make the payment. Therefore, if the partnership makes a payment, that payment from the partnership may result in a deduction even if the partnership incurs a gain on the transfer under general tax principles because the partnership used built-in gain property as consideration. Similarly, if the partnership receives a payment as consideration for the sale of built-in loss property, that payment to the partnership will result in income. *See*

§ 1.59A–3(b)(2)(ix) and § 1.59A–7(c)(5)(iv) and (d)(1).

If a series of payments or accruals with respect to a transaction occurs over time, whether there is a base erosion payment is determined each time there is a payment or accrual. If, instead, there is a single payment that results in base erosion tax benefits being allocated by a partnership over multiple years, the portion of the payment that is a base erosion payment must be determined at the time of the payment, but the amount of the base erosion tax benefits will be determined based on the allocations by the partnership that occur each year. For example, if a partnership, whose partners are a domestic corporation and an unrelated person, acquires depreciable property from a foreign related party of the domestic corporation, then the entire amount is a base erosion payment with respect to the domestic corporation and any allocations by the partnership of depreciation to the domestic corporation are base erosion tax benefits.

The final regulations clarify that if a distribution of property from a partnership to a partner causes an increase in the tax basis of property that either continues to be held by the partnership or is distributed from the partnership to a partner, such as under section 732(b) or 734(b), the increase in tax basis for the benefit of a taxpayer that is attributable to a foreign related party is treated as if it was newly purchased property by the taxpayer from the foreign related party that is placed in service when the distribution occurs for purposes of determining if a taxpayer has a base erosion payment. *See* § 1.59A–7(c)(4).

The final regulations also include certain additional operating rules to clarify how § 1.59A–7 applies. For example, § 1.59A–7(c)(5)(ii) clarifies the order in which the base erosion payment rules apply, and § 1.59A–7(c)(5)(iv) reaffirms that if both parties to a transaction use non-cash consideration, each transfer of property must be separately analyzed to determine if there is a base erosion payment.

The final regulations also clarify that if a transaction is not specifically described in § 1.59A–7, whether it gives rise to a base erosion payment or base erosion tax benefit will be determined in accordance with the principles of § 1.59A–7 and the purposes of section 59A. *See* § 1.59A–7(b). Further, the final regulations clarify that the aggregate approach under § 1.59A–7 does not override the treatment of any partnership item under any Code section other than section 59A. *See* § 1.59A–7(a). That clarification is consistent with the principle that a rule of general applicability applies unless explicitly replaced or turned off by another rule. Thus, for example, section 482 continues to apply to controlled transactions involving partnerships (such as transfers of property or provisions of services, contributions, and distributions), as it applies to all controlled transactions, and is taken into account in determining the arm's length consideration for such transactions (such as the pricing of transferred property or services, and the valuation of contributions and distributions) and in determining whether partnership transactions (including partnership allocations) otherwise clearly reflect income. *See,* for example, §§ 1.482–1(f)(1)(iii) and (i)(7) and (8) and 1.704–1(b)(1)(iii) and (5)(Ex. 28); Notice 2015–54, 2015–34 I.R.B. 210, §§ 2.03 and 2.04.

Given the absence in the statute of a provision describing the specific treatment of partnerships and partners, the Act's legislative history, and the overall significance of the proper functioning of the BEAT regime, the Treasury Department and the IRS have determined that, in addition to section 59A, certain authorities in subchapter K provide support for the treatment of partners and partnerships under these final regulations. The 1954 legislative history to subchapter K makes clear that this determination of aggregate versus entity should be based on the policies of the provision at issue, in this case, section 59A. See H.R. Rep. No. 83–2543, at 59 (1954). Under the rules of subchapter K, an aggregate approach applies if it is appropriate to carry out the purpose of a provision of the Code, unless an entity approach is specifically prescribed and clearly contemplated by the relevant statute. *See,* for example, § 1.701–2(e). The BEAT regime does not prescribe the treatment of a partnership as an entity and the treatment of a partnership as an aggregate is appropriate with respect to payments made to or received by it.

E. Determining a Partner's Base Erosion Tax Benefit

For purposes of determining whether a payment or accrual by a partnership is a base erosion payment, proposed § 1.59A–7(b)(2) provides that (subject to the small partner exception) any amount paid or accrued by a partnership is treated as paid or accrued by each partner based on the partner's distributive share of items of deduction (or other amounts that could be base erosion tax benefits) with respect to that amount (as determined under section 704). A comment noted that proposed § 1.59A–7(b)(2) does not indicate how a partner's base erosion tax benefits would be determined if a partner's distributive share of the partnership item that produces the base erosion tax benefits changed from one taxable year to another taxable year. The comment concluded that the amount of a partner's distributive share of deductions with respect to property acquired by the partner's base erosion payment that is treated as a base erosion tax benefit may not correspond to the amount of the partner's initial base erosion payment with respect to that property. The comment recommended that the final regulations clarify whether any amount of the partner's distributive share of deductions with respect to property acquired by a base erosion payment (in any amount) that is treated as made by the partner would be a base erosion tax benefit, subject to the small partner exception.

Another comment requested that the final regulations provide that when depreciable property is contributed to a partnership that adopts the remedial method under § 1.704–3(d) with respect to that property, the remedial items of depreciation (which may be allocated to a partner that is an applicable taxpayer) should not be treated as base erosion tax benefits. The comment further asserted that treating remedial items as base erosion tax benefits would penalize applicable taxpayers that are U.S. transferors in section 721(c) partnerships for which the gain deferral method is applied. *See generally* § 1.721(c)–1T.

As recommended by a comment, § 1.59A–7(d)(1) clarifies that the base erosion tax benefits are not dependent on the amount of the base erosion payment, and provides that a partner's base erosion tax benefits are the partner's distributive share of any deductions described in § 1.59A–3(c)(1)(i) or (ii) or reductions to determine gross income described in § 1.59A–3(c)(1)(iii) or (iv) attributable to the base erosion payment.

The final regulations also clarify that a taxpayer's base erosion tax benefits resulting from a base erosion payment include the partner's distributive share of any deduction or reduction to determine gross income attributable to the base erosion payment, including as a result of section 704(c), section 734(b), section 743(b) or certain other sections. *See* § 1.59A–7(d)(1). As a result, if a taxpayer is allocated depreciation or amortization deductions from property acquired pursuant to a base erosion payment, those deductions are base erosion tax benefits. If the partner obtains depreciation deductions in excess of the partner's proportionate share of the depreciable property, those deductions still arise from the acquisition of the property pursuant to a base erosion payment, and the Treasury Department and the IRS have determined that it would not be appropriate to exclude those deductions from base erosion tax benefit treatment.

F. Small Partner Exception

The proposed regulations provide that partners with certain small ownership interests are excluded from the aggregate approach for purposes of determining base erosion tax benefits from the partnership. This small partner exception generally applies to partnership interests that: (i) Represent less than ten percent of the capital and profits of the partnership; (ii) represent less than ten percent of each item of income, gain, loss, deduction, and credit; and (iii) have a fair market value of less than $25 million.

Comments recommended expanding the thresholds for the small partner exception for partnership interests and items to 25 percent, and eliminating the fair market value limitation. The comments suggested that the compliance burden associated with the thresholds in the proposed regulations would be substantial and that minority partners may have little or no ability to obtain the necessary information from the partnership.

The final regulations do not adopt these recommendations. In determining the appropriate threshold for a small ownership interest in the proposed regulations, the Treasury Department and the IRS considered the treatment of small ownership interests in partnerships in analogous situations in other Treasury regulations. Further, the fair market value threshold addresses a concern that while a partner may have a relatively small interest in a partnership, the partnership itself could have significant value such that partnership items should not be excluded from the BEAT base when an analogous payment made outside of the partnership context is not similarly excluded from the BEAT base. The $25 million fair market value threshold was developed after qualitative consideration of these factors.

Comments also recommended that the small partner exception apply to payments made to a partnership. The final regulations do not adopt this recommendation. The proposed regulations included the small partner interest exception for payments by a partnership in part because the Treasury Department and the IRS were cognizant that small partners in a partnership may not always have sufficient information about the amounts of payments made by the partnership and the identity of the payee. The Treasury Department and the IRS were also cognizant that this type of information is not currently reportable by the partnership to its partners on a Form K–1; that is, without information provided by the partnership to the taxpayer partner, that partner may not be able to determine whether it is treated as having made a base erosion payment through the partnership pursuant to proposed § 1.59A–7. The Treasury Department and the IRS considered these factors, and reached a qualitative conclusion that at or below the threshold level set forth in the proposed regulations, the administrability considerations outweighed the competing consideration of ensuring that base erosion payments through a partnership are properly taken into account by taxpayer partners in the partnership.

In a situation where a taxpayer makes a payment to a partnership (that is, a payment that may be a base erosion payment under proposed § 1.59A–7 because a partner in the partnership is a foreign related party with respect to the payor), the administrability concerns that factored into the small partner exception for payments by a partnership are less pronounced. That is, the taxpayer (payor) will generally have information to determine whether it has made a payment to a partnership in which any foreign related party is a partner without needing to obtain significant information from the partnership. Based on these factors, the Treasury Department and the IRS reached a qualitative conclusion that the administrability aspects of accounting for payments by a taxpayer to a partnership are not outweighed by the competing consideration of ensuring that base erosion payments to a partnership are properly taken into account by taxpayer payors.

IX. Comments and Changes to Proposed § 1.59A–9—Anti-Abuse and Recharacterization Rules

Proposed § 1.59A–9 contains anti-abuse rules that recharacterize certain transactions in accordance with their substance for purposes of carrying out the provisions of section 59A. The proposed anti-abuse rules address the following types of transactions: (a) Transactions involving intermediaries acting as a conduit if there is a principal purpose of avoiding a base erosion payment (or reducing the amount of a base erosion payment); (b) transactions with a principal purpose of increasing the deductions taken into account in the denominator of the base erosion percentage; and (c) transactions among related parties entered into with a principal purpose of avoiding the application of rules applicable to banks and registered securities dealers (for example, causing a bank or registered securities dealer to disaffiliate from an affiliated group so as to avoid the requirement th at it be a member of such a group).

Comments generally requested more guidance on when a transaction has ''a principal purpose'' of avoiding a provision of section 59A. Comments expressed a concern that any transaction that would result in a lower BEAT liability could be viewed as having ''a principal purpose'' of avoiding a provision of the section 59A regulations. Comments also expressed a concern that the anti-abuse rules could be interpreted as applying to transactions undertaken in the ordinary course of a taxpayer's business. One comment requested that the Treasury Department and the IRS consider whether existing anti-abuse rules and judicial doctrines, including section 7701(o), are sufficient to address abuse of section 59A.

Consistent with the grant of authority in section 59A(i), the Treasury Department and the IRS believe that anti-abuse rules specific to section 59A are needed. The final regulations address the requests for clarity regarding the ''principal purpose'' standard in the final regulations by adding new examples that illustrate the differences between transactions that the Treasury Department and the IRS find to be abusive or non-abusive. *See* § 1.59A–9(c)(5), (7), (8), (9).

A comment requested that the anti-abuse rule for transactions involving intermediaries acting as a conduit be modified so that it would not apply to transactions where taxpayers restructure their operations in a way that reduces their base erosion payments because they have moved operations to the United States. The comment asserted that proposed § 1.59A–9(b)(1) should not apply where taxpayers restructure their operations for business reasons even if, under the resulting structure, payments are made to a foreign related party through an intermediary. As an example, the comment suggested that taxpayers might restructure their business so that a domestic related party performs functions previously performed by a foreign related party. However, if the foreign related party continues to perform some functions that benefit the taxpayer, and payments for those functions are made through the domestic related party, the comment suggested that proposed § 1.59A–9(b)(1) could apply to the transaction. The determination of whether proposed § 1.59A–9(b)(1) will apply to a transaction is dependent, in part, on whether the transaction has a principal purpose of avoiding a base erosion payment or reducing the amount of a base erosion payment. The requested exception could lead to inappropriate results where the change in the taxpayer's operations is insignificant compared to the impact of reducing the taxpayer's base erosion payments. Accordingly, the final regulations do not include the requested exception.

Another comment requested clarification on when the anti-abuse rule in proposed § 1.59A–9(b)(1) could apply to a ''corresponding payment'' to an intermediary that would have been a base erosion payment if made to a foreign related party. The final regulations do not modify this rule because the rule is already clear that it applies to a corresponding payment that is part of a transaction, plan, or arrangement that has a principal purpose of avoiding a base erosion payment, and the final regulations include examples of transactions with such a purpose. Another similar comment requested clarification on when the anti-abuse rule in proposed § 1.59A–9(b)(1) could apply to an ''indirect'' corresponding payment. The final regulations do not modify this rule because it is already clear that transactions involving conduits and intermediaries can include transactions involving multiple intermediaries, for example, multiple intermediary lenders in a fact pattern similar to that in proposed § 1.59A–9(c)(4) (Example 4), and thus expanding that example to involve another intermediary would be redundant.

Other comments asked for a clarification that the anti-abuse rule for transactions designed to inflate the denominator of the base erosion percentage applies only to non-economic deductions such as those described in the example in proposed § 1.59A–9(c)(5) (Example 5). One comment recommended that the rule be limited to deductions and losses incurred for ''the'' principal purpose of increasing the denominator. The comment expressed a concern that the rule could be interpreted as applying to deductions and losses on transactions undertaken in the ordinary course of a taxpayer's business. The final regulations do not change the standard for determining whether transactions that increase the denominator of the base erosion percentage are abusive. Narrowing the rule to apply only to transactions where the single principal purpose is to increase the denominator of the base erosion percentage would make it difficult to administer in all but the most egregious cases. Further, it is a common formulation for anti-abuse rules to apply when ''a principal purpose'' or ''one of the principal purposes'' of a transaction is to avoid a particular provision. *See,* for example, section 954(h)(7)(A), (C), and (D); section 965(c)(3)(F); *see also* 60 FR 46500, 46501 (rejecting comments requesting that an anti-avoidance rule of § 1.954–1(b)(4) apply only if a purpose of first importance, rather than a principal purpose, was to avoid the de minimis test of § 1.954–1(b)(1)(i) because the suggested standard would be ''significantly more subjective'' than the test adopted and therefore inadministrable). However, the final regulations address the requests for clarity regarding the treatment of transactions entered into in the ordinary course of a taxpayer's business by adding a new example of the application of § 1.59A–9(b)(2). *See* § 1.59A–9(c)(7).

One comment requested that the anti-abuse rule with respect to the disaffiliation of banks and registered securities dealers be removed. The comment expressed a concern that proposed § 1.59A–9(b)(3) could effectively prevent taxpayers from disaffiliating a bank or registered securities dealer, notwithstanding the fact that disaffiliation could have other non-tax effects. The comment suggested that if a disaffiliation made sense from a business perspective and is permissible under applicable banking and securities rules, the Treasury Department and the IRS should not treat disaffiliation as abusive. The Treasury Department and the IRS have determined that disaffiliation of a bank or registered securities dealer could be abusive in certain circumstances, such as the interposition of entities other than ''includible corporations'' (as defined in section 1504(b)) with a principal purpose of avoiding the rules applicable to banks and registered securities dealers. Moreover, in developing guidance under various Code provisions, the Treasury Department and IRS often consider that disaffiliation could potentially avoid the purposes of a provision. See, for example, § 1.904(i)–1, which similarly limits the use of deconsolidation to avoid foreign tax credit limitations. *See* 59 FR 25584. Therefore, the final regulations retain § 1.59A–9(b)(3). However, the final regulations address the concern raised by the comment by providing examples to clarify the types of transactions that the Treasury Department and the IRS consider to be abusive. *See* § 1.59A–9(c)(8) and (9).

Finally, a comment recommended excluding from the anti-abuse rule transactions entered into, or pursuant to a binding commitment that was in effect, before the date of public announcement of certain provisions in section 59A. The final regulations do not adopt this recommendation. The anti-abuse rule in § 1.59A–9 is based on the specific grant of authority in section 59A(i), and the Treasury Department and the IRS decline to adopt a grandfathering rule when no such rule was adopted by statute.

X. Rules Relating to Insurance Companies

Section 59A(d)(3) provides that the term ''base erosion payment'' includes any premium or other consideration paid or accrued by a taxpayer to a foreign related party for any reinsurance payments that are taken into account under sections 803(a)(1)(B) or 832(b)(4)(A). The preamble to the proposed regulations requests comments regarding several issues relating to insurance companies. Specifically, the preamble to the proposed regulations requests comments regarding certain reinsurance agreements and other commercial agreements with reciprocal payments that are settled on a net basis. REG–104259–18, 83 FR 65968 (December 21, 2018).

Comments were also requested with respect to whether claims payments for losses incurred and other deductible payments made by a domestic reinsurance company to a foreign related insurance company are base erosion payments within the scope of section 59A(d)(1). REG–104259–18, 83 FR 65968 (December 21, 2018). The proposed regulations, however, did not provide any exceptions specific to the insurance industry.

Comments received generally addressed whether (1) claims payments for losses incurred (claims payments) under reinsurance contracts should be treated as base erosion payments, and (2) certain payments made pursuant to reinsurance contracts should be netted. For a discussion of comments relating to life/non-life consolidated returns, see Part XI of this Summary of Comments and Explanation of Revisions.

A. Reinsurance Claims Payments to a Related Foreign Insurance Company

The proposed regulations do not provide specific rules for payments by a domestic reinsurance company to a related foreign insurance company. The preamble to the proposed regulations notes the treatment of claims payments for purposes of section 59A may be different for life insurance companies and non-life insurance companies. REG–104259–18, 83 FR 65968 (December 21, 2018). For a life insurance company, payments for claims or losses incurred are deductible pursuant to sections 805(a)(1); therefore, these payments are potentially within the scope of section 59A(d)(1). With respect to non-life insurance companies, however, the preamble to the proposed regulations notes that certain claims payments for losses incurred may be treated as reductions in gross income under section 832(b)(3), rather than deductions under section 832(c). To the extent not covered by section 59A(d)(3), these payments treated as reductions in gross income may not be within scope of section 59A.

Generally, comments requested that the final regulations provide an exception to the term ''base erosion payment'' for claims payments made by a domestic reinsurance company to a related foreign insurance company. Some comments recommended that the exception should apply only to claims payments with respect to reinsurance that ultimately relates to the risk of unrelated third parties. Comments also stated that there was no apparent policy reason for treating life and non-life insurance claims payments differently for purposes of section 59A, although one comment noted that this distinction between life and non-life insurance claims payments results from the different approaches taken in drafting section 801(b) and section 832(b)(3), and that the Code sometimes provides disparate results.

Comments explained that an exception for claims payments by a domestic reinsurance company to a related foreign insurance company would provide symmetrical treatment for life insurance companies and non-life insurance companies. In addition, comments noted that reinsurance transactions with respect to which outbound claims payments are made do not base erode because they result from insurance business that is moved into the United States; therefore, it is appropriate to provide an exception similar to the TLAC exception and the exception for foreign currency losses. As noted, several comments requested an exception for reinsurance claims payments only to the extent that the claims payments are with respect to policies ultimately insuring third-party risks. Comments stated that because the reinsurance claims payments are payable only when an unrelated third party makes a claim under an insurance policy that the domestic insurance company has reinsured (and the nature of those claims payments are non-routine and often large and unpredictable), the timing and amount of the claims payment are not controlled by the related parties. Finally, comments noted that foreign regulatory requirements generally require that a local entity provide insurance to its residents; as a result of these regulatory requirements, domestic companies that want to provide insurance in many jurisdictions must do so by reinsuring a subsidiary established in the local jurisdiction.

Comments also addressed how an exception for claims payments should impact the base erosion percentage calculation. Generally, comments recommended that claims payments be excluded from the numerator, but included in the denominator. If claims payments were eliminated from the denominator, comments noted that a significant amount of business expenses would be removed from the base erosion percentage calculation. Several comments acknowledged that the final regulations may adopt an exception that applies to both the numerator and the denominator; in that case, comments recommended that claims payments should be eliminated from the denominator of the base erosion percentage only to the extent that the payments are made to a foreign related party. Comments also indicated that the ambiguity regarding whether a claims payment is a deduction or a reduction in gross income for non-life insurance companies could result in taxpayers taking inconsistent positions and may lead to controversy regarding the calculation of the denominator for the base erosion percentage.

Finally, several comments noted that certain self-help remedies with respect to claims payments are not available for insurance companies. First, because insurance companies are per se corporations under § 301.7701–2(b)(4), an election under § 301.7701–3 to treat a related foreign insurance company as a disregarded entity for U.S. tax purposes is unavailable. In addition, comments stated that regulators in some jurisdictions would prohibit a local insurance company from making an election to be treated as a U.S. taxpayer pursuant to section 953(d) if the election would result in U.S. withholding tax with respect to payments to policyholders.

Section 1.59A–3(b)(3)(ix) adopts the recommendation from these comments and provides a specific exception for deductible amounts for losses incurred (as defined in section 832(b)(5)) and claims and benefits under section 805(a) (''claims payments'') paid pursuant to reinsurance contracts that would otherwise be within the definition of section 59A(d)(1), to the extent that the amounts paid or accrued to the related foreign insurance company are properly allocable to amounts required to be paid by such company (or indirectly through another regulated foreign insurance company), pursuant to an insurance, annuity, or reinsurance contract, to a person other than a related party. The final regulations also clarify that all claims payments are included in the denominator of the base erosion percentage, except to the extent excepted from the definition of a base erosion payment under § 1.59A–3(b)(3)(ix). This treatment in the denominator is consistent with the treatment in the final regulations of derivatives and QDPs (discussed in Part VII of this Summary of Comments and Explanation of Revisions), section 988 foreign exchange losses (discussed in Part IV.C.4 of this Summary of Comments and Explanation of Revisions), and deductions for services eligible for the SCM exception (discussed in Part IV.C.1 of this Summary of Comments and Explanation of Revisions).

B. Netting With Respect to Insurance Contracts

As discussed in Part IV.A.2 of this Summary of Comments and Explanation of Revisions, the amount of any base erosion payment is generally determined on a gross basis, regardless of any contractual or legal right to make or receive payments on a net basis. The proposed regulations do not provide an exception to this general rule with respect to reinsurance agreements.

Several comments recommended that the final regulations permit netting with respect to reinsurance contracts to better reflect the economics of the transactions. One comment suggested that the final regulations permit netting with respect to a single economic transaction where the parties exchange net value in the form of a single payment, which would include many reinsurance transactions. Other comments identified specific types of reinsurance transactions for which netting should or should not be permitted. For quota share reinsurance arrangements, comments noted that the proposed regulations provide that the gross amount of reinsurance premium is a base erosion payment without considering any inbound payments such as reserve adjustments, ceding commissions, and claims payments. Other comments suggested that the amount of base erosion payments with respect to modified coinsurance (''modco'') and funds withheld reinsurance be determined on a net basis (particularly when settlement is on a net basis) in the final regulations to be consistent with the norm of paying tax on a net basis.

As background, reinsurance is the transfer from an insurer (referred to as the ''ceding'' company) to a reinsurer of all or part of the risk assumed under a policy or a group of policies. A traditional reinsurance agreement typically requires the ceding company to pay a reinsurance premium to the reinsurance company and the reinsurance company to pay a ceding commission to the ceding company. The reinsurance premium compensates the reinsurer for acquiring the reinsured obligations. The ceding commission compensates the ceding company for its expenses incurred in acquiring and managing the reinsured policies, and may include a profit margin. When the risks are transferred, the ceding company may reduce its reserves for the reinsured obligations, and the reinsurance company establishes its own reserves for the reinsured obligations. In terms of payment flows, it is common for the ceding commission owed under the reinsurance agreement to be netted against the reinsurance premium owed, such that the ceding company remits the reinsurance premium net of the ceding commission amount. However, both flows are typically separately identified in the contract and in any case represent reciprocal economic obligations. When losses are paid under the reinsured policies, depending on the terms of the reinsurance agreement, the reinsurer will have corresponding obligations to make payments to the ceding company (for example, the agreement may require the reinsurer to reimburse a percentage of total losses, or losses above a certain dollar threshold).

Under modco and similar funds-withheld reinsurance agreements, the ceding company retains the assets with respect to the policies reinsured and generally does not transmit an initial premium payment to the reinsurer under the agreement. The reinsuring company in a modco agreement is entitled to premiums and a share of investment earnings on certain assets, and the ceding company is entitled to expense allowances (similar to ceding commissions) and reimbursement for losses paid under the reinsured policies, but the parties make net settlement payments based on each party's overall entitlement under the agreement on a periodic basis. Comments noted that in this respect, the arrangement is similar to making settlement payments under a derivative contract. In both the modco and traditional reinsurance context, comments asserted that imposing tax on one leg of a reinsurance transaction (the premium payment) is not equitable and does not reflect the economics of the transaction.

A comment recommended that the final regulations exclude ceding commissions paid by a domestic insurance company to a foreign affiliate in exchange for the domestic insurance company's reinsurance of foreign risk from the definition of a base erosion payment. The comment suggested that this exception would be similar to the exception for section 988 foreign currency losses and for TLAC securities because an insurance group should not have a base erosion payment when insurance regulators dictate the structure of reinsurance agreements. The comments noted that reinsurance involves substantial payments in both directions, including premiums, ceding commissions, and claims. The comment explained that a ceding commission compensates the reinsured for its policy acquisition costs plus a small profit component and noted that a substantial amount of the commissions are reimbursements for third party expenses for many lines of business. For most reinsurance contracts, a comment noted that ceding commissions and premiums are separately stated in the reinsurance contract, but not separately paid. Instead, premiums are paid to the reinsurer net of the ceding commission.

Several comments expressed strong support for the determination in the proposed regulations that netting is not permitted with respect to reinsurance arrangements. Comments indicated that the result from the proposed regulations is appropriate under current law and necessary to achieve the legislative goals for the BEAT. Before the enactment of the BEAT, comments explained that foreign insurance groups had a significant competitive advantage over U.S.-based insurance companies because foreign groups were allowed to shift their U.S. earnings into low-tax jurisdictions using affiliated reinsurance payments. Comments asserted that section 59A identified reinsurance as a base erosion payment to close the loophole. Comments also noted that using gross amounts is consistent with the statutory annual statement that is the basis for determining taxable income under subchapter L. Comments explained that the use of gross reinsurance premium, rather than net, is consistent with the excise tax imposed under section 4371, which computes the excise tax as a percentage of gross reinsurance payments, even for a funds-withheld or modco contract (where only net amounts are transferred between the contracting insurance companies). Finally, comments noted that when Congress determines that netting is appropriate with respect to insurance, it specifically permits netting. *See* sections 848(d)(1), 72(u)(2)(B), and 834(e); *see also* sections 803(a) and 832.

Some comments asserted that the statutory language of section 59A(d)(3), which provides that base erosion payments include consideration paid or accrued ''for any reinsurance payments which are taken into account under sections 803(a)(1)(B) or 832(b)(4)(A),'' requires treating only the net amounts paid by a domestic company under a modco-type reinsurance contract as base erosion payments. For example, in the life insurance context, section 803(a)(1) defines ''premiums'' as:

(A) The gross amount of premiums and other consideration on insurance and annuity contracts, less

(B) return premiums, and premiums and other consideration arising out of indemnity reinsurance.

Further, section 59A(c)(2)(A)(iii)(I) closely tracks section 803(a)(1) in its definition of base erosion tax benefit in the life insurance context as the amount by which ''gross premiums and other consideration on insurance and annuity contracts'' are reduced by ''premiums and other consideration arising out of indemnity reinsurance.'' These comments suggested that the phrase ''consideration arising out of indemnity reinsurance'' suggests a broader view of the transaction than just reinsurance premiums and is best interpreted as referring to the net cash settlement payments under a modco-type reinsurance contract, rather than the gross amount identified in the contract as reinsurance premium.

Other comments disagreed with this characterization and noted that section 59A(d)(3) is describing consideration paid or accrued for reinsurance—that is, payments moving in one direction from the taxpayer to foreign related party—without describing offsetting or reciprocal payments. The comments noted that the phrase ''arising out of indemnity reinsurance'' was merely lifted from preexisting section 803(a)(1)(B), rather than being selected deliberately by Congress to account for both inflows and outflows under a reinsurance contract. They noted further that section 803(a)(1)(B) and its non-life counterpart, section 832(b)(4), use parallel structures for measuring the amount of premiums included in insurance company gross income, starting with total premiums received, and reducing that total by premiums paid for reinsurance and by return premiums (that is, premium amounts refunded to the policyholder). The two provisions do not provide for additional offsets based on obligations flowing in the other direction, such as ceding commissions or reinsurance claim payments owed.

Some comments asserted that foreign insurers may decide to reduce their capacity, discontinue lines of business, or increase pricing as a result of section 59A. Those comments acknowledged that domestic reinsurers may pick up the increased capacity, but warned that the shift to domestic reinsurers would concentrate the insured risk in the United States rather than spreading it globally, resulting in less risk diversification (a key element of insurance risk management). Other comments disagreed with this contention, noting that global reinsurance capacity has remained strong and that premium increases have been negligible since the enactment of section 59A.

In contrast, a comment asserted in the context of reinsurance that it was clear that the law applies on a gross basis, both based on the plain language of the statute and the intent of Congress, and that relevant policy considerations weigh heavily in favor of applying the BEAT on a gross basis. The comment explained that because the reinsurance transactions at issue are between related parties, they are not necessarily at arm's length. Further, according to the comment, the legislative purpose of section 59A was to level the playing field between U.S. and foreign-owned companies, which can only be advanced if section 59A is applied on a gross basis.

The final regulations do not adopt the recommendations that payments made under a reinsurance contract be netted for purposes of determining the amount of a base erosion payment, unless netting would otherwise be permitted for U.S. federal income tax purposes. Section 59A's requirements are best interpreted in the context of the existing body of tax law and regulations. As discussed in Part IV.A.3 of this Summary of Comments and Explanation of Revisions, amounts of income and deduction are generally determined on a gross basis under the Code, and unless a rule permits netting (so that there is no deduction or the deduction is a reduced amount, as opposed to a deduction offset by an item of income), no netting is permitted.

Although comments asserted that section 59A(d)(3) (defining a base erosion payment as including certain reinsurance payments) requires the netting of ceding commissions and other payments from the related foreign reinsurance company against reinsurance premiums, the Treasury Department and IRS are not persuaded by arguments that the language of section 59A(d)(3) mandates that result. Whether payments under particular types of reinsurance contracts (for example, modco) may be netted for purposes of section 59A is determined based on the existing rules in the Code and regulations regarding netting. The subchapter L provisions cited in section 59A(d)(3) (section 803(a)(1)(B) for life insurance companies and section 832(b)(4)(A) for non-life insurance companies) do not provide for netting of ceding commissions, claims payments or other expenses against premiums.

With respect to the comment that modco and other reinsurance contracts that are periodically settled on a net basis are substantially similar to derivative contracts, the Treasury Department and IRS note that Congress specified in section 59A(h)(4)(C) that the term ''derivative'' does not include insurance contracts. This indicates that Congress did not intend for agreements with derivative-like characteristics that are also insurance contracts to be treated as derivatives for purposes of section 59A.

With respect to comments that ceding commissions should be broken down into components and not treated as base erosion payments to the extent that they reimburse amounts paid to third parties, this scenario is not materially different from those described in comments received from taxpayers in other industries and discussed in Part IV.A.1 of this Summary of Comments and Explanation of Revisions. These other comments described various scenarios in which a domestic corporation makes a deductible payment to a foreign related party, and that foreign related party in turn makes deductible payments to unrelated third parties. Therefore, the final regulations do not adopt a narrower regulatory exception for payments to foreign related insurance companies that arise in connection with a regulatory requirement.

XI. Comments and Changes to § 1.1502–59A

A. In General

Proposed § 1.1502–59A provides rules regarding the application of section 59A and the regulations thereunder to consolidated groups. Under these rules, all members of a consolidated group are treated as a single taxpayer for purposes of determining whether the group is an applicable taxpayer and the amount of tax due under section 59A. For example, items resulting from intercompany transactions (as defined in § 1.1502–13(b)(1)(i)) are disregarded for purposes of making the required computations.

Some comments requested clarification on what it means for intercompany transactions to be ''disregarded'' in making the required computations under section 59A. Generally, intercompany transactions should not change the consolidated taxable income or consolidated tax liability of a consolidated group. For example, where one member (S) sells depreciable property to another member (B) at a gain, S's gain on the sale is deferred. Every year, as B depreciates the property, S recognizes a portion of its deferred gain. As a result, the depreciation expense deducted by B that exceeds the depreciation expense the group would have deducted if S and B were divisions of a single entity (''additional depreciation'') is offset by the amount of gain S recognizes each year, and the intercompany sale does not change the consolidated taxable income.

However, the base erosion percentage is generally computed based solely on deductions; income items are not relevant. Therefore, under the foregoing example, B's depreciation deduction would include the additional depreciation amount, but S's offsetting gain inclusion would be excluded from the base erosion percentage computation.

To make clear that intercompany transactions may not impact the BEAT consequences of a consolidated group, these final regulations clarify in § 1.1502–59A(b)(1) that items resulting from intercompany transactions are not taken into account in computing the group's base erosion percentage and BEMTA. Consequently, in the foregoing example, B's additional depreciation is not taken into account in computing the group's base erosion percentage.

In addition, some comments raised concerns that the proposed section 59A regulations and proposed § 1.1502–59A may be incompatible with the rules and framework of § 1.1502–47 for life-nonlife consolidated groups. The

Treasury Department and the IRS are analyzing these concerns and expect to address the issues in future proposed regulations, and thus reserve on this matter in the final regulations.

B. New Rules Under § 1.1502–59A(c) When a Member Deconsolidates From a Consolidated Group With a Section 163(j) Carryforward

Proposed section 1.1502–59A(c)(3) provides rules to determine whether a consolidated group's business interest deduction permitted under section 163(j) is a base erosion tax benefit. Due to the fungibility of money, these rules generally treat the consolidated group as a single entity and aggregate all members' current-year business interest expense paid to nonmembers. The current-year business interest expense deducted by members is then classified as an amount paid or accrued to a domestic related party, foreign related party, or unrelated party based on specified allocation ratios, which are based on the entire group's business interest expense paid. If members cannot fully deduct their current-year business interest expense, then the members' section 163(j) carryforwards are allocated a status as a domestic related carryforward, foreign related carryforward, or unrelated carryforward based on specified allocation ratios. Such status is taken into account for BEAT purposes in future years when the member deducts its section 163(j) disallowed business interest expense carryforward, whether the member remains in the group or deconsolidates.

A comment requested a special rule under § 1.1502–59A(c)(3) for certain situations in which a member (T) deconsolidates from a consolidated group (the original group) that was not an applicable taxpayer under section 59A and joins an unrelated consolidated group. Assume that, during the time T was a member of the original group, T incurred business interest expense that could not be fully deducted and has a section 163(j) disallowed business interest expense carryforward. T then deconsolidates from the original group and joins the new group, which is an applicable taxpayer under section 59A. The comment recommended allowing T to use the special allocation ratios under § 1.1502–59A(c)(3) of the new group for the taxable year of the acquisition (rather than the allocation ratios of the original group). The comment posited that the original group would not have determined or maintained information pertaining to the allocation ratios because the original group was not an applicable taxpayer.

The final regulations do not adopt this special rule. Whether a business interest expense deducted by members of a consolidated group is a base erosion tax benefit is determined on a single-entity basis, without regard to which member actually incurred the payment to the domestic related, foreign related, or unrelated party. Therefore, in the foregoing example, whether T's deduction of its section 163(j) disallowed business interest expense carryforward is a base erosion tax benefit must be determined by reference to the original group, not the new group.

Furthermore, to determine whether a consolidated group is an applicable taxpayer, the group generally must determine its base erosion percentage for the year. In order to do so, the group must apply the classification rule under § 1.1502–59A(c)(3) to its aggregate current-year business interest expense that was deducted. Therefore, the original group should have the information relevant to the classification rule under § 1.1502–59A(c)(3), regardless of whether it was an applicable taxpayer. Consequently, the final regulations do not adopt the rule recommended by the comment.

However, the final regulations provide two rules for situations in which a member deconsolidates from the original consolidated group with a section 163(j) carryforward. The first rule is an exception that applies if the original group was not an applicable taxpayer because it did not meet the gross receipts test in the year the business interest expense at issue was incurred. Under these circumstances, application of the classification rule under § 1.1502–59A(c)(3) would have been unnecessary within the original consolidated group with regard to the year in which the interest was paid or accrued. This special rule permits the deconsolidating member (and any acquiring consolidated group) to apply the classification rule on a separate-entity basis to determine the status of the deconsolidating member's section 163(j) disallowed business interest expense carryforward as a payment or accrual to a domestic related, foreign related, or unrelated party. The second rule applies if the deconsolidating member (or its acquiring consolidated group) fails to substantiate the status of its section 163(j) disallowed business interest expense carryforward from the original group. In that case, the section 163(j) disallowed business interest expense carryforward is treated as a payment or accrual to a foreign related party.

Applicability Dates

Pursuant to section 7805(b)(1)(B), these final regulations (other than the reporting requirements for QDPs in § 1.6038A–2(b)(7), § 1.1502–2, and § 1.1502–59A) apply to taxable years ending on or after December 17, 2018. However, taxpayers may apply these final regulations in their entirety for taxable years ending before December 17, 2018. Taxpayers may also apply provisions matching §§ 1.59A–1 through 1.59A–9 from the Internal Revenue Bulletin (IRB) 2019–02 (*https://www.irs.gov/pub/irs-irbs/irb19-02.pdf*) in their entirety for all taxable years ending on or before December 6, 2019. Taxpayers choosing to apply the proposed regulations must apply them consistently and cannot selectively choose which particular provisions to apply.

Section 1.6038A–2(b)(7)(ix) applies to taxable years beginning Monday, June 7, 2021. No penalty under sections 6038A(d) or 6038C(c) will apply to a failure solely under § 1.6038A–2(a)(3), (b)(6), or (b)(7) that is corrected by March 6, 2020.

Pursuant to sections 1503(a) and 7805(b)(1)(A), § 1.1502–2 and § 1.1502–59A apply to taxable years for which the original consolidated Federal income tax return is due (without extensions) after December 6, 2019. However, taxpayers may apply § 1.1502–2 and § 1.1502–59A in their entirety for taxable years for which such a return is due (without extensions) before December 6, 2019.

Statement of Availability of IRS Documents

IRS revenue procedures, revenue rulings, notices, and other guidance cited in this preamble are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For purposes of Executive Order 13771, this rule is regulatory.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these regulations as economically significant under section 1(c) of the MOA. Accordingly, the OMB has reviewed these regulations.

A. Background

The Tax Cuts and Jobs Act of 2017 (the ''Act'') added new section 59A, which applies to large corporations that have the ability to reduce U.S. tax liabilities by making deductible payments to foreign related parties. The Base Erosion and Anti-Abuse Tax (''BEAT'') is generally levied on certain large corporations that have deductions paid or accrued to foreign related parties that are greater than three percent of their total deductions (two percent in the case of certain banks or registered securities dealers), a determination referred to as the base erosion percentage test. Large corporations are those with gross receipts of $500 million or more, as calculated under the rules of section 59A, a determination referred to as the gross receipts test. By taxing these corporations' base erosion tax benefits, the BEAT ''aims to level the playing field between U.S. and foreign-owned multinational corporations in an administrable way.'' Senate Committee on Finance, Explanation of the Bill, S. Prt. 115–20, at 391 (November 22, 2017). The BEAT operates as a minimum tax, so a taxpayer is only subject to additional tax under the BEAT if the BEAT tax rate multiplied by the taxpayer's modified taxable income exceeds the taxpayer's regular tax liability adjusted for certain credits.

B. Need for the Final Regulations

Section 59A is largely self-executing, which means that it is binding on taxpayers and the IRS without any regulatory action. Although it is self-executing, the Treasury Department and the IRS recognize that section 59A provides interpretive latitude for taxpayers and the IRS which could create uncertainty and prompt a variety of taxpayer responses without further guidance. The final regulations are needed to address questions regarding the application of section 59A and to reduce compliance burden and economic inefficiency that would be caused by uncertainty about how to calculate tax liability.

C. Overview of the Final Regulations

These final regulations provide guidance under section 59A regarding the determination of the tax with respect to base erosion payments for certain taxpayers with substantial gross receipts. They provide guidance for applicable taxpayers to determine the amount of BEAT liability and how to compute the components of the tax calculation.

Regulations under section 59A (§§ 1.59A–1 through 1.59A–10) provide details for taxpayers regarding whether a taxpayer is an applicable taxpayer and the computation of certain components of the base erosion minimum tax amount, including the amount of base erosion payments, the amount of base erosion payments that are treated as base erosion tax benefits, and modified taxable income. The regulations also provide specific guidance for banks, registered securities dealers, and insurance companies, and provide guidance in applying section 59A to amounts paid by and to partnerships. These regulations also establish anti-abuse rules to prevent taxpayers from taking measures to inappropriately circumvent section 59A.

Regulations under sections 383, 1502 and 6038A (§§ 1.383–1, 1.1502–2, 1.1502–59A, 1.6038A–1, 1.6038A–2, and 1.6038–4) provide rules for the application of section 59A with respect to limitations on certain capital losses and excess credits, consolidated groups and their members, and reporting requirements, which include submitting, in certain cases, new Form 8991, Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts.

D. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these final regulations compared to a no-action baseline that reflects anticipated Federal income tax-related behavior in the absence of these final regulations.

2. Summary of Economic Effects

These final regulations provide certainty and clarity to taxpayers regarding the meaning of terms and calculations they are required to apply under the BEAT provisions of the Act. In the absence of the enhanced specificity provided by these regulations, similarly situated taxpayers might interpret the statutory rules of section 59A differently, potentially resulting in inefficient patterns of economic activity. For example, two otherwise similar taxpayers might structure an income-generating activity differently based solely on different assumptions about whether that activity will involve payments that are subject to the BEAT. If this tax-driven difference in business structures confers a competitive advantage on the less profitable enterprise, U.S. economic performance may suffer. This final regulatory guidance thus provides value by helping to ensure that economic agents face similar tax incentives, a tenet of economic efficiency.

The Treasury Department and the IRS project that under these final regulations, 3,500–4,500 taxpayers may be applicable taxpayers under the BEAT because those taxpayers (1) are U.S. shareholders of a foreign corporation, 25 percent foreign-owned corporations, or foreign corporations engaged in a trade or business within the United States and (2) have gross receipts of $500 million or more without taking into account the gross receipts of members of its aggregate group. As many as 100,000–110,000 additional taxpayers may be applicable taxpayers as a result of being members of an aggregate group.[5]

The Treasury Department and the IRS recognize that in response to these final regulations, these businesses may alter the way they transact with related versus unrelated parties. They may make changes to financial arrangements, supply chain arrangements, or the locations of business activity, each in ways that increase or reduce the volume of payments made to a foreign affiliate that qualify as base erosion payments, relative to the decisions they would make under alternative regulatory approaches, including the no-action baseline. These differences in business activities may have economic effects beyond their effects on taxpayers' tax liability.

The Treasury Department and the IRS have not attempted to quantify the economic effects of any changes in business activity stemming from these final regulations. The Treasury Department and the IRS do not have readily available data or models that predict with reasonable precision the decisions that businesses would make under the final regulations versus

[5] These estimates are based on current tax filings for taxable year 2017 and do not yet include the BEAT. At this time, the Treasury Department and the IRS do not have readily available data to determine whether a taxpayer that is a member of an aggregate group will meet all tests to be an applicable taxpayer for purposes of the BEAT.

alternative regulatory approaches. Nor do they have readily available data or models that would measure with reasonable precision the loss or gain in economic surplus resulting from these business decisions relative to the business decisions that would be made under an alternative regulatory approach. Such estimates would be necessary to quantify the economic effects of the final regulations versus alternative approaches.

Within these limitations, part I.D.3 of these Special Analyses (and the Summary of Comments and Explanation of Revisions) explains the rationale behind the final regulations and provides a qualitative assessment of the economic effects of the final regulations relative to the alternative regulatory approaches that were considered.

The Treasury Department and the IRS welcome comments on these conclusions and on the economic effects of the provisions described in the following sections.

3. Economic Effects of Provisions Substantially Revised From the Proposed Regulations

a. Securities Lending Transactions

Section 59A(h) includes an exception to base erosion payment status for certain payments by a corporation to a foreign related party pursuant to certain derivative contracts (qualified derivative payments, or QDPs). The statute further provides that the QDP exception does not apply to a payment pursuant to a derivative contract that would be treated as a base erosion payment if the payment was not made pursuant to a derivative contract. The final regulations specify how the QDP exception applies to securities lending transactions, a particular form of financial transaction. In this regard, the final regulations generally provide parity in the treatment of securities lending transactions and sale-repurchase transactions, a similar, alternative form of financial transaction. This part I.D.3.a discusses the treatment of securities lending transactions and sale-repurchase transactions under the final regulations. For a further description of securities lending transactions and sale-repurchase transactions, see Part VII.B of the Summary of Comments and Explanation of Revisions.

In general, a sale-repurchase transaction is an agreement under which a person transfers a security in exchange for cash and simultaneously agrees to receive substantially identical securities from the transferee in the future in exchange for cash. Certain sale-repurchase transactions are treated as secured debt for federal tax purposes; that is, the nominal seller of the securities in the sale-repurchase transaction is treated as transferring securities as collateral for a loan from the nominal buyer to the nominal seller. The fee paid by the nominal seller to the nominal buyer pursuant to this type of sale-repurchase contract is one example of a payment that does not qualify for the QDP exception.

In this type of sale-repurchase transaction, the nominal seller remains the beneficial owner of the securities for federal income tax purposes and is treated as a cash borrower from the nominal buyer. Because the nominal seller remains the beneficial owner of the securities for federal income tax purposes, when the nominal buyer receives any payments with respect to the securities and passes those payments through to the nominal seller (known as substitute payments), such as interest or dividends, the nominal seller is treated as receiving that payment directly from the issuer of the security for federal income tax purposes. Thus, the substitute payment is not considered a payment between the nominal seller and the nominal buyer for federal tax purposes. Consequently, even if the nominal buyer is a U.S. person and the nominal seller is a foreign related party, the substitute payments on the sale-repurchase agreement that is treated as a loan for federal tax purposes generally are not base erosion payments for the BEAT.

Certain securities lending transactions are economically similar to sale-repurchase transactions but are treated differently for federal income tax purposes. In some securities lending transactions, a securities lender also transfers securities to a securities borrower in exchange for an obligation that the securities borrower make certain payments to the securities lender and also return identical (though not necessarily the same) securities to the securities lender. In connection with the transfer of securities in this type of transaction, the securities borrower may also provide cash or other form of collateral to the securities lender, often with the same or greater value as the lent security. Economically, the securities lender in these transactions can be viewed as both a lender of securities to the counterparty, and a borrower of cash from the counterparty. In these respects, the securities lending transaction is economically similar to a sale-repurchase transaction.

However, in these securities lending transactions, the securities lender is no longer treated as the beneficial owner of the securities for federal income tax purposes. As a result, when the securities borrower makes substitute payments (with respect to the securities) in the securities lending transaction, those substitute payments may be base erosion payments (without regard for the QDP exception) if the securities lender is a foreign related party because the substitute payments are treated as payments from the securities borrower to the securities lender for federal income tax purposes.

The proposed regulations state that sale-repurchase transactions are not eligible for the QDP exception. The proposed regulations further provide that securities lending transactions are not eligible for the QDP exception because the securities lending transactions are economically similar to sale-repurchase transactions. However, as discussed in this part I.D.3.a, substitute payments on a sale-repurchase transaction are not a base erosion payment because the nominal seller of the securities is treated as remaining the beneficial owner of the securities for federal income tax purposes. Comments observed that the proposed regulations thus failed to take into account the disparate tax treatment of substitute payments for sale-repurchase transactions and securities lending transactions for purposes of the BEAT.

To take into account the disparate treatment of the substitute payments in securities lending transactions, the final regulations remove the per se exclusion of securities lending transactions from the QDP exception. Instead, the final regulations more narrowly exclude the borrowing of cash pursuant to a securities lending transaction (''cash leg'') from the QDP exception. This change provides symmetry with the treatment of a sale-repurchase transaction that is treated as a secured loan for federal income tax purposes. Under the final regulations, both a sale-repurchase transaction and the cash leg of a securities lending transaction are excluded from the QDP exception to the extent that they are treated as financings, and thus may be base erosion payments.

The final regulations no longer exclude payments attributable to the borrowing of securities pursuant to a securities lending transaction from qualifying for the QDP exception; as a result, substitute payments on the security may qualify for the QDP exception. This change in the final regulations provides general symmetry in the treatment of substitute payments made pursuant to sale-repurchase transactions and securities lending transactions for purposes of the BEAT.

The final regulations also provide an anti-abuse rule to address a potentially abusive transaction characterized by an uncollateralized borrowing of securities that can be liquidated for cash in a multiple-step transaction that is economically similar to an uncollateralized cash loan.

Specifically, the Treasury Department and the IRS adopted an anti-abuse rule that takes into account two factors: (a) Whether the securities lending transaction or substantially similar transaction provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing and (b) whether the transaction is part of an arrangement that has been entered into with a principal purpose of avoiding the treatment of any payment with respect to the transaction as a base erosion payment.

The Treasury Department and the IRS considered an alternative anti-abuse rule that would have applied solely on the basis of the securities loan being undercollateralized. The Treasury Department and the IRS did not adopt this alternative in the final regulations because the Treasury Department and the IRS are cognizant that an objective mechanical rule based solely on the level of collateralization may be difficult for both taxpayers and the IRS to apply, in particular due to the high volume of transactions issued under varying conditions. Accordingly, the final regulations further provide that for the anti-abuse rule to apply, the transactions must also be part of an arrangement that has been entered into with a principal purpose of avoiding the treatment of any payment with respect to the transaction as a base erosion payment. See §§ 1.59A–6(d)(2)(iii)(C); 1.59A–6(e)(2) (Example 2).

The Treasury Department and the IRS recognize that in response to these final regulations, businesses may increase the volume of certain securities lending transactions relative to the volume that would occur under alternative anti-abuse rules. The Treasury Department and the IRS project, however, that taxpayer response to these rules, and the relative economic effects of adoption of the final rule, will be minor given the wide range of financial transactions that applicable taxpayers currently engage in, the various roles that securities lending transactions play, and the relatively small difference in regulatory treatment between the final regulations and alternative anti-abuse rules.

The Treasury Department and the IRS have not attempted to provide a quantitative prediction of the change in the volume of securities lending transactions nor to quantify the economic effects of this potential shift that may result from the final regulations, relative to alternative regulatory approaches. The Treasury Department and the IRS do not have readily available data or models that predict with reasonable precision the types of intercompany arrangements that businesses would adopt under the final regulations versus alternative regulatory approaches. Nor do they have readily available data or models that would measure with reasonable precision the difference in returns or risk that would occur as a result of this shift in the volume of securities lending transactions relative to the alternative regulatory approach. Such estimates would be necessary to quantify the economic effects of these final regulations over the treatment of securities lending transactions versus alternative regulatory approaches.

Profile of affected taxpayers. The taxpayers affected by these provisions of the final regulations are domestic banks and broker-dealers that engage in securities lending transactions with a foreign related party where the domestic bank or broker-dealer is the securities borrower that makes substitute payments to the foreign related party. The taxpayers affected are also foreign banks and broker-dealers that engage in these securities lending transactions with a foreign related party as part of their conduct of a U.S. trade or business.

To provide an estimate of taxpayers affected by the change to the QDP rule, the Treasury Department and the IRS used current tax filings for taxable year 2017 and examined the set of filers who marked-to-market securities and were (1) U.S. shareholders of a foreign corporation as indicated by the filing of Form 5471 or (2) otherwise potentially applicable taxpayers as indicated by the filing of Form 5472. This marked-to-market proxy is reasonable because the QDP exception applies only if a taxpayer recognizes gain or loss as if the derivative were sold for fair market value on the last day of the taxable year and treats that gain or loss as ordinary. Based on these tax data, the number of taxpayers estimated to be affected by these provisions of the final regulations is 900, based on counts of the forms shown in the accompanying table.

TAXPAYERS AFFECTED BY § 1.59A

[Estimate based on current tax filings for taxable year 2017]

	Estimated impacted filer counts
Form 1120 with mark-to-market on Form M3 and Form 5471 and/or 5472	750
Form 1120F who completed line u of the Additional Information and Form 5471 and/or 5472	150

b. Section 988 Losses in the Denominator of the Base Erosion Percentage

Under section 59A, a taxpayer is subject to the BEAT only if the taxpayer meets the statutory tests to be an applicable taxpayer, including the base erosion percentage test. The base erosion percentage test is satisfied with respect to a taxpayer if the taxpayer (or, if the taxpayer is a member of an aggregate group, that aggregate group) has a base erosion percentage of three percent or more. A lower threshold of two percent generally applies if the taxpayer, or a member of the taxpayer's aggregate group, is a member of an affiliated group that includes a domestic bank or registered securities dealer. The final regulations specify how losses from certain currency exchange transactions should be included in the base erosion percentage test.

Proposed § 1.59A–3(b)(3)(iv) provides that exchange losses from section 988 transactions described in § 1.988–1(a)(1) are excluded from the definition of base erosion payments. Section 988 transactions are generally transactions in which the amount that the taxpayer is entitled to receive (or required to pay) is denominated in terms of a nonfunctional currency or is determined by reference to one or more nonfunctional currencies. In the proposed regulations, the Treasury Department and the IRS determined that this section 988 exception from the definition of a base erosion payment is appropriate because those losses do not present the same base erosion concerns as other types of losses that arise in connection with payments to a foreign related party. Because exchange losses from section 988 transactions are excluded from the definition of base erosion payments in the proposed regulations, those losses are not included in the numerator of the base erosion percentage under the proposed regulations. The final regulations retain the exclusion of section 988 losses from the definition of base erosion payments and from the numerator of the base erosion percentage.

Proposed § 1.59A–2(e)(3)(ii)(D) also provides that exchange losses from section 988 transactions (including with respect to transactions with persons other than foreign related parties) are not included in the denominator when calculating the base erosion percentage for purposes of the base erosion percentage test. In response to comments, the final regulations restore the section 988 losses to the denominator when calculating the base erosion percentage, except to the extent of the amount of section 988 losses from transactions with foreign related parties that is also excluded from the numerator of the base erosion percentage.

As an alternative, the Treasury Department and the IRS considered removing all section 988 losses from the denominator of the base erosion percentage test. However, the Treasury Department and the IRS determined that it was appropriate to exclude from the denominator only the amounts that are excluded from the numerator because that is how other statutory exceptions from the BEAT are addressed in the base erosion percentage calculations. Specifically, for the QDP exception (discussed in Part I.D.3.a of this Special Analysis) and the services cost method exception (discussed in Part IV.C.1 of the Summary of Comments and Explanation of Revisions) the amounts in the denominator of the base erosion percentage are also accounted for in this manner. That is, the denominator does include the amount of QDP deductions or services cost method deductions that are also excluded from the numerator of the base erosion percentage because of those exceptions.

The Treasury Department and the IRS project that under these final regulations, fewer taxpayers would be expected to satisfy the base erosion percentage test and therefore fewer would be liable for the BEAT, relative to the alternative regulatory approach as specified in the proposed regulations. These final regulations include in the denominator of the base erosion percentage section 988 losses arising from foreign currency transactions with unrelated parties. Inclusion of such losses in the denominator, all else equal, reduces the base erosion percentage, and may increase the likelihood that businesses engage in incremental section 988 transactions with unrelated parties to reduce the base erosion percentage, relative to the proposed regulations. However, regulations under § 1.59A–9(b)(2) (anti-abuse rule addressing transactions to increase the amount of deductions taken into account in the denominator of the base erosion percentage computation) are expected to limit this behavior.

The Treasury Department and the IRS have not attempted to provide a quantitative prediction of the change in the volume of section 988 transactions nor to quantify the economic effects of this change resulting from the final regulations, relative to the alternative regulatory approach. The Treasury Department and the IRS do not have readily available data or models that predict with reasonable precision the volume of section 988 transactions that businesses might engage in under the final regulations versus the alternative regulatory approach because of the complex role that currency exchange plays for these businesses. The Treasury Department and the IRS further do not have readily available data or models that would measure with reasonable precision the difference in economic returns or volatility that these businesses would experience as a result of this shift in section 988 transactions relative to the alternative regulatory approach, again because of the complex role that currency exchange plays for these businesses. Such estimates would be necessary to quantify the economic effects of these final regulations over the treatment of section 988 transactions versus the alternative regulatory approach.

Profile of affected taxpayers. The taxpayers affected by these provisions of the final regulations generally are those taxpayers that engage in foreign currency transactions with unrelated parties and have section 988 losses that will be included in the denominator of the base erosion percentage under the final regulations.

The Treasury Department and the IRS have not estimated the number of these taxpayers because the Form 1120 series does not separately break out gains or losses from section 988 transactions. The sole form that breaks out section 988 gain and loss is Form 5471, which is filed by U.S. shareholders of a CFC. Information from Form 5471 is unlikely to be informative because a CFC is unlikely to be an applicable taxpayer.

4. Economic Effects of Provisions Not Substantially Revised From the Proposed Regulations

a. Applicable Taxpayer for Aggregate Groups

A taxpayer is liable for the BEAT only if the taxpayer is an applicable taxpayer. In general, an applicable taxpayer is a corporation, other than a RIC, REIT, or an S corporation, that satisfies the gross receipts test and the base erosion percentage test. For purposes of these tests, members of a group of corporations related by certain specified percentages of stock ownership are aggregated. Section 59A(e)(3) refers to aggregation on the basis of persons treated as a single taxpayer under section 52(a) (controlled group of corporations), which includes both domestic and foreign persons. In the proposed regulations, the Treasury Department and the IRS determined that to implement the provisions of section 59A, it was necessary to treat foreign corporations as outside of the controlled group for purposes of applying the aggregation rules, except to the extent that the foreign corporation is subject to net income tax under section 882(a) (tax on income of foreign corporations connected with U.S. business). The final regulations also adopt this position.

Upon aggregation of domestic and foreign controlled groups of corporations, intra-aggregate group transactions are eliminated for purposes of the gross receipts test and base erosion percentage test. If aggregation were defined to include both domestic and all related foreign persons (*i.e.,* a ‘‘single employer’’ under section 52(a)), regardless of whether the foreign person was subject to tax in the United States, this would eliminate most base erosion payments, which are defined by section 59A(d)(1) as ‘‘any amount paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer and with respect to which a deduction is allowed under this chapter.’’ Without these base erosion payments, virtually no taxpayer or aggregate group would satisfy the base erosion percentage test; thus substantially all taxpayers (or the aggregate group of which the taxpayer was a member) would be excluded from the requirement to pay a tax equal to the base erosion minimum tax amount (BEMTA).

In the proposed regulations, the Treasury Department and the IRS considered an alternative of not providing guidance on the aggregation rule in the statute. Absent the proposed regulations, there would be uncertainty among taxpayers as to whether the tax equal to the BEMTA would apply to them. Without guidance, different taxpayers would likely take different positions regarding the determination of their status as an applicable taxpayer, which would result in inefficient decision-making and inconsistent application of the statute as taxpayers engage in corporate restructurings, or adjust investment and spending policies based on tax planning strategies to manage BEAT liability. No substantive comments objected to the general approach set forth in the proposed regulations.

b. Service Cost Method Exception

Section 59A(d)(5) provides an exception from the definition of a base erosion payment for an amount paid or accrued by a taxpayer for services if the services are eligible for the services cost method under section 482 (without regard to certain requirements under the section 482 regulations) and the amount constitutes the total services cost with no markup component. The statute is ambiguous as to whether the SCM exception (1) does not apply to a payment or accrual that includes a markup component, or (2) does apply to such a payment or accrual that includes a markup component, but only to the extent of the total services costs. The proposed regulations follow the latter approach. See REG–104259–18, 83 FR 65961 (December 21, 2018). The final regulations retain the same approach. See part IV.C.1 of the Summary of Comments and Explanation of Revisions.

Alternatives would have been to disallow the SCM exception for the entire amount of any payment that includes a markup component, or to not provide any guidance at all regarding the SCM exception. The Treasury Department and the IRS rejected the former approach. The section 482 regulations mandate intercompany pricing under an ''arm's length standard.'' Under specific circumstances, the section 482 regulations provide that intercompany payments for services can be set by a taxpayer at the cost of providing the service with no profit markup. However, the section 482 regulations prohibit use of this cost-only SCM approach for services ''that contribute significantly to fundamental risks of business success or failure'' (the ''business judgment rule''). See § 1.482–9(b)(5). At arm's length, such services generally would be priced to include a profit element to satisfy the market's demand for, and supply of, services among recipients and providers. Section 59A(d)(5)(A) explicitly allows an exception from the BEAT for services that would be eligible for the SCM, ''determined without regard to [the business judgment rule].'' By allowing an exception from the BEAT for intercompany service payments that do not include a profit markup (*i.e.,* under the SCM transfer pricing method), but also for intercompany service payments that must apply a different transfer pricing method, and therefore generally would include a profit markup at arm's length (*i.e.,* those subject to the business judgment rule), the statute creates ambiguity about the SCM exception's application with respect to the portion of intercompany prices paid for services reflecting the cost of providing the services, when there is also a mark-up component. Thus, the proposed regulations provide that the SCM exception is available if there is a profit markup (provided that other requirements are satisfied), but the portion of any payment exceeding cost is not eligible for the SCM exception.

The Treasury Department and the IRS also rejected the option of not providing any guidance at all regarding the SCM exception because if taxpayers relied on statutory language alone, taxpayers would adopt different approaches due to ambiguity in the statute, leaving it open to differing statutory interpretations and an inconsistent application of the statute. Comments supported the SCM exception and recommended that final regulations adopt the approach from the proposed regulations.

c. Effectively Connected Income

The final regulations provide an exception from the definition of base erosion payment for payments to the U.S. branch of a foreign related person to the extent that the payments are treated as effectively connected income.

Under section 59A, whether a deductible payment is a base erosion payment is determined based on whether the recipient is a foreign person (as defined in section 6038A(c)(3)) and a related party. See section 59A(f). A foreign person means any person who is not a United States person. However, the Treasury Department and the IRS determined in the proposed regulations that establishing whether a payment is a base erosion payment based solely on the status of the recipient as a foreign person is inconsistent with the statute's intent of eliminating base erosion. As a result, deductible payments to a foreign person that are treated as effectively connected income are subject to tax under section 871(b) and 882(a) in substantially the same manner as payments to a U.S. citizen or resident, or a domestic corporation, and, thus, such payments do not result in base erosion. Thus, such payments are treated as income to the recipient and subject to U.S. tax, substantially similar to any payment between related U.S. corporations. Further, treatment of effectively connected income payments to a foreign related party would produce different tax results for two similarly situated U.S. taxpayers. That is, if the taxpayer were to make a payment to a related U.S. corporation, the payment generally would not be subject to the BEAT, but if a taxpayer were to make a payment to a foreign person with respect to its effectively connected income, it would give rise to BEAT liability, despite the fact that in both cases the recipients include the payment in U.S. taxable income. The final regulations retain the same approach as the proposed regulations. See § 1.59A–3(b)(3)(iii). This approach provides consistency with the approach in the regulations to determining the applicable taxpayer for aggregate groups, which is discussed in part I.D.4.a of this Special Analysis, because this provision excludes from the definition of a base erosion payment those payments to members of the aggregate group that are also excluded from the base erosion percentage because the payments are also within the aggregate group.

The Treasury Department and the IRS considered an alternative of not providing this exception to the definition of a base erosion payment, but determined that it would be inconsistent to exclude a payment to the U.S. branch of a foreign related person from the base erosion percentage (a condition to the application of the BEAT) but not also exclude the same payment from the amount of base erosion payments (a factor in determining the amount of BEAT tax liability).

d. Modified Taxable Income

Modified taxable income is a taxpayer's taxable income for the year calculated without regard to any base erosion tax benefit or the base erosion percentage of any allowable net operating loss deductions under section 172 (net operating loss deduction). As discussed in Part V.A. of the Summary of Comments and Explanation of Revisions, the proposed regulations provide that modified taxable income is computed under the add-back method of adding back to taxable income the base erosion tax benefits and base erosion percentage of any net operating loss deductions. The regulations do not provide for computing modified taxable income by recomputing the tax base without base erosion tax benefits under an approach similar to the alternative minimum tax, which the Act repealed for corporations. Applying the recomputation method would require taxpayers to maintain records for separate carryforward balances for attributes, such as net operating loss deductions and business interest expense carryovers. These items are limited based on taxable income, so under the recomputation or alternative minimum tax-approach, there would most likely be different annual limitations and other computational differences for regular tax purposes and section 59A purposes. The final regulations retain the same approach as the proposed regulations. This add-back approach is expected to be less costly for taxpayers to apply than the recomputation approach because under the add-back approach, where amounts are only added to taxable income, taxpayers will not have to recompute their entire tax return on a different basis or maintain separate sets of records to track annual limitations on attributes such as net operating loss carryforwards or business interest expense carryforwards (and the IRS will not have to administer such a system). See Part V.A. of the Summary of Comments and Explanation of Revisions for a detailed discussion of the comments that were not adopted.

e. Payments to or From Partnerships

As discussed in Part VIII of the Summary of Comments and Explanation of Revisions section, these final regulations apply the ''aggregate'' approach to base erosion payments involving partnerships, which is to say that the regulations generally treat the partnership as an aggregation of its partners, with the partners viewed as entering into transactions. This aggregate approach is in contrast to the alternative ''entity'' approach that treats the partnership as an entity that engages in transactions. Because partnerships are passthrough entities that are not themselves subject to U.S. income tax and because the income of the partnership is taxable to the partners in the partnership, these final regulations apply the aggregate approach and provide that payments by a corporation to a partnership, and payments by a partnership to a corporation, are treated in the first instance as payments to the partners in the partnership and in second instance as payments by the partners in the partnership. Under the alternative entity approach that assesses the partnership as a separate entity, a payment by an applicable taxpayer (corporation) to a related foreign partnership could be a base erosion payment even if all of the partners in the partnership are domestic persons.

Under the aggregate approach adopted in these final regulations, the applicable taxpayer (corporation) that makes a payment to a related foreign partnership with a partner or partners that are related foreign parties will determine whether it has made a base erosion payment by treating the amount as having been paid to each partner of the partnership. Conversely, also in the absence of this aggregate approach, a payment by an applicable taxpayer (corporation) to a related domestic partnership would not be a base erosion payment even if some or all of the partners in the partnership are foreign related parties. As with a payment to a related foreign partnership, under the aggregate approach adopted in these final regulations, the applicable taxpayer (corporation) that makes a payment to a related domestic partnership with a partner or partners that are related foreign parties will determine whether it has made a base erosion payment by treating the amount as having being paid to each partner of the partnership. This approach is thus neutral in both preventing potential abuse and preventing potential over-breadth.

The final regulations retain the same general approach that was provided in the proposed regulations. See Part VIII of the Summary of Comments and Explanation of Revisions. The Treasury Department and the IRS considered an alternative of not providing guidance on transactions involving partnerships; however, as discussed in this part I.D.4.e, these final regulations eliminate the distortion that would otherwise be present if determination of whether a payment is a base erosion payment is made by reference to the partnership, rather than by reference to the partners. For example, in the absence of these final regulations, taxpayers might be incentivized to route payments through a domestic partnership that is formed by foreign persons as an intermediary to avoid the BEAT. Conversely, in the absence of the final regulations, taxpayers would be incentivized to restructure to avoid making any payments to a foreign partnership that has partners that are solely domestic because such payment could be inappropriately classified as a base erosion payment.

f. Anti-Abuse and Reporting Requirements

Section 59A(i) provides the Secretary authority to issue regulations and other guidance including for the purposes of preventing the avoidance of the purposes of section 59A. Pursuant to this specific grant of regulatory authority, § 1.59A–9 provides rules recharacterizing certain specified transactions as necessary to prevent the avoidance of section 59A, and provides examples. The Treasury Department and the IRS have determined that any compliance burdens or other economic costs created by the anti-abuse provisions are necessary to further the purposes of section 59A.

These final regulations also provide reporting requirements necessary to properly administer and enforce section 59A. In particular, the Treasury Department and the IRS have identified certain types of information from taxpayers who are applicable taxpayers for purposes of section 59A that will be required to be reported on Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Under Sections 6038A and 6038C of the Internal Revenue Code), and a new Form 8991, Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts. The regulations increase record keeping requirements for taxpayers relative to the baseline because additional information is to be reported on Form 5472 and Form 8991. The requirements added by the proposed regulations, however, derive directly from statutory changes that require information from applicable taxpayers and are necessary for the effective administration of section 59A.

II. Paperwork Reduction Act

1. Collections of Information—Forms 8991, 5471, 5472, and 8858

The collections of information in the final regulations with respect to section 59A are in §§ 1.59A–3(b)(3)(i)(C), 1.59A–3(b)(4)(i)(D), and 1.6038A–2. In response to comments addressing the notice of proposed rulemaking preceding the final regulations, the Treasury Department and the IRS have revised the collection of information with respect to section 6038A. The revised collection of information with respect to sections 59A and 6038A is in § 1.6038A–2(b)(7)(ix).

The collection of information in § 1.59A–6(b)(2)(i) and § 1.6038A–2(b)(7)(ix) requires an applicable taxpayer that makes qualified derivative payments to report information regarding its qualified derivative payments on Form 8991 in order for the QDP exception from base erosion payment status to apply to any particular payment. In response to comments, § 1.59A–6(b)(2)(i) provides that a taxpayer satisfies the reporting requirement by reporting the aggregate amount of all QDPs (rather than the aggregate amount as determined by type of derivative contract as provided in proposed § 1.6038A–2(b)(7)(ix)(A)) on Form 8991 or its successor form. To comply with these reporting requirements, taxpayers will need to develop systems to collect and report the relevant information. To separately determine the aggregate amount of QDPs by each specific type of derivative contract would add to the complexity of those systems. That additional complexity and compliance burden outweighs the utility to the IRS of receiving that information for each specific type of derivative contract. Section 1.59A–6(b)(2)(iv) also provides that during the transition period before § 1.59A–6(b)(2)(i) is applicable, taxpayers will not be deemed to have failed to satisfy the reporting requirement if the taxpayer reports the aggregate amount of qualified derivative payments in good faith. For purposes of the PRA, the reporting burden associated with § 1.59A–3(b)(4)(i)(D), § 1.59A–6(b)(2)(i) and § 1.6038A–2(b)(7)(ix) will be reflected in the PRA submission associated with the Form 8991 series (see chart at the end of this Part II of the Special Analysis section for the status of the PRA submission for this form).

TAX FORM IMPACTED

Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
§ 1.59A–3(b)(4)(i)(D) election to use-applicable financial statements	105,600	Form 8991 series.
§ 1.59A–6(b)(2)(i) and § 1.6038A–2(b)(7)(ix) requirement to report qualified derivative payments	105,600	Form 8991 series.

CDW.

The information collection requirements pursuant to § 1.59A–3(b)(3)(i)(C) are discussed further below. The collections of information pursuant to section 59A, except with respect to information collected under § 1.59A–3(b)(3)(i)(C), will be conducted by way of the following:

- Form 8991, Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts;
- Schedule G to the Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations;
- Part VIII of the updated Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business;
- Revised Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities.

For purposes of the Paperwork Reduction Act, the reporting burden associated with the collections of information with respect to section 59A, other than with respect to § 1.59A–3(b)(3)(i)(C), will be reflected in the IRS Forms 14029 Paperwork Reduction Act Submission, associated with Forms 5471 (OMB control numbers 1545–0123, and 1545–0074), 5472 (OMB control number 1545–0123), 8858 (OMB control numbers 1545–0123, 1545–0074, and 1545–1910), and 8991 (OMB control number 1545–0123).

The current status of the Paperwork Reduction Act submissions related to BEAT is provided in the following table. The BEAT provisions are included in aggregated burden estimates for the OMB control numbers listed below which, in the case of 1545–0123, represents a total estimated burden time, including all other related forms and schedules for corporations, of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017) and, in the case of 1545–0074, a total estimated burden time, including all other related forms and schedules for individuals, of 1.784 billion hours and total estimated monetized costs of $31.764 billion ($2017). The burden estimates provided in the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include but not isolate the estimated burden of only the BEAT requirements. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the final regulations. The Treasury Department and IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burden that international tax provisions imposed prior to the Act. No burden estimates specific to the final regulations are currently available. The Treasury Department has not estimated the burden, including that of any new information collections, related to the requirements under the final regulations. Those estimates would capture both changes made by the Act and those that arise out of discretionary authority exercised in the final regulations. The Treasury Department and the IRS request comment on all aspects of information collection burdens related to the final regulations. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

Form	Type of filer	OMB No.(s)	Status
Form 5471 (including Schedule G).	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*		

Form	Type of filer	OMB No.(s)	Status
	Individual (NEW Model)	1545–0074	Limited Scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 3/2019. 60 Day **Federal Register** notice not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031*.		
Form 5472 (including Part VIII)	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd*.		
Form 8858	All other Filers (mainly trusts and estates) (Legacy system).	1545–1910	Published in the **Federal Register** on 10/30/18. Public Comment period closed on11/30/18. ICR in process by the Treasury Department as of 9/6/18.
	Link: *https://www.federalregister.gov/documents/2018/10/30/2018-23644/agency-information-collection-activities-submission-for-omb-review-comment-request-multiple-irs*.		
	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd*.		
	Individual (NEW Model)	1545–0074	Limited Scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 3–2019. 60 Day **Federal Register** notice not published yet for full collection.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031*.		
Form 8991	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/11/18. Public Comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd*.		

RELATED NEW OR REVISED TAX FORMS

	New	Revision of existing form	Number of respondents (2018, estimated)
Form 8991	Y		3,500–4,500
Form 5471, Schedule G		Y	15,000–25,000
Form 5472, Part VIII	Y		80,000–100,000
Form 8858		Y	15,000–25,000

The numbers of respondents in the Related New or Revised Tax Forms table were estimated by Treasury's Office of Tax Analysis based on data from IRS Compliance Planning and Analytics using tax return data for tax years 2015 and 2016. Data for Form 8991 represent preliminary estimates of the total number of taxpayers which may be required to file the new Form 8991. Only certain large corporate taxpayers with gross receipts of at least $500 million are expected to file this form. Data for each of the Forms 5471, 5472, and 8858 represent preliminary estimates of the total number of taxpayers that are expected to file these information returns regardless of whether that taxpayer must also file Form 8991.

The Treasury Department and the IRS project that 3,500–4,500 taxpayers may be applicable taxpayers under the BEAT. This estimate is based on the number of filers that (1) filed the Form 1120 series of tax returns (except for the Form 1120–S), (2) filed a Form 5471 or Form 5472, and (3) reported gross receipts of at least $500 million. Because an applicable taxpayer is defined under section 59A(e)(1)(A) as a corporation other than a regulated investment company, a real estate investment trust, or an S corporation, the Treasury Department and the IRS have determined that taxpayers who filed the Form 1120 series of tax returns will be most likely to be affected by these proposed regulations. Additionally, the Treasury Department and the IRS estimated the number of filers likely to make payments to a foreign related party based on filers of the Form 1120 series of tax returns who also filed a Form 5471 or Form 5472 to determine the number of respondents. Finally, because an applicable taxpayer is defined under section 59A(e)(1)(B) as a taxpayer with average annual gross receipts of at least $500 million for the 3-taxable-year period ending with the preceding taxable year, the Treasury Department and the IRS estimated the scope of respondents based on the amount of gross receipts reported by taxpayers filing the Form 1120 series of tax returns.

These projections are based solely on data with respect to the taxpayer, without taking into account any members of the taxpayer's aggregate group. As many as 105,600 additional taxpayers may be applicable taxpayers as a result of being members of an aggregate group.[6] This estimate is based on the number of taxpayers who filed a Form 1120 and also filed a Form 5471 or a Form 5472, but without regard to the gross receipts test.

2. Collection of Information—§ 1.59A–3(b)(3)(i)(C)

The information collection requirements pursuant to § 1.59A–3(b)(3)(i)(C) will be satisfied by the taxpayer maintaining permanent books and records that are adequate to verify the amount charged for the services and the total services costs incurred by the renderer, including a description of the services in question, identification of the renderer and the recipient of the services, calculation of the amount of profit mark-up (if any) paid for the services, and sufficient documentation to allow verification of the methods used to allocate and apportion the costs to the services.

The collection of information in § 1.59A–3(b)(3)(i)(C) is mandatory for taxpayers seeking to exclude certain amounts paid or accrued to a foreign related party for services from treatment as base erosion payments for purposes of section 59A (the ''SCM exception to the BEAT''). Taxpayers seeking to rely on the SCM exception to the BEAT are aggregate groups of corporations with average annual gross receipts of at least $500 million and that make payments to foreign related parties. The information required to be maintained will be used by the IRS for tax compliance purposes.

Estimated total annual reporting burden: 5,000 hours.

Estimated average annual burden hours per respondent: 2.5 hours.

Estimated average cost per respondent ($2017): $238.00.

Estimated number of respondents: 2,000. This estimate is based on the assumption that only a portion of taxpayers will qualify for the SCM exception to the BEAT, multiplied by the number of respondents shown above.

Estimated annual frequency of responses: Once.

Based on these estimates, the annual three-year reporting burden for those electing the SCM exemption is $0.16 mn/yr ($2017) ($238 × 2,000/3, converted to millions).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

III. Regulatory Flexibility Act

It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that these regulations will primarily affect aggregate groups of corporations with average annual gross receipts of at least $500 million and that make payments to foreign related parties. Generally only large businesses both have substantial gross receipts and make payments to foreign related parties.

Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG–104259–18) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold is approximately $154 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

VI. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (''CRA''). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**. Notwithstanding this requirement, section 808(2) of the CRA allows agencies to dispense with the requirements of 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines.

Pursuant to section 808(2) of the CRA, the Treasury Department and the IRS find, for good cause, that a 60-day delay in the effective date is unnecessary and contrary to the public interest. The Treasury Department and the IRS have determined that the rules in this Treasury decision (other than the reporting requirements for QDPs in § 1.6038A–2(b)(7), § 1.1502–2(a)(9), and § 1.1502–59A) shall take effect for taxable years ending on or after December 17, 2018. Section 14401(e) of the Act provides that section 59A applies to base erosion payments paid or accrued in taxable years beginning after December 31, 2017. This means that the statute is currently effective, and taxpayers may be required to make payments under section 59A on a U.S. federal income tax return for 2018 tax years. These final regulations provide crucial guidance for taxpayers on how to apply the rules of section 59A, correctly calculate their liability under section 59A, and accurately file their U.S. federal income tax returns. Because the statute already requires taxpayers to comply with section 59A, a 60-day delay in the effective date is unnecessary and contrary to the public interest.

Drafting Information

The principal authors of these final regulations are Azeka J. Abramoff, Sheila Ramaswamy, and Karen Walny of the Office of Associate Chief Counsel (International) and Julie Wang and John

[6] These estimates are based on current tax filings for taxable year 2017 and do not yet include the BEAT. At this time, the Treasury Department and the IRS do not have readily available data to determine whether a taxpayer that is a member of an aggregate group will meet all tests to be an applicable taxpayer for purposes of the BEAT.

P. Stemwedel of the Office of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by revising the entry for § 1.6038A–2 and adding entries for §§ 1.59A–0, 1.59A–1, 1.59A–2, 1.59A–3, 1.59A–4, 1.59A–5, 1.59A–6, 1.59A–7, 1.59A–8, 1.59A–9, 1.59A–10, 1.1502–59A, and 1.1502–100 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

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§ 1.59A–0 also issued under 26 U.S.C. 59A(i).

§ 1.59A–1 also issued under 26 U.S.C. 59A(i).

§ 1.59A–2 also issued under 26 U.S.C. 59A(i).

§ 1.59A–3 also issued under 26 U.S.C. 59A(i).

§ 1.59A–4 also issued under 26 U.S.C. 59A(i).

§ 1.59A–5 also issued under 26 U.S.C. 59A(i).

§ 1.59A–6 also issued under 26 U.S.C. 59A(i).

§ 1.59A–7 also issued under 26 U.S.C. 59A(i).

§ 1.59A–8 also issued under 26 U.S.C. 59A(i).

§ 1.59A–9 also issued under 26 U.S.C. 59A(i).

§ 1.59A–10 also issued under 26 U.S.C. 59A(i).

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§ 1.1502–59A also issued under 26 U.S.C. 1502.

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§ 1.1502–100 also issued under 26 U.S.C. 1502.

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§ 1.6038A–2 also issued under 26 U.S.C. 6001, 6038A, and 6038C.

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■ **Par. 2.** Sections 1.59A–0 through 1.59A–10 are added to read as follows:

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Sec.

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§ 1.59A–1 Base erosion and anti-abuse tax.

(a) *Purpose.* This section and §§ 1.59A–2 through 1.59A–10 (collectively, the ''section 59A regulations'') provide rules under section 59A to determine the amount of the base erosion and anti-abuse tax. Paragraph (b) of this section provides definitions applicable to the section 59A regulations. Section 1.59A–2 provides rules regarding how to determine whether a taxpayer is an applicable taxpayer. Section 1.59A–3 provides rules regarding base erosion payments and base erosion tax benefits. Section 1.59A–4 provides rules for calculating modified taxable income. Section 1.59A–5 provides rules for calculating the base erosion minimum tax amount. Section 1.59A–6 provides rules relating to qualified derivative payments. Section 1.59A–7 provides rules regarding the application of section 59A to partnerships. Section 1.59A–8 is reserved for rules regarding the application of section 59A to certain expatriated entities. Section 1.59A–9 provides anti-abuse rules to prevent avoidance of section 59A. Finally, § 1.59A–10 provides the applicability date for the section 59A regulations.

(b) *Definitions.* For purposes of this section and §§ 1.59A–2 through 1.59A–10, the following terms have the meanings provided in this paragraph (b).

(1) Aggregate group. The term *aggregate group* means the group of corporations determined by—

(i) Identifying a controlled group of corporations as defined in section 1563(a), except that the phrase ''more than 50 percent'' is substituted for ''at least 80 percent'' each place it appears in section 1563(a)(1) and the determination is made without regard to sections 1563(a)(4) and (e)(3)(C), and

(ii) Once the controlled group of corporations is determined, excluding foreign corporations except with regard to income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States under an applicable provision of the Internal Revenue Code or regulations published under 26 CFR chapter I. Notwithstanding the foregoing, if a foreign corporation is subject to tax on a net basis pursuant to an applicable income tax treaty of the United States, it is excluded from the controlled group of corporations except with regard to income taken into account in determining its net taxable income.

(2) Applicable section 38 credits. The term *applicable section 38 credits* means the credits allowed under section 38 for the taxable year that are properly allocable to—

(i) The low-income housing credit determined under section 42(a),

(ii) The renewable electricity production credit determined under section 45(a), and

(iii) The investment credit determined under section 46, but only to the extent properly allocable to the energy credit determined under section 48.

(3) *Applicable taxpayer.* The term *applicable taxpayer* means a taxpayer that meets the requirements set forth in § 1.59A–2(b).

(4) *Bank.* The term *bank* has the meaning provided in section 581.

(5) *Base erosion and anti-abuse tax rate.* The term *base erosion and anti-abuse tax rate* means the percentage that the taxpayer applies to its modified taxable income for the taxable year to calculate its base erosion minimum tax amount. See § 1.59A–5(c) for the base erosion and anti-abuse tax rate applicable for the relevant taxable year.

(6) *Business interest expense.* The term *business interest expense,* with respect to a taxpayer and a taxable year, has the meaning provided in § 1.163(j)–1(b)(2).

(7) *Deduction.* The term *deduction* means any deduction allowable under chapter 1 of subtitle A of the Internal Revenue Code.

(8) *Disallowed business interest expense carryforward.* The term *disallowed business interest expense carryforward* has the meaning provided in § 1.163(j)–1(b)(9).

(9) *Domestic related business interest expense.* The term *domestic related business interest expense* for any taxable year is the taxpayer's business interest expense paid or accrued to a related party that is not a foreign related party.

(10) *Foreign person.* The term *foreign person* means any person who is not a United States person. For purposes of the preceding sentence, a United States person has the meaning provided in section 7701(a)(30), except that any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States is not a United States person. See § 1.59A–7(b) for rules applicable to partnerships.

(11) *Foreign related business interest expense.* The term *foreign related business interest expense* for any taxable year is the taxpayer's business interest expense paid or accrued to a foreign related party.

(12) *Foreign related party.* The term *foreign related party* means a foreign person, as defined in paragraph (b)(10) of this section, that is a related party, as defined in paragraph (b)(17) of this section, with respect to the taxpayer. In addition, for purposes of § 1.59A–3(b)(4)(v)(B) (relating to internal dealings under certain income tax treaties), a foreign related party also includes the foreign corporation's home office or a foreign branch of the foreign corporation. See § 1.59A–7(b), (c), and (f) for rules applicable to partnerships.

(13) *Gross receipts.* The term *gross receipts* has the meaning provided in § 1.448–1T(f)(2)(iv).

(14) *Member of an aggregate group.* The term *member of an aggregate group* means a corporation that is included in an aggregate group, as defined in paragraph (b)(1) of this section.

(15) *Registered securities dealer.* The term *registered securities dealer* means any dealer as defined in section 3(a)(5) of the Securities Exchange Act of 1934 that is registered, or required to be registered, under section 15 of the Securities Exchange Act of 1934.

(16) *Regular tax liability.* The term *regular tax liability* has the meaning provided in section 26(b).

(17) *Related party*—(i) *In general.* A *related party,* with respect to an applicable taxpayer, is—

(A) Any 25-percent owner of the taxpayer;

(B) Any person who is related (within the meaning of section 267(b) or 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer; or

(C) A controlled taxpayer within the meaning of § 1.482–1(i)(5) together with, or with respect to, the taxpayer.

(ii) *25-percent owner.* With respect to any corporation, a *25-percent owner* means any person who owns at least 25 percent of—

(A) The total voting power of all classes of stock of the corporation entitled to vote; or

(B) The total value of all classes of stock of the corporation.

(iii) *Application of section 318.* Section 318 applies for purposes of paragraphs (b)(17)(i) and (ii) of this section, except that—

(A) ''10 percent'' is substituted for ''50 percent'' in section 318(a)(2)(C); and

(B) Section 318(a)(3)(A) through (C) are not applied so as to consider a United States person as owning stock that is owned by a person who is not a United States person.

(18) *TLAC long-term debt required amount.* The term *TLAC long-term debt required amount* means the specified minimum amount of debt that is required pursuant to 12 CFR 252.162(a).

(19) *TLAC securities amount.* The term *TLAC securities amount* is the sum of the adjusted issue prices (as determined for purposes of § 1.1275–1(b)) of all TLAC securities issued and outstanding by the taxpayer, without regard to whether interest thereunder would be a base erosion payment absent § 1.59A–3(b)(3)(v).

(20) *TLAC security.* The term *TLAC security* means an eligible internal debt security, as defined in 12 CFR 252.161.

(21) *Unrelated business interest expense.* The term *unrelated business interest expense* for any taxable year is the taxpayer's business interest expense paid or accrued to a party that is not a related party.

§ 1.59A–2 Applicable taxpayer.

(a) *Scope.* This section provides rules for determining whether a taxpayer is an applicable taxpayer. Paragraph (b) of this section defines an applicable taxpayer. Paragraph (c) of this section provides rules for determining whether a taxpayer is an applicable taxpayer by reference to the aggregate group of which the taxpayer is a member. Paragraph (d) of this section provides rules regarding the gross receipts test. Paragraph (e) of this section provides rules regarding the base erosion percentage test. Paragraph (f) of this section provides examples illustrating the rules of this section.

(b) *Applicable taxpayer.* For purposes of section 59A, a taxpayer is an applicable taxpayer with respect to any taxable year if the taxpayer—

(1) Is a corporation, but not a regulated investment company, a real estate investment trust, or an S corporation;

(2) Satisfies the gross receipts test of paragraph (d) of this section; and

(3) Satisfies the base erosion percentage test of paragraph (e) of this section.

(c) *Aggregation rules*—(1) *In general.* Solely for purposes of this section and § 1.59A–4, a taxpayer that is a member of an aggregate group determines its gross receipts and its base erosion percentage on the basis of the aggregate group. For these purposes, transactions that occur between members of the taxpayer's aggregate group that were members of the aggregate group as of the time of the transaction are not taken into account. In the case of a foreign corporation that is a member of an aggregate group, only transactions that occur between members of the aggregate group and that relate to income effectively connected with, or treated as effectively connected with, the conduct of a trade or business in the United States are not taken into account for this purpose. In the case of a foreign corporation that is a member of an aggregate group and that is subject to tax on a net basis pursuant to an applicable income tax treaty of the United States, only transactions that occur between members of the aggregate group and that relate to income that is taken into account in determining its net taxable income are not taken into account for this purpose.

(2) *Aggregate group determined with respect to each taxpayer*—(i) *In general.* Solely for purposes of this section, an aggregate group is determined with respect to each taxpayer. As a result, the aggregate group of one taxpayer may be different than the aggregate group of another member of the taxpayer's aggregate group.

(ii) [Reserved]

(3) *Taxable year of members of an aggregate group.* Solely for purposes of this section, a taxpayer that is a member of an aggregate group measures the gross receipts and base erosion percentage of the aggregate group for a taxable year by reference to the taxpayer's gross receipts, base erosion tax benefits, and deductions for the taxable year and the gross receipts, base erosion tax benefits, and deductions of each member of the aggregate group for the taxable year of the member that ends with or within the taxpayer's taxable year.

(4) through (6) [Reserved]

(7) *Partnerships.* For the treatment of partnerships for purposes of determining gross receipts and base erosion tax benefits, see § 1.59A–7(e)(2) and (d), respectively.

(8) *Transition rule for aggregate group members with different taxable years.* If the taxpayer has a different taxable year than another member of the taxpayer's aggregate group (other member), and the other member is eligible for the exception in § 1.59A–3(b)(3)(vi) (amounts paid or accrued in taxable years beginning before January 1, 2018) with respect to a taxable year ending with or within the taxpayer's taxable year (''excepted taxable year''), the excepted taxable year of the other member is not taken into account for purposes of paragraph (e) of this section. This rule applies solely for purposes of determining whether a taxpayer is an applicable taxpayer under this section.

(d) *Gross receipts test*—(1) *Amount of gross receipts.* A taxpayer, or the aggregate group of which the taxpayer is a member, satisfies the gross receipts test of this section if it has average annual gross receipts of at least $500,000,000 for the three-taxable-year period ending with the preceding taxable year.

(2) *Taxpayer not in existence for entire three-year period.* If a taxpayer was not in existence for the entire three-year period referred to in paragraph (d)(1) of this section, the taxpayer determines a gross receipts average for the period that it was in existence (which includes gross receipts in the current year).

(3) *Gross receipts of foreign corporations.* With respect to any foreign corporation, only gross receipts that are taken into account in determining income that is, or is treated as, effectively connected with the conduct of a trade or business within the United States are taken into account for purposes of paragraph (d)(1) of this section. In the case of a foreign corporation that is a member of an aggregate group and that is subject to tax on a net basis pursuant to an applicable income tax treaty of the United States, the foreign corporation includes only gross receipts that are attributable to transactions taken into account in determining its net taxable income.

(4) *Gross receipts of an insurance company.* Solely for purposes of this section, for any corporation that is subject to tax under subchapter L or any corporation that would be subject to tax under subchapter L if that corporation were a domestic corporation, gross receipts are reduced by return premiums (within the meaning of section 803(a)(1)(B) and section 832(b)(4)(A)), but are not reduced by any reinsurance premiums paid or accrued.

(5) *Reductions in gross receipts.* For purposes of this section, gross receipts for any taxable year are reduced by returns and allowances made during that taxable year.

(6) *Gross receipts of consolidated groups.* For purposes of this section, the gross receipts of a consolidated group are determined by aggregating the gross receipts of all of the members of the consolidated group. See § 1.1502–59A(b).

(e) *Base erosion percentage test*—(1) *In general.* A taxpayer, or the aggregate group of which the taxpayer is a member, satisfies the base erosion percentage test if its base erosion percentage is three percent or higher.

(2) *Base erosion percentage test for banks and registered securities dealers*—(i) *In general.* A taxpayer that is a member of an affiliated group (as defined in section 1504(a)(1)) that includes a bank (as defined in § 1.59A–1(b)(4)) or a registered securities dealer (as defined in section § 1.59A–1(b)(15)) satisfies the base erosion percentage test if its base erosion percentage is two percent or higher.

(ii) *Aggregate groups.* An aggregate group of which a taxpayer is a member and that includes a bank or a registered securities dealer that is a member of an affiliated group (as defined in section 1504(a)(1)) is subject to the base erosion percentage threshold described in paragraph (e)(2)(i) of this section.

(iii) *De minimis exception for banking and registered securities dealer activities.* An aggregate group that includes a bank or a registered securities dealer that is a member of an affiliated group (as defined in section 1504(a)(1)) is not treated as including a bank or registered securities dealer for purposes of paragraph (e)(2)(i) of this section for a taxable year, if, for that taxable year, the total gross receipts of the aggregate group attributable to the bank or the registered securities dealer (or attributable to all of the banks and registered securities dealers in the group, if more than one) represent less than two percent of the total gross receipts of the aggregate group, as determined under paragraph (d) of this section. When there is no aggregate group, a consolidated group that includes a bank or a registered securities dealer is not treated as including a bank or registered securities dealer for purposes of paragraph (e)(2)(i) of this section for a taxable year, if, for that taxable year, the total gross receipts of the consolidated group attributable to the bank or the registered securities dealer (or attributable to all of the banks or registered securities dealers in the group, if more than one) represent less than two percent of the total gross receipts of the consolidated group, as determined under paragraph (d) of this section.

(3) *Computation of base erosion percentage*—(i) *In general.* The taxpayer's base erosion percentage for any taxable year is determined by dividing—

(A) The aggregate amount of the taxpayer's (or in the case of a taxpayer that is a member of an aggregate group, the aggregate group's) base erosion tax benefits (as defined in § 1.59A–3(c)(1)) for the taxable year, by

(B) The sum of—

(*1*) The aggregate amount of the deductions (including deductions for base erosion tax benefits described in § 1.59A–3(c)(1)(i) and base erosion tax benefits described in § 1.59A–3(c)(1)(ii)) allowable to the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, any member of the aggregate group) under chapter 1 of Subtitle A for the taxable year;

(*2*) The base erosion tax benefits described in § 1.59A–3(c)(1)(iii) with respect to any premiums or other consideration paid or accrued by the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, any member of the aggregate group) to a foreign related party for any reinsurance payment taken into account under sections 803(a)(1)(B) or 832(b)(4)(A) for the taxable year; and

(*3*) Any amount paid or accrued by the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, any member of the aggregate group) resulting in a reduction of gross receipts described in § 1.59A–3(c)(1)(iv) for the taxable year.

(ii) *Certain items not taken into account in denominator.* Except as provided in paragraph (e)(3)(viii) of this section, the amount under paragraph (e)(3)(i)(B) of this section is determined by not taking into account—

(A) Any deduction allowed under section 172, 245A, or 250 for the taxable year;

(B) Any deduction for amounts paid or accrued for services to which the exception described in § 1.59A–3(b)(3)(i) applies;

(C) Any deduction for qualified derivative payments that are not treated as base erosion payments by reason of § 1.59A–3(b)(3)(ii);

(D) Any exchange loss within the meaning of § 1.988–2 from a section 988 transaction as described in § 1.988–1(a)(1) that is not treated as a base erosion payment by reason of § 1.59A–3(b)(3)(iv);

(E) Any deduction for amounts paid or accrued to foreign related parties with respect to TLAC securities and foreign TLAC securities that are not treated as base erosion payments by reason of § 1.59A–3(b)(3)(v);

(F) Any reinsurance losses incurred and claims payments described in § 1.59A–3(b)(3)(ix); and

(G) Any deduction not allowed in determining taxable income for the taxable year.

(iii) *Effect of treaties on base erosion percentage determination.* See § 1.59A–3(c)(2) and (3).

(iv) *Amounts paid or accrued between members of a consolidated group.* See § 1.1502–59A(b).

(v) *Deductions and base erosion tax benefits from partnerships.* See § 1.59A–7(b), (d), and (e).

(vi) *Mark-to-market positions.* For any position with respect to which the taxpayer (or in the case of a taxpayer that is a member of an aggregate group, a member of the aggregate group) applies a mark-to-market method of accounting for U.S. federal income tax purposes, the taxpayer must determine its gain or loss with respect to that position for any taxable year by combining all items of income, gain, loss, or deduction arising with respect to the position during the taxable year, regardless of how each item arises (including from a payment, accrual, or mark) for purposes of paragraph (e)(3) of this section. See paragraph (f)(1) of this section (*Example 1*) for an illustration of this rule. For purposes of section 59A, a taxpayer computes its losses resulting from positions subject to a mark-to-market regime under the Internal Revenue Code based on a single mark for the taxable year on the earlier of the last business day of the taxpayer's taxable year and the disposition (whether by sale, offset, exercise, termination, expiration, maturity, or other means) of the position, regardless of how frequently a taxpayer marks to market for other purposes. See § 1.59A–3(b)(2)(iii) for the application of this rule for purposes of determining the amount of base erosion payments.

(vii) *Reinsurance losses incurred and claims payments.* Except as provided in paragraph (e)(3)(ii)(F) of this section, amounts paid for losses incurred (as defined in section 832(b)(5)) and claims and benefits under section 805(a)(1) are taken into account for purposes of paragraph (e)(3)(i)(B)(*1*) of this section.

(viii) *Certain payments that qualify for the effectively connected income exception and another base erosion payment exception.* Subject to paragraph (c) of this section (transactions that occur between members of the taxpayer's aggregate group), a payment that qualifies for the effectively connected income exception described in § 1.59A–3(b)(3)(iii) and either the service cost method exception described in § 1.59A–3(b)(3)(i), the qualified derivative payment exception described in § 1.59A–3(b)(3)(ii), or the TLAC exception described in § 1.59A–3(b)(3)(v) is not subject to paragraph (e)(3)(ii)(B), (C), or (E) of this section and those amounts are included in the denominator of the base erosion percentage if the foreign related party who received the payment is not a member of the aggregate group.

(f) *Examples.* The following examples illustrate the rules of this section.

(1) *Mark-to-market*—(i) *Facts.* (A) Foreign Parent (FP) is a foreign corporation that owns all of the stock of domestic corporation (DC). FP is a foreign related party of DC under § 1.59A–1(b)(12). DC is a registered securities dealer that does not hold any securities for investment. On January 1 of year 1, DC enters into two interest rate swaps for a term of two years, one with unrelated Customer A as the counterparty (position A) and one with unrelated Customer B as the counterparty (position B). Each of the swaps provides for semiannual periodic payments to be made or received on June 30 and December 31. No party makes any payment to any other party upon initiation of either of the swaps (that is, they are entered into at-the-money). DC is required to mark-to-market positions A and B for U.S. federal income tax purposes. DC is a calendar year taxpayer.

(B) For position A in year 1, DC makes a payment of $150x on June 30, and receives a payment of $50x on December 31. There are no other payments in year 1. On December 31, position A has a value to DC of $110x (that is, position A is in-the-money by $110x).

(C) For position B in year 1, DC receives a payment of $120x on June 30, and makes a payment of $30x on December 31. There are no other payments in year 1. On December 31, position B has a value to DC of ($130x) (that is, position B is out-of-the-money by $130x).

(ii) *Analysis.* (A) With respect to position A, based on the total amount of payments made and received in year 1, DC has a net deduction of $100x. In addition, DC has a mark-to-market gain of $110x. As described in paragraph (e)(3)(vi) of this section, the mark-to-market gain of $110x is combined with the net deduction of $100x resulting from the payments. Therefore, with respect to position A, DC has a gain of $10x, and thus has no deduction in year 1 for purposes of section 59A.

(B) With respect to position B, based on the total amount of payments made and received in year 1, DC has net income of $90x. In addition, DC has a mark-to-market loss of $130x. As described in paragraph (e)(3)(vi) of this section, the mark-to-market loss of $130x is combined with the net income of $90x resulting from the payments. Therefore, with respect to position B, DC has a loss of $40x, and thus has a $40x deduction in year 1 for purposes of section 59A.

(2) [Reserved]

§ 1.59A–3 Base erosion payments and base erosion tax benefits.

(a) *Scope.* This section provides definitions and related rules regarding base erosion payments and base erosion tax benefits. Paragraph (b) of this section provides definitions and rules regarding base erosion payments. Paragraph (c) of this section provides rules for determining the amount of base erosion tax benefits. Paragraph (d) of this section provides examples illustrating the rules described in this section.

(b) *Base erosion payments*—(1) *In general.* Except as provided in paragraph (b)(3) of this section, a *base erosion payment* means—

(i) Any amount paid or accrued by the taxpayer to a foreign related party of the taxpayer and with respect to which a deduction is allowable under chapter 1 of subtitle A of the Internal Revenue Code;

(ii) Any amount paid or accrued by the taxpayer to a foreign related party of the taxpayer in connection with the acquisition of property by the taxpayer from the foreign related party if the character of the property is subject to the allowance for depreciation (or amortization in lieu of depreciation);

(iii) Any premium or other consideration paid or accrued by the taxpayer to a foreign related party of the taxpayer for any reinsurance payments that are taken into account under section 803(a)(1)(B) or 832(b)(4)(A); or

(iv) Any amount paid or accrued by the taxpayer that results in a reduction of the gross receipts of the taxpayer if the amount paid or accrued is with respect to—

(A) A surrogate foreign corporation, as defined in section 59A(d)(4)(C)(i), that is a related party of the taxpayer (but only if the corporation first became a surrogate foreign corporation after November 9, 2017); or

(B) A foreign person that is a member of the same expanded affiliated group, as defined in section 59A(d)(4)(C)(ii), as the surrogate foreign corporation.

(2) *Operating rules*—(i) *In general.* The determination of the amount paid or accrued, and the identity of the payor and recipient of any amount paid or accrued, is made under general U.S. federal income tax law.

(ii) *Amounts paid or accrued in cash and other consideration.* For purposes of paragraph (b)(1) of this section, an amount paid or accrued includes an amount paid or accrued using any form of consideration, including cash, property, stock, a partnership interest, or the assumption of a liability, including any exchange transaction. A distribution of property that is not part of an exchange (such as a distribution under section 301, without regard to whether section 301(c)(1), (c)(2), or (c)(3) applies), is not received with respect to an amount paid or accrued and does not give rise to a base erosion payment. In contrast, a redemption of stock by a corporation within the meaning of section 317(b) (such as a redemption described in section 302(a) or (d) or section 306(a)(2)), or a transaction in which there is an exchange for stock (such as a section 304 or section 331 transaction), is an amount paid or accrued by the shareholder to the corporation (or by the acquiring corporation to the transferor in a section 304 transaction), without regard to the treatment of such transaction for U.S. federal income tax purposes. See paragraph (b)(3)(viii) of this section for an exception for specified nonrecognition transactions (as defined in paragraph (b)(3)(viii)(A) of this section).

(iii) *Transactions providing for net payments.* Except as otherwise provided in paragraph (b)(2)(iv) of this section or as permitted by the Internal Revenue Code or the regulations, the amount of any base erosion payment is determined on a gross basis, regardless of any contractual or legal right to make or receive payments on a net basis. For this purpose, a right to make or receive payments on a net basis permits the parties to a transaction or series of transactions to settle obligations by offsetting any amounts to be paid by one party against amounts owed by that party to the other party. For example, any premium or other consideration paid or accrued by a taxpayer to a foreign related party for any reinsurance payments is not reduced by or netted against other amounts owed to the taxpayer from the foreign related party or by reserve adjustments or other returns.

(iv) *Amounts paid or accrued with respect to mark-to-market position.* For any transaction with respect to which the taxpayer applies the mark-to-market method of accounting for U.S. federal income tax purposes, the rules set forth in § 1.59A–2(e)(3)(vi) apply to determine the amount of the base erosion payment.

(v) *Coordination among categories of base erosion payments.* A payment that does not satisfy the criteria of one category of base erosion payment may be a base erosion payment described in one of the other categories.

(vi) *Certain domestic passthrough entities*—(A) *In general.* If a taxpayer pays or accrues an amount that would be a base erosion payment except for the fact that the payment is made to a specified domestic passthrough, then the taxpayer will be treated as making a base erosion payment to each specified foreign related party for purposes of section 59A and §§ 1.59A–2 through 1.59A–10. This rule has no effect on the taxation of the specified domestic passthrough under subchapter J or subchapter M of the Code (as applicable).

(B) *Amount of base erosion payment.* The amount of the base erosion payment is equal to the lesser of the amount paid or accrued by the taxpayer to or for the benefit of the specified domestic passthrough and the amount of the deduction allowed under section 561, 651, or 661 to the specified domestic passthrough with respect to amounts paid, credited, distributed, deemed distributed, or required to be distributed to a specified foreign related party.

(C) *Specified domestic passthrough.* For purposes of this paragraph (b)(2)(vi), specified domestic passthrough means:

(*1*) A domestic trust that is not a grantor trust under subpart E of subchapter J of chapter 1 of the Code (''domestic trust'') and which domestic trust is allowed a deduction under section 651 or section 661 with respect to amounts paid, credited, or required to be distributed to a specified foreign related party;

(*2*) A real estate investment trust (as defined in § 1.856–1(a)) that pays, or is deemed to pay, a dividend to a specified foreign related party for which a deduction is allowed under section 561; or

(*3*) A regulated investment company (as defined in § 1.851–1(a)) that pays, or is deemed to pay, a dividend to a specified foreign related party for which a deduction is allowed under section 561.

(D) *Specified foreign related party.* For purposes of this paragraph (b)(2)(vi), specified foreign related party means, with respect to a specified domestic passthrough, any foreign related party of a taxpayer that is a direct or indirect beneficiary or shareholder of the specified domestic passthrough.

(vii) *Transfers of property to related taxpayers.* If a taxpayer owns property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation) with respect to which paragraph (c)(1)(ii) of this section applies, and the taxpayer sells, exchanges, or otherwise transfers the property to another taxpayer that is a member of an aggregate group that includes the taxpayer (taking into account § 1.59A–7), any deduction for depreciation (or amortization in lieu of depreciation) by the transferee taxpayer remains subject to paragraph (c)(1)(ii) of this section to the same extent the amounts would have been so subject in the hands of the transferor. See paragraph (d)(7) of this section (*Example 7*) for an illustration of this rule.

(viii) *Reductions to determine gross income.* For purposes of paragraphs (b)(1)(i) and (ii) of this section, any amount resulting in a reduction to determine gross income under section 61, including an amount properly treated as cost of goods sold under the Code, is not a base erosion payment.

(ix) *Losses recognized on the sale or transfer of property.* If a taxpayer recognizes a loss on a sale or transfer of property to a foreign related party, the loss recognized with respect to the sale or transfer is not a deduction that would cause the payment to be treated as a base erosion payment under paragraph (b)(1)(i) of this section. However, if a taxpayer uses property to make a payment to a foreign related party and the payment otherwise meets the requirements of paragraph (b)(1) of this section, the amount of the payment that is treated as a base erosion payment equals the fair market value of the property at the time of the transfer.

(3) *Exceptions to base erosion payment.* Paragraph (b)(1) of this section does not apply to the types of payments or accruals described in paragraphs (b)(3)(i) through (ix) of this section.

(i) *Certain services cost method amounts*—(A) *In general.* Amounts paid or accrued by a taxpayer to a foreign related party for services that meet the requirements in paragraph (b)(3)(i)(B) of this section, but only to the extent of the total services cost of those services. Thus, any amount paid or accrued to a foreign related party in excess of the total services cost of services eligible for the services cost method exception (the mark-up component) remains a base erosion payment. For this purpose, services are an activity as defined in § 1.482–9(l)(2) performed by a foreign related party (the renderer) that provides a benefit as defined in § 1.482–9(l)(3) to the taxpayer (the recipient).

(B) *Eligibility for the services cost method exception.* To be eligible for the services cost method exception, all of the requirements of § 1.482–9(b) must be satisfied, except that:

(*1*) The requirements of § 1.482–9(b)(5) do not apply for purposes of determining eligibility for the service cost method exception in this section; and

(*2*) Adequate books and records must be maintained as described in paragraph (b)(3)(i)(C) of this section, instead of as described in § 1.482–9(b)(6).

(C) *Adequate books and records.* Permanent books of account and records must be maintained for as long as the costs with respect to the services are incurred by the renderer. The books and records must be adequate to permit verification by the Commissioner of the amount charged for the services and the total services costs incurred by the renderer, including a description of the services in question, identification of the renderer and the recipient of the services, calculation of the amount of profit mark-up (if any) paid for the services, and sufficient documentation to allow verification of the methods used to allocate and apportion the costs to the services in question in accordance with § 1.482–9(k). For example, where a renderer incurs costs that are attributable to performing a service for the taxpayer that includes services eligible for the services cost method exception under this section (regardless of whether the taxpayer determined its payments for those services based on the services cost method) and another service that is not eligible for the services cost method exception, books and records must be maintained that show, among other things: the total amount of costs that are attributable to each of those services, the method chosen under § 1.482–9(k) to apportion the costs between the service eligible for the services cost method under this section and the other service, and the application of that method in calculating the amount eligible for the services cost method exception. This paragraph (b)(3)(i)(C) does not affect the recordkeeping requirements imposed by any other provision, including § 1.6001–1.

(D) *Total services cost.* For purposes of this section, total services cost has the same meaning as total services costs in § 1.482–9(j).

(ii) *Qualified derivative payments.* Any qualified derivative payment as described in § 1.59A–6.

(iii) *Effectively connected income*—(A) *In general.* Except as provided in paragraph (b)(3)(iii)(B) of this section, amounts paid or accrued to a foreign related party that are subject to U.S. federal income taxation as income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States under an applicable provision of the Internal Revenue Code or regulations. Paragraph (b)(3)(iii) of this section applies only if the taxpayer receives a withholding certificate on which the foreign related party claims an exemption from withholding under section 1441 or 1442 because the amounts are effectively connected income.

(B) *Application to certain treaty residents.* If a foreign related party determines its taxable income pursuant to the business profits provisions of an applicable income tax treaty, amounts paid or accrued to the foreign related party that are taken into account in determining its taxable income.

(iv) *Exchange loss on a section 988 transaction.* Any exchange loss within the meaning of § 1.988–2 from a section 988 transaction described in § 1.988–1(a)(1) that is an allowable deduction and that results from a payment or accrual by the taxpayer to a foreign related party.

(v) *Amounts paid or accrued with respect to TLAC securities and foreign TLAC securities*—(A) *In general.* Except as provided in paragraph (b)(3)(v)(B) and (F) of this section, amounts paid or accrued to foreign related parties with respect to TLAC securities and foreign TLAC securities.

(B) *Limitation on exclusion for TLAC securities.* The amount excluded under paragraph (b)(3)(v)(A) of this section is no greater than the product of the scaling ratio and amounts paid or accrued to foreign related parties with respect to TLAC securities for which a deduction is allowed.

(C) *Scaling ratio.* For purposes of this paragraph (b)(3)(v), the scaling ratio for a taxable year of a taxpayer is a fraction the numerator of which is 115 percent of the average TLAC long-term debt required amount and the denominator of which is the average TLAC securities amount. The scaling ratio may in no event be greater than one.

(D) *Average TLAC securities amount.* The average TLAC securities amount for a taxable year is the average of the TLAC securities amounts for the year, computed at regular time intervals in accordance with this paragraph. The TLAC securities amount used in calculating the average TLAC securities amount is computed on a monthly basis.

(E) *Average TLAC long-term debt required amount.* The average TLAC long-term debt required amount for a taxable year is the average of the TLAC long-term debt required amounts, computed on a monthly basis.

(F) *Limitation on exclusion for foreign TLAC securities*—(*1*) *In general.* The amount excluded under paragraph (b)(3)(v)(A) of this section for foreign TLAC securities is limited to the extent that interest deducted by a U.S. trade or business or permanent establishment with respect to foreign TLAC securities exceeds the interest expense associated with the foreign TLAC long-term debt required amount, applying the scaling ratio principles set forth under paragraphs (b)(3)(v)(B) through (E) of this section.

(*2*) *Foreign TLAC long-term debt required amount.* For purposes of paragraph (b)(3)(v) of this section, the term *foreign TLAC long-term debt required amount* means in the case of a trade or business or a permanent establishment in the United States, the lesser of—

(*i*) The specified minimum amount of debt, if any, required pursuant to a bank regulatory requirement imposed under the laws or regulations of a foreign country that are comparable to 12 CFR 252.160–167; or

(*ii*) The specified minimum amount of debt, if any, that would be required pursuant to 12 CFR 252.162(a) if the trade or business or permanent establishment were a U.S. person (as determined under Federal Reserve regulations).

(*3*) *No specified minimum provided by local law.* For purposes of paragraph (b)(3)(v)(F)(*2*)(*ii*) of this section, if the bank regulatory requirements imposed under the laws or regulations of a foreign country do not specify a minimum amount, the limitation for purposes of paragraph (b)(3)(v)(F)(*2*) of this section is determined by reference solely to paragraph (b)(3)(v)(F)(*2*)(*ii*) of this section.

(*4*) *Foreign TLAC security.* For purposes of paragraph (b)(3)(v) of this section, the term *foreign TLAC security* means an internal debt security issued under a bank regulatory requirement imposed under the laws or regulations of a foreign country that is comparable to 12 CFR 252.160–167. The laws or regulations of a foreign country are comparable to 12 CFR 252.160–167 if the requirement is imposed by a Financial Stability Board member state and those laws or regulations are substantially consistent with TLAC standards of the Financial Stability Board.

(vi) *Amounts paid or accrued in taxable years beginning before January 1, 2018.* Any amount paid or accrued in taxable years beginning before January 1, 2018.

(vii) *Business interest carried forward from taxable years beginning before January 1, 2018.* Any disallowed business interest described in section 163(j)(2) that is carried forward from a taxable year beginning before January 1, 2018.

(viii) *Specified nonrecognition transactions*—(A) *In general.* Subject to paragraph (b)(3)(viii)(B) and (C) of this section, any amount transferred to, or exchanged with, a foreign related party pursuant to a transaction to which sections 332, 351, 355, or 368 apply (''specified nonrecognition transaction''). See § 1.59A–9(b)(4) for anti-abuse rules.

(B) *Other property transferred to a foreign related party in a specified nonrecognition transaction.* If a taxpayer transfers other property (as defined in paragraph (b)(3)(viii)(D) of this section) to a foreign related party pursuant to a specified nonrecognition transaction, the other property is treated as an amount paid or accrued to which paragraph (b)(3) of this section does not apply, regardless of whether gain is recognized on the transaction.

(C) *Other property received from a foreign related party in certain specified nonrecognition transactions.* If, in a transaction described in section 351, 355, or 368, the taxpayer transfers property and receives other property (as defined in paragraph (b)(3)(viii)(D) of this section) from a foreign related party, the property transferred by the taxpayer is treated as an amount paid or accrued to which paragraph (b)(3) of this section does not apply, regardless of whether gain is recognized on the transaction.

(D) *Definition of other property.* Solely for purposes of this paragraph (b)(3)(viii), the term *other property* has the meaning of the phrase ''other property or money'' as used in section 351(b), with respect to a transaction to which section 351 applies, and as used in sections 356(a)(1)(B) and 361(b), with respect to a transaction to which sections 355 or 368 apply, as applicable, including liabilities treated as money under section 357(b). However, the term *other property* does not include the sum of any money and the fair market value of any other property to which section 361(b)(3) applies. The term *other property* also includes liabilities that are assumed by the taxpayer in the specified nonrecognition transaction, but only to the extent of the amount of gain recognized under section 357(c).

(E) *Allocation of other property.* Other property is treated as exchanged for property in a specified nonrecognition transaction in a manner consistent with U.S. federal income tax law. For purposes making the allocation under this paragraph (b)(3)(viii)(E), liabilities described in paragraph (b)(3)(viii)(D) of this section are treated as money received.

(ix) *Reinsurance losses incurred and claims payments*—(A) *In general.* Any amounts paid by a taxpayer subject to tax under subchapter L to a foreign related party that is a regulated insurance company under a reinsurance contract between the taxpayer and the regulated foreign insurance company for losses incurred (as defined in section 832(b)(5)) and claims and benefits under section 805(a)(1), to the extent that the amounts paid or accrued are properly allocable to amounts required to be paid by the regulated foreign insurance company (or indirectly through another regulated foreign insurance company), pursuant to an insurance, annuity, or reinsurance contract, to a person other than a related party. For purposes of this paragraph (b)(3)(ix), the determination of whether a contract is an insurance contract or an annuity contract is made without regard to sections 72(s), 101(f), 817(h), and 7702, provided that the contract is regulated as a life insurance or annuity contract in its jurisdiction of issuance and no policyholder, insured, annuitant or beneficiary with respect to the contract is a United States person.

(B) *Regulated foreign insurance company.* The term regulated foreign insurance company means any foreign corporation which—

(*1*) Is subject to regulation as an insurance (or reinsurance) company by the country in which the corporation is created, organized, or maintains its registered office, and is licensed, authorized, or regulated by the applicable insurance regulatory body for that country to sell insurance, annuity, or reinsurance contracts to persons other than related parties in that country, and

(*2*) Would be subject to tax under subchapter L if it were a domestic corporation.

(4) *Rules for determining the amount of certain base erosion payments.* The following rules apply in determining the amount that is a base erosion payment.

(i) *Interest expense allocable to a foreign corporation's effectively connected income*—(A) *Methods described in § 1.882–5.* A foreign corporation that has interest expense allocable under section 882(c) to income that is, or is treated as, effectively connected with the conduct of a trade or business within the United States applying the method described in § 1.882–5(b) through (d) or the method described in § 1.882–5(e) has base erosion payments under paragraph (b)(1)(i) of this section for the taxable year equal to the sum of—

(*1*) The interest expense on a liability described in § 1.882–5(a)(1)(ii)(A) or (B) (direct allocations) that is paid or accrued by the foreign corporation to a foreign related party;

(*2*) The interest expense on U.S.-booked liabilities, as described in § 1.882–5(d)(2), determined by taking into account paragraph (b)(4)(i)(B) of this section, that is paid or accrued by the foreign corporation to a foreign related party; and

(*3*) The interest expense on U.S.-connected liabilities, as described in § 1.882–5(d) or 1.882–5(e), in excess of interest expense on U.S.-booked liabilities as described in § 1.882–5(d)(2), if any (hereafter, excess U.S.-connected liabilities), multiplied by a fraction, the numerator of which is the foreign corporation's average worldwide interest expense due to a foreign related party, and the denominator of which is the foreign corporation's average total worldwide interest expense. The numerator and denominator of this fraction are determined by translating interest expense into the functional currency of the foreign corporation using any reasonable method, consistently applied. Any interest expense that is interest expense on a U.S.-booked liability or is subject to a direct allocation is excluded from both the numerator and the denominator of the fraction.

(B) *U.S.-booked liabilities determination.* For purposes of paragraph (b)(4)(i)(A) of this section, the determination of the interest expense on U.S.-booked liabilities, as described in § 1.882–5(d)(2), is made without regard to whether the foreign corporation applies the method described in § 1.882–5(b) through (d) or the method described in § 1.882–5(e) for purposes of determining interest expense.

(C) *U.S.-booked liabilities in excess of U.S.-connected liabilities.* For purposes of paragraph (b)(4)(i)(A)(*2*) of this section, if a foreign corporation has U.S.-booked liabilities, as described in § 1.882–5(d)(2), in excess of U.S.-connected liabilities, as described in § 1.882–5(d) or § 1.882–5(e), the foreign corporation applies the scaling ratio pro-rata to all interest expense on U.S.-booked liabilities consistent with § 1.882–5(d)(4) for purposes of determining the amount of allocable interest expense on U.S.-booked liabilities that is a base erosion payment. This paragraph (b)(4)(i)(C) applies without regard to whether the foreign corporation applies the method described in § 1.882–5(b) through (d) or the method described in § 1.882–5(e) for purposes of determining its interest expense.

(D) *Election to use financial statements.* A foreign corporation may elect to calculate the fraction described in paragraph (b)(4)(i)(A)(*3*) of this section on the basis of its applicable financial statement rather than U.S. tax principles. For purposes of this section, an applicable financial statement has the meaning provided in section 451(b)(3). The applicable financial statement must be the applicable financial statement of the foreign corporation, not a consolidated applicable financial statement. A foreign corporation makes this election in accordance with the requirements of Form 8991 (or successor).

(E) *Coordination with certain tax treaties*—(*1*) *In general.* If a foreign corporation elects to determine its taxable income pursuant to business profits provisions of an income tax treaty rather than provisions of the Internal Revenue Code, or the regulations published under 26 CFR chapter I, for determining effectively connected income, and the foreign corporation does not apply § 1.882–5 to allocate interest expense to a permanent establishment, then paragraph (b)(4)(i)(A) through (D) of this section applies to determine the amount of hypothetical § 1.882–5 interest expense that is a base erosion payment under paragraph (b)(1) of this section. Interest expense allowed to the permanent establishment in excess of the hypothetical § 1.882–5 interest expense, if any, is treated as an amount paid or accrued by the permanent establishment to the foreign corporation's home office or to another branch of the foreign corporation and is a base erosion payment to the extent that the payment or accrual is described under paragraph (b)(1) of this section.

(*2*) *Hypothetical § 1.882–5 interest expense defined.* The hypothetical § 1.882–5 interest expense is equal to the amount of interest expense that would have been allocable under section 882(c) to income that is, or is treated as, effectively connected with the conduct of a trade or business within the United States if the foreign corporation determined interest expense in accordance with section § 1.882–5. However, the hypothetical § 1.882–5 interest expense shall not exceed the amount of interest expense allowed to the permanent establishment.

(*3*) *Consistency requirement.* For purposes of determining the amount described in paragraph (b)(4)(i)(E)(*2*) of this section and applying paragraph (b)(4)(i)(A) through (D) of this section, the elections of § 1.882–5 must be applied consistently and are subject to the rules and limitations of § 1.882–5, including limitations on the time period in which an election may be made or revoked. If a foreign corporation otherwise meets the requirements for making or revoking an election under § 1.882–5, then solely for purposes of this section, the foreign corporation is treated as making or revoking the election in accordance with the requirements of Form 8991 (or successor) and its instructions.

(F) *Coordination with exception for foreign TLAC securities.* For purposes of paragraph (b)(4)(i)(A) of this section, amounts paid or accrued to a foreign related party with respect to securities that are eligible for the foreign TLAC exception in paragraph (b)(3)(v) of this section are not treated as paid to a foreign related party.

(ii) *Other deductions allowed with respect to effectively connected income.* A deduction allowed under § 1.882–4 for an amount paid or accrued by a foreign corporation to a foreign related party (including a deduction for an amount apportioned in part to effectively connected income and in part to income that is not effectively connected income) is a base erosion payment under paragraph (b)(1) of this section.

(iii) *Depreciable property.* Any amount paid or accrued by a foreign corporation to a foreign related party of the taxpayer in connection with the acquisition of property by the foreign corporation from the foreign related party if the character of the property is subject to the allowance for depreciation (or amortization in lieu of depreciation) is a base erosion payment to the extent the property so acquired is used, or held for use, in the conduct of a trade or business within the United States.

(iv) *Coordination with ECI exception.* For purposes of paragraph (b)(4) of this section, amounts paid or accrued to a foreign related party treated as effectively connected income (or, in the case of a foreign related party that determines taxable income pursuant to the business profits provisions of an applicable income tax treaty, such amounts that are taken into account in determining taxable income) are not treated as paid to a foreign related party.

(v) *Coordination with certain tax treaties*—(A) *Allocable expenses.* Except as provided in paragraph (b)(4)(i)(E) of this section with respect to interest, if a foreign corporation determines its taxable income on a net basis pursuant to an applicable income tax treaty rather than provisions of the Internal Revenue Code, or the regulations published under 26 CFR chapter I, for determining effectively connected income, then the foreign corporation must determine whether each allowable deduction is a base erosion payment under paragraph (b)(1) of this section.

(B) *Internal dealings under certain income tax treaties.* Except as provided in paragraph (b)(4)(i)(E) of this section with respect to interest, if, pursuant to the terms of an applicable income tax treaty, a foreign corporation determines the profits attributable to a permanent establishment based on the assets used, risks assumed, and functions performed by the permanent establishment, then any deduction attributable to any amount paid or accrued (or treated as paid or accrued) by the permanent establishment to the foreign corporation's home office or to another branch of the foreign corporation (an ''internal dealing'') is a base erosion payment to the extent that the payment or accrual is described under paragraph (b)(1) of this section.

(vi) *Business interest expense arising in taxable years beginning after December 31, 2017.* Any disallowed business interest expense described in section 163(j)(2) that resulted from a payment or accrual to a foreign related party that first arose in a taxable year beginning after December 31, 2017, is treated as a base erosion payment under paragraph (b)(1)(i) of this section in the year that the business interest expense initially arose. See paragraph (c)(4) of this section for rules that apply when business interest expense is limited under section 163(j)(1) in order to determine whether the disallowed business interest is attributed to business interest expense paid to a person that is not a related party, a foreign related party, or a domestic related party.

(c) *Base erosion tax benefit*—(1) *In general.* Except as provided in paragraph (c)(2) of this section, a base erosion tax benefit means:

(i) In the case of a base erosion payment described in paragraph (b)(1)(i) of this section, any deduction that is allowed under chapter 1 of subtitle A of the Internal Revenue Code for the taxable year with respect to that base erosion payment;

(ii) In the case of a base erosion payment described in paragraph (b)(1)(ii) of this section, any deduction allowed under chapter 1 of subtitle A of the Internal Revenue Code for the taxable year for depreciation (or amortization in lieu of depreciation) with respect to the property acquired with that payment;

(iii) In the case of a base erosion payment described in paragraph (b)(1)(iii) of this section, any reduction under section 803(a)(1)(B) in the gross amount of premiums and other consideration on insurance and annuity contracts for premiums and other consideration arising out of indemnity reinsurance, or any deduction under section 832(b)(4)(A) from the amount of gross premiums written on insurance contracts during the taxable year for premiums paid for reinsurance; or

(iv) In the case of a base erosion payment described in paragraph (b)(1)(iv) of this section, any reduction in gross receipts with respect to the payment in computing gross income of the taxpayer for the taxable year for purposes of chapter 1 of subtitle A of the Internal Revenue Code.

(2) *Exception to base erosion tax benefit*—(i) *In general.* Except as provided in paragraph (c)(3) of this section, any base erosion tax benefit attributable to any base erosion payment is not taken into account as a base erosion tax benefit if tax is imposed on that payment under section 871 or 881, and the tax has been deducted and withheld under section 1441 or 1442. If a payment is taken into account for purposes of the fraction described in paragraph (b)(4)(i)(A)(*3*) of this section, and tax is imposed on the payment under section 871 or 881, and the tax has been deducted and withheld under section 1441 or 1442, the payment is treated as not paid or accrued to a foreign related party.

(ii) *Branch-level interest tax.* Except as provided in paragraph (c)(3) of this section, any base erosion tax benefit of a foreign corporation attributable to any base erosion payment determined under paragraph (b)(4)(i)(A)(*3*) of this section or attributable to interest expense in excess of the hypothetical section 1.882–5 interest expense determined under paragraph (b)(4)(i)(E)(*1*) of this section is not taken into account as a base erosion tax benefit to the extent of the amount of excess interest, as defined in § 1.884–4(a)(2), if any, on which tax is imposed on the foreign corporation under section 884(f) and § 1.884–4, if the tax is properly reported on the foreign corporation's income tax return and paid in accordance with § 1.884–4(a)(2)(iv).

(3) *Effect of treaty on base erosion tax benefit.* If any treaty between the United States and any foreign country reduces the rate of tax imposed by section 871 or 881, the amount of base erosion tax benefit that is not taken into account under paragraph (c)(2) of this section is equal to the amount of the base erosion tax benefit before the application of paragraph (c)(2) of this section multiplied by a fraction of—

(i) The rate of tax imposed under the treaty; over

(ii) The rate of tax imposed without regard to the treaty.

(4) *Application of section 163(j) to base erosion payments*—(i) *Classification of payments or accruals of business interest expense based on the payee.* The following rules apply for corporations and partnerships:

(A) *Classification of payments or accruals of business interest expense of a corporation.* For purposes of this section, in the year that business interest expense of a corporation is paid or accrued the business interest expense is classified as foreign related business interest expense, domestic related business interest expense, or unrelated business interest expense.

(B) *Classification of payments or accruals of business interest expense by a partnership.* For purposes of this section, in the year that business interest expense of a partnership is paid or accrued, the business interest expense that is allocated to a partner is classified separately with respect to each partner in the partnership as foreign related business interest expense, domestic related business interest expense, or unrelated business interest expense.

(C) *Classification of payments or accruals of business interest expense paid or accrued to a foreign related party that is subject to an exception*—(*1*) *ECI exception.* For purposes of paragraph (c)(4)(i)(A) and (B) of this section, business interest expense paid or accrued to a foreign related party to which the exception in paragraph (b)(3)(iii) of this section (effectively connected income) applies is classified as domestic related business interest expense.

(*2*) *TLAC interest and interest subject to withholding tax.* For purposes of paragraph (c)(4)(i)(A) and (B) of this section, if the exception in paragraph (b)(3)(v) of this section (TLAC securities) or paragraph (c)(2) or (3) of this section (withholding tax) applies to business interest expense paid or accrued to a foreign related party, that business interest expense remains classified as foreign related business interest expense, and retains its classification as eligible for those exceptions, on a pro-rata basis with other foreign related business interest expense.

(ii) *Ordering rules for business interest expense that is limited under section 163(j)(1) to determine which classifications of business interest expense are deducted and which classifications of business interest expense are carried forward*—(A) *In general.* Section 163(j) and the regulations published under 26 CFR chapter I provide a limitation on the amount of business interest expense allowed as a deduction in a taxable year by a corporation or a partner in a partnership. In the case of a corporation with a disallowed business interest expense carryforward, the regulations under section 163(j) determine the ordering of the business interest expense deduction that is allowed on a year-by-year basis by reference first to business interest expense incurred in the current taxable year and then to disallowed business interest expense carryforwards from prior years. To determine the amount of base erosion tax benefit under paragraph (c)(1) of this section, this paragraph (c)(4)(ii) sets forth ordering rules that determine the amount of the deduction of business interest expense allowed under section 163(j) that is classified as paid or accrued to a foreign related party for purposes of paragraph (c)(1)(i) of this section. This paragraph (c)(4)(ii) also sets forth similar ordering rules that apply to disallowed business interest expense carryforwards for which a deduction is permitted under section 163(j) in a later year.

(B) *Ordering rules for treating business interest expense deduction and disallowed business interest expense carryforwards as foreign related *business interest expense, domestic related business interest expense, and unrelated business interest expense*—(*1*) *General ordering rule for allocating business interest expense deduction between classifications.* For purposes of paragraph (c)(1) of this section, if a deduction for business interest expense is not subject to the limitation under section 163(j)(1) in a taxable year, the deduction is treated first as foreign related business interest expense and domestic related business interest expense (on a pro-rata basis), and second as unrelated business interest expense. The same principle applies to business interest expense of a partnership that is deductible at the partner level under § 1.163(j)–6(f).

(*2*) *Ordering of business interest expense incurred by a corporation.* If a corporation's business interest expense deduction allowed for any taxable year is attributable to business interest expense paid or accrued in that taxable year and to disallowed business interest expense carryforwards from prior taxable years, the ordering of business interest expense deduction provided in paragraph (c)(4)(ii)(B)(*1*) of this section among the classifications described therein applies separately for the carryforward amount from each taxable year, following the ordering set forth in § 1.163(j)–5(b)(2). Corresponding adjustments to the classification of disallowed business interest expense carryforwards are made consistent with this year-by-year approach. For purposes of section 59A and this section, an acquiring corporation in a transaction described in section 381(a) will succeed to and take into account the classification of any disallowed business interest expense carryforward. See § 1.381(c)(20)–1.

(*3*) *Ordering of business interest expense incurred by a partnership and allocated to a corporate partner.* For a corporate partner in a partnership that is allocated a business interest expense deduction under § 1.163(j)–6(f), the ordering rule provided in paragraph (c)(4)(ii)(B)(*1*) of this section applies separately to the corporate partner's allocated business interest expense deduction from the partnership; that deduction is not comingled with the business interest expense deduction addressed in paragraph (c)(4)(ii)(B)(*1*) or (*2*) of this section or the corporate partner's items from any other partnership. Similarly, when a corporate partner in a partnership is allocated excess business interest expense from a partnership under the rules set forth in § 1.163(j)–6(f) and the excess interest expense becomes deductible to the corporate partner, that partner applies the ordering rule provided in paragraph (c)(4)(ii)(B)(*1*) of this section separately to that excess interest expense on a year-by-year basis. Corresponding adjustments to the classification of disallowed business interest expense carryforwards are made consistent with this year-by-year and partnership-by-partnership approach.

(d) *Examples.* The following examples illustrate the application of this section. For purposes of all the examples, assume that the taxpayer is an applicable taxpayer and all payments apply to a taxable year beginning after December 31, 2017.

(1) *Example 1: Determining a base erosion payment*—(i) *Facts.* FP is a foreign corporation that owns all of the stock of FC, a foreign corporation, and DC, a domestic corporation. FP has a trade or business in the United States with effectively connected income (USTB). DC owns FDE, a foreign disregarded entity. DC pays interest to FDE and FC. FDE pays interest to USTB. All interest paid by DC to FC and by FDE to USTB is deductible by DC in the current year for regular income tax purposes. FDE also acquires depreciable property from FP during the taxable year. FP's income from the sale of the depreciable property is not effectively connected with the conduct of FP's trade or business in the United States. DC and FP (based only on the activities of USTB) are applicable taxpayers under § 1.59A–2(b).

(ii) *Analysis.* The payment of interest by DC to FC is a base erosion payment under paragraph (b)(1)(i) of this section because the payment is made to a foreign related party and the interest payment is deductible. The payment of interest by DC to FDE is not a base erosion payment because the transaction is not a payment to a foreign person and the transaction is not a deductible payment. With respect to the payment of interest by FDE to USTB, if FP's USTB treats the payment of interest by FDE to USTB as income that is effectively connected with the conduct of a trade or business in the United States pursuant to section 864 or as profits attributable to a U.S. permanent establishment of a tax treaty resident, and if DC receives a withholding certificate from FP with respect to the payment, then the exception in paragraph (b)(3)(iii) of this section applies. Accordingly, the payment from DC, through FDE, to USTB is not a base erosion payment even though the payment is to the USTB of FP, a foreign related party. The acquisition of depreciable property by DC, through FDE, from FP is a base erosion payment under paragraph (b)(1)(ii) of this section because there is a payment to a foreign related party in connection with the acquisition by the taxpayer of property of a character subject to the allowance for depreciation and the exception in paragraph (b)(3)(iii) of this section does not apply because FP's income from the sale of the depreciable property is not effectively connected with the conduct of FP's trade or business in the United States. See § 1.59A–2 for the application of the aggregation rule with respect to DC and FP's USTB.

(2) *Example 2: Interest allocable under § 1.882–5*—(i) *Facts.* FC, a foreign corporation, has income that is effectively connected with the conduct of a trade or business within the United States. FC determines its interest expense under the three-step process described in § 1.882–5(b) through (d) with a total interest expense of $125x. The total interest expense is comprised of interest expense of $100x on U.S.- booked liabilities ($60x paid to a foreign related party and $40x paid to unrelated persons) and $25x of interest on excess U.S.-connected liabilities. FC has average worldwide interest expense (not including interest expense on U.S.-booked liabilities) of $500x, of which $100x is interest expense paid to a foreign related party. FC is an applicable taxpayer with respect to its effectively connected income. Assume all of the interest expense is deductible in the current taxable year and that none of the interest is subject to the effectively connected income exception in paragraph (b)(3)(iii) of this section.

(ii) *Analysis.* Under paragraph (b)(4)(i) of this section, the total amount of interest expense determined under § 1.882–5 that is a base erosion payment is $65x ($60x + 5x). FC has $60x of interest on U.S.-booked liabilities that is paid to a foreign related party and that is treated as a base erosion payment under paragraph (b)(4)(i)(A)(*2*) of this section. Additionally, $5x of the $25x of interest expense on excess U.S.-connected liabilities is treated as a base erosion payment under paragraph (b)(4)(i)(A)(*3*) of this section ($25x * ($100x/$500x)).

(3) *Example 3: Interaction with section 163(j)*—(i) *Facts.* Foreign Parent (FP) is a foreign corporation that owns all of the stock of DC, a domestic corporation that is an applicable taxpayer. DC does not conduct a utility trade or business as described in section 163(j)(7)(A)(iv), an electing real property trade or business as described in section 163(j)(7)(B), or an electing farming business as described in section 163(j)(7)(C). In Year 1, DC has adjusted taxable income, as defined in section 163(j)(8), of $1000x and pays the following amounts of business interest expense: $420x that is paid to unrelated Bank, and $360x that is paid to FP. DC does not earn any business interest income or incur any floor plan financing interest expense in Year 1. None of the exceptions in paragraph (b)(3) of this section apply, and the interest is not subject to withholding.

(ii) *Analysis*—(A) *Classification of business interest.* In Year 1, DC is permitted to deduct only $300x of business interest expense under section 163(j)(1) ($1000x × 30%). Paragraph (c)(4)(ii)(B) of this section provides that for purposes of paragraph (c)(1) of this section the deduction is treated first as foreign related business interest expense and domestic related business interest expense (here, only FP); and second as unrelated business interest expense (Bank). As a result, the $300x of business interest expense that is permitted under section 163(j)(1) is treated entirely as the business interest paid to the related foreign party, FP. All of DC's $300x deductible interest is treated as an add-back to modified taxable income in the Year 1 taxable year for purposes of § 1.59A–4(b)(2)(i).

(B) *Ordering rules for disallowed business interest expense carryforward.* Under section 163(j)(2), the $480x of disallowed business interest ($420x + $360x − $300x) is carried forward to the subsequent year. Under paragraph (c)(4)(ii)(B)(*1*) and (*2*) of this section, the disallowed business interest carryforward is correspondingly treated first as unrelated business interest expense, and second pro-rata as foreign related business interest expense and domestic related business interest expense. As a result, $420x of the $480x disallowed business interest expense carryforward is treated first as business interest expense paid to Bank and the remaining $60x of the $480x disallowed business interest expense carryforward is treated as interest paid to FP and as an add-back to modified taxable income.

(4) *Example 4: Interaction with section 163(j); carryforward*—(i) *Facts.* The facts are the same as in paragraph (d)(3) of this section (the facts in *Example 3*), except that in addition, in Year 2, DC has adjusted taxable income of $250x, and pays the following amounts of business interest expense: $50x that is paid to unrelated Bank, and $45x that is paid to FP. DC does not earn any business interest income or incur any floor plan financing interest expense in Year 2. None of the exceptions in paragraph (b)(3) of this section apply.

(ii) *Analysis*—(A) *Classification of business interest.* In Year 2, for purposes of section 163(j)(1), DC is treated as having paid or accrued total business interest expense of $575x, consisting of $95x business interest expense actually paid in Year 2 and $480x of business interest expense that is carried forward from Year 1. DC is permitted to deduct $75x of business interest expense in Year 2 under the limitation in section 163(j)(1) ($250x × 30%). Section 1.163(j)–5(b)(2) provides that, for purposes of section 163(j), the allowable business interest expense is first attributed to amounts paid or accrued in the current year, and then attributed to amounts carried over from earlier years on a first-in-first-out basis from the earliest year. Accordingly, the $75x of deductible business interest expense is deducted entirely from the $95x business interest expense incurred in Year 2 for section 163(j) purposes. Because DC's business interest expense deduction is limited under section 163(j)(1) and because DC's total business interest expense is attributable to more than one taxable year, paragraph (c)(4)(ii)(B)(*2*) of this section provides that the ordering rule in paragraph (c)(4)(ii)(B)(*1*) of this section is applied separately to each annual amount of section 163(j) disallowed business interest expense carryforward. With respect to the Year 2 layer, which is deducted first, paragraph (c)(4)(ii)(B) of this section provides that, for purposes of paragraph (c)(1) of this section, the Year 2 $75x deduction is treated first as foreign related business interest expense and domestic related business interest expense (here, only FP, $45x); and second as unrelated business interest expense (Bank, $30x). Consequentially, all of the $45x deduction of business interest expense that was paid to FP in Year 2 is treated as a base erosion tax benefit and an add-back to modified taxable income for the Year 2 taxable year for purposes of § 1.59A–4(b)(2)(i).

(B) *Ordering rules for disallowed business interest expense carryforward.* The disallowed business interest expense carryforward of $20x from Year 2 is correspondingly treated first as business interest expense paid to Bank under paragraph (c)(4)(i) of this section. The disallowed business interest expense carryforward of $480x from the Year 1 layer that is also not allowed as a deduction in Year 2 remains treated as $420x paid to Bank and $60 paid to FP.

(5) *Example 5: Interaction with section 163(j); carryforward*—(i) *Facts.* The facts are the same as in paragraph (d)(4) of this section (the facts in *Example 4*), except that in addition, in Year 3, DC has adjusted taxable income of $4000x and pays no business interest expense. DC does not earn any business interest income or incur any floor plan financing interest expense in Year 3.

(ii) *Analysis.* In Year 3, DC is treated as having paid or accrued total business interest expense of $500x, consisting of $480x of business interest expense that is carried forward from Year 1 and $20x of business interest expense that is carried forward from Year 2 for purposes of section 163(j)(1). DC is permitted to deduct $1200x of business interest expense in Year 3 under the limitation in section 163(j)(1) ($4000x × 30%). For purposes of section 163(j), DC is treated as first deducting the business interest expense from Year 1 then the business interest expense from Year 2. See § 1.163(j)–5(b)(2). Because none of DC's $500x business interest expense is limited under section 163(j), the stacking rule in paragraph (c)(4)(ii) of this section for allowed and disallowed business interest expense does not apply. For purposes of § 1.59A–4(b)(2)(i), DC's add-back to modified taxable income is $60x determined by the classifications in paragraph (c)(4)(i)(A) of this section ($60x treated as paid to FP from Year 1).

(6) *Example 6: Interaction with section 163(j); partnership*—(i) *Facts.* The facts are the same as in paragraph (d)(4) of this section (the facts in *Example 4*), except that in addition, in Year 2, DC forms a domestic partnership (PRS) with Y, a domestic corporation that is not related to DC within the meaning of § 1.59A–1(b)(17). PRS does not conduct a utility trade or business as described in section 163(j)(7)(A)(iv), an electing real property trade or business as described in section 163(j)(7)(B) or an electing farming business as described in section 163(j)(7)(C) subject to section 163(j). PRS is not a small business described in section 163(j)(3). DC and Y are equal partners in partnership PRS. In Year 2, PRS has ATI of $100x and $48x of business interest expense. $12x of PRS's business interest expense is paid to Bank, and $36x of PRS's business interest expense is paid to FP. PRS allocates the items comprising its $100x of ATI $50x to DC and $50x to Y. PRS allocates its $48x of business interest expense $24x to DC and $24x to Y. DC classifies its $24x of business interest expense as $6x unrelated business interest expense (Bank) and $18x as foreign related business interest expense (FP) under paragraph (c)(4)(i)(B) of this section. Y classifies its $24x of business interest expense as entirely unrelated business interest expense of Y (Bank and FP) under paragraph (c)(4)(i)(B) of this section. None of the exceptions in paragraph (b)(3) of this section apply.

(ii) *Partnership level analysis.* In Year 2, PRS's section 163(j) limit is 30 percent of its ATI, or $30x ($100x × 30 percent). Thus, PRS has $30x of deductible business interest expense and $18x of excess business interest expense ($48x − $30x). The $30x of deductible business interest expense is includible in PRS's non-separately stated income or loss, and is not subject to further limitation under section 163(j) at the partners' level.

(iii) *Partner level allocations analysis.* Pursuant to § 1.163(j)–6(f)(2), DC and Y are each allocated $15x of deductible business interest expense and $9x of excess business interest expense. At the end of Year 2, DC and Y each have $9x of excess business interest expense from PRS, which under § 1.163(j)–6 is not treated as paid or accrued by the partner until such partner is allocated excess taxable income or excess business interest income from PRS in a succeeding year. Pursuant to § 1.163(j)–6(e), DC and Y, in computing their limit under section 163(j), do not increase any of their section 163(j) items by any of PRS's section 163(j) items.

(iv) *Partner level allocations for determining base erosion tax benefits.* The $15x of deductible business interest expense allocated to DC is treated first as foreign related business interest expense (FP) under paragraph (c)(4)(ii)(B) of this section. DC's excess business interest expense from PRS of $9x is classified first as the unrelated business interest expense with respect to Bank ($6x) and then as the remaining portion of the business interest expense paid to FP ($3x, or $18x − $15x). Under paragraph (c)(4)(ii)(B)(*3*) of this section, these classifications of the PRS items apply irrespective of the classifications of DC's own interest expense as set forth in paragraph (d)(4) of this section (*Example 4*).

(v) *Computation of modified taxable income.* For Year 2, DC is treated as having incurred base erosion tax benefits of $60x, consisting of the $15x base erosion tax benefit with respect to its interest in PRS that is computed in paragraph (d)(6)(iii) of this section (*Example 6*) and $45x that is computed in paragraph (d)(4) of this section (*Example 4*).

(7) *Example 7: Transfers of property to related taxpayers*—(i) *Facts.* FP is a foreign corporation that owns all of the stock of DC1 and DC2, both domestic corporations. DC1 and DC2 are both members of the same aggregate group but are not members of the same consolidated tax group under section 1502. In Year 1, FP sells depreciable property to DC1. On the first day of the Year 2 tax year, DC1 sells the depreciable property to DC2.

(ii) *Analysis*—(A) *Year 1.* The acquisition of depreciable property by DC1 from FP is a base erosion payment under paragraph (b)(1)(ii) of this section because there is a payment to a foreign related party in connection with the acquisition by the taxpayer of property of a character subject to the allowance for depreciation.

(B) *Year 2.* The acquisition of the depreciable property in Year 2 by DC2 is not itself a base erosion payment because DC2 did not acquire the property from a foreign related party. However, under paragraph (b)(2)(viii) of this section any depreciation expense taken by DC2 on the property acquired from DC1 is a base erosion payment and a base erosion tax benefit under paragraph (c)(1)(ii) of this section because the acquisition of the depreciable property was a base erosion payment by DC1 and the property was sold to a member of the aggregate group; therefore, the depreciation expense continues as a base erosion tax benefit to DC2 as it would have been to DC1 if it continued to own the property.

§ 1.59A–4 Modified taxable income.

(a) *Scope.* Paragraph (b)(1) of this section provides rules for computing modified taxable income. Paragraph (b)(2) of this section provides rules addressing how base erosion tax benefits and net operating losses affect modified taxable income. Paragraph (b)(3) of this section provides a rule for a holder of a residual interest in a REMIC. Paragraph (c) of this section provides examples illustrating the rules described in this section.

(b) *Computation of modified taxable income*—(1) *In general.* The term *modified taxable income* means a taxpayer's taxable income, as defined in section 63(a), determined with the additions described in paragraph (b)(2) of this section. Notwithstanding the foregoing, the taxpayer's taxable income may not be reduced to an amount less than zero as a result of a net operating loss deduction allowed under section 172. See paragraphs (c)(1) and (2) of this section (*Examples 1* and *2*).

(2) *Modifications to taxable income.* The amounts described in this paragraph (b)(2) are added back to a taxpayer's taxable income to determine its modified taxable income.

(i) *Base erosion tax benefits.* The amount of any base erosion tax benefit as defined in § 1.59A–3(c)(1).

(ii) *Certain net operating loss deductions.* The base erosion percentage, as described in § 1.59A–2(e)(3), of any net operating loss deduction allowed to the taxpayer under section 172 for the taxable year. For purposes of determining modified taxable income, the net operating loss deduction allowed does not exceed taxable income before taking into account the net operating loss deduction. See paragraph (c)(1) and (2) of this section (*Examples 1* and *2*). The base erosion percentage for the taxable year that the net operating loss arose is used to determine the addition under this paragraph (b)(2)(ii). For a net operating loss that arose in a taxable year beginning before January 1, 2018, the base erosion percentage for the taxable year is zero.

(3) *Rule for holders of a residual interest in a REMIC.* For purposes of paragraph (b)(1) of this section, the limitation in section 860E(a)(1) is not taken into account in determining the taxable income amount that is used to compute modified taxable income for the taxable year.

(c) *Examples.* The following examples illustrate the rules of paragraph (b) of this section.

(1) *Example 1: Current year loss*—(i) *Facts.* A domestic corporation (DC) is an applicable taxpayer that has a calendar taxable year. In 2020, DC has gross income of $100x, a deduction of $80x that is not a base erosion tax benefit, and a deduction of $70x that is a base erosion tax benefit. In addition, DC has a net operating loss carryforward to 2020 of $400x that arose in 2016.

(ii) *Analysis.* DC's starting point for computing modified taxable income is $(50x), computed as gross income of $100x, less a deduction of $80x (non-base erosion tax benefit) and a deduction of $70x (base erosion tax benefit). Under paragraph (b)(2)(ii) of this section, DC's starting point for computing modified taxable income does not take into account the $400x net operating loss carryforward because the allowable deductions for 2020, not counting the NOL deduction, exceed the gross income for 2020. DC's modified taxable income for 2020 is $20x, computed as $(50x) + $70x base erosion tax benefit.

(2) *Example 2: Net operating loss deduction*—(i) *Facts.* The facts are the same as in paragraph (c)(1)(i) of this section (the facts in *Example 1*), except that DC's gross income in 2020 is $500x.

(ii) *Analysis.* DC's starting point for computing modified taxable income is $0x, computed as gross income of $500x, less: A deduction of $80x (non-base erosion tax benefit), a deduction of $70x (base erosion tax benefit), and a net operating loss deduction of $350x (which is the amount of taxable income before taking into account the net operating loss deduction, as provided in paragraph (b)(2)(ii) of this section ($500x − $150x)). DC's modified taxable income for 2020 is $70x, computed as $0x + $70x base erosion tax benefit. DC's modified taxable income is not increased as a result of the $350x net operating loss deduction in 2020 because the base erosion percentage of the net operating loss that arose in 2016 is zero under paragraph (b)(2)(ii) of this section.

§ 1.59A–5 Base erosion minimum tax amount.

(a) *Scope.* Paragraph (b) of this section provides rules regarding the calculation of the base erosion minimum tax amount. Paragraph (c) of this section describes the base erosion and anti-abuse tax rate applicable to the taxable year.

(b) *Base erosion minimum tax amount*—(1) *In general.* For each taxable year, an applicable taxpayer must determine its base erosion minimum tax amount.

(2) *Calculation of base erosion minimum tax amount.* With respect to any applicable taxpayer, the base erosion minimum tax amount for any taxable year is, the excess (if any) of—

(i) An amount equal to the base erosion and anti-abuse tax rate multiplied by the modified taxable income of the taxpayer for the taxable year, over

(ii) An amount equal to the regular tax liability as defined in § 1.59A–1(b)(16) of the taxpayer for the taxable year, reduced (but not below zero) by the excess (if any) of—

(A) The credits allowed under chapter 1 of subtitle A of the Code against regular tax liability over

(B) The sum of the credits described in paragraph (b)(3) of this section.

(3) *Credits that do not reduce regular tax liability.* The sum of the following credits are used in paragraph (b)(2)(ii)(B) of this section to limit the amount by which the credits allowed under chapter 1 of subtitle A of the Internal Revenue Code reduce regular tax liability—

(i) *Taxable years beginning on or before December 31, 2025.* For any taxable year beginning on or before December 31, 2025—

(A) The credit allowed under section 38 for the taxable year that is properly allocable to the research credit determined under section 41(a);

(B) The portion of the applicable section 38 credits not in excess of 80 percent of the lesser of the amount of those applicable section 38 credits or the base erosion minimum tax amount (determined without regard to this paragraph (b)(3)(i)(B)); and

(C) Any credits allowed under sections 33, 37, and 53.

(ii) *Taxable years beginning after December 31, 2025.* For any taxable year beginning after December 31, 2025, any credits allowed under sections 33, 37, and 53.

(c) *Base erosion and anti-abuse tax rate*—(1) *In general.* For purposes of calculating the base erosion minimum tax amount, the base erosion and anti-abuse tax rate is—

(i) *Calendar year 2018.* For taxable years beginning in calendar year 2018, five percent.

(ii) *Calendar years 2019 through 2025.* For taxable years beginning after December 31, 2018, through taxable years beginning before January 1, 2026, 10 percent.

(iii) *Calendar years after 2025.* For taxable years beginning after December 31, 2025, 12.5 percent.

(2) *Increased rate for banks and registered securities dealers*—(i) *In general.* In the case of a taxpayer that is a member of an affiliated group (as defined in section 1504(a)(1)) that includes a bank or a registered securities dealer, the percentage otherwise in effect under paragraph (c)(1) of this section is increased by one percentage point.

(ii) *De minimis exception to increased rate for banks and registered securities dealers.* Paragraph (c)(2)(i) of this section does not apply to a taxpayer that is a member of an affiliated group (as defined in section 1504(a)(1)) that includes a bank or registered securities dealer if, in that taxable year, the total gross receipts of the affiliated group attributable to the bank or the registered securities dealer (or attributable to all of the banks and registered securities dealers in the group, if more than one) represent less than two percent of the total gross receipts of the affiliated group, as determined under § 1.59A–2(d).

(3) *Application of section 15 to tax rates in section 59A*—(i) *New tax.* Section 15 does not apply to any taxable year that includes January 1, 2018.

(ii) *Change in tax rate pursuant to section 59A(b)(1)(A).* Section 15 does not apply to any taxable year that includes January 1, 2019.

(iii) *Change in rate pursuant to section 59A(b)(2).* Section 15 applies to the change in tax rate pursuant to section 59A(b)(2)(A).

§ 1.59A–6 Qualified derivative payment.

(a) *Scope.* This section provides additional guidance regarding qualified derivative payments. Paragraph (b) of this section defines the term qualified derivative payment. Paragraph (c) of this section provides guidance on certain payments that are not treated as qualified derivative payments. Paragraph (d) defines the term derivative for purposes of section 59A. Paragraph (e) of this section provides examples illustrating the rules of this section.

(b) *Qualified derivative payment*—(1) *In general.* A *qualified derivative payment* means any payment made by a taxpayer to a foreign related party pursuant to a derivative with respect to which the taxpayer—

(i) Recognizes gain or loss as if the derivative were sold for its fair market value on the last business day of the taxable year (and any additional times as required by the Internal Revenue Code or the taxpayer's method of accounting);

(ii) Treats any gain or loss so recognized as ordinary; and

(iii) Treats the character of all items of income, deduction, gain, or loss with respect to a payment pursuant to the derivative as ordinary.

(2) *Reporting requirements*—(i) *In general.* No payment is a qualified derivative payment under paragraph (b)(1) of this section for any taxable year unless the taxpayer (whether or not the taxpayer is a reporting corporation as defined in § 1.6038A–1(c)) reports the information required in § 1.6038A–2(b)(7)(ix) for the taxable year. To report its qualified derivative payments, a taxpayer must include the payment in the aggregate amount of qualified derivative payments on Form 8991 (or successor).

(ii) *Failure to satisfy the reporting requirement.* If a taxpayer fails to satisfy the reporting requirement described in paragraph (b)(2)(i) of this section with respect to any payments, those payments are not eligible for the qualified derivative payment exception described in § 1.59A–3(b)(3)(ii) and are base erosion payments unless an exception in § 1.59A–3(b)(3) otherwise applies. A taxpayer's failure to report a payment as a qualified derivative payment does not impact the eligibility of any other payment which the taxpayer properly reported under paragraph (b)(2)(i) of this section from being a qualified derivative payment.

(iii) *Reporting of aggregate amount of qualified derivative payments.* The aggregate amount of qualified derivative payments is the sum of the amount described in paragraph (b)(3) of this section for each derivative. To the extent that the taxpayer is treated as receiving a payment, as determined in § 1.59A–2(e)(3)(vi), for the taxable year with respect to a derivative, the payment is not included in the aggregate qualified derivative payments.

(iv) *Transition period for qualified derivative payment reporting.* Before paragraph (b)(2)(i) of this section is applicable, a taxpayer will be treated as satisfying the reporting requirement described section 59A(h)(2)(B) to the extent that the taxpayer reports the aggregate amount of qualified derivative payments on Form 8991 (or successor). *See* § 1.6038A–2(g) (applicability date for § 1.6038A–2(b)(7)(ix)). Until paragraph (b)(2)(i) of this section is applicable, paragraph (b)(2)(ii) of this section will not apply to a taxpayer who reports the aggregate amount of qualified derivative payments in good faith.

(3) *Amount of any qualified derivative payment*—(i) *In general.* The amount of any qualified derivative payment excluded from the denominator of the base erosion percentage as provided in § 1.59A–2(e)(3)(ii)(C) is determined as provided in § 1.59A–2(e)(3)(vi).

(ii) *Net qualified derivative payment that includes a payment that is a base erosion payment.* Any net amount determined in paragraph (b)(3)(i) of this section must be reduced by any gross items that are treated as a base erosion payment pursuant to paragraph (c) of this section.

(c) *Exceptions for payments otherwise treated as base erosion payments.* A payment does not constitute a qualified derivative payment if—

(1) The payment would be treated as a base erosion payment if it were not made pursuant to a derivative, including any interest, royalty, or service payment; or

(2) In the case of a contract that has derivative and nonderivative components, the payment is properly allocable to the nonderivative component.

(d) *Derivative defined*—(1) *In general.* For purposes of this section, the term *derivative* means any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following:

(i) Any share of stock in a corporation;

(ii) Any evidence of indebtedness;

(iii) Any commodity that is actively traded;

(iv) Any currency; or

(v) Any rate, price, amount, index, formula, or algorithm.

(2) *Exceptions.* The following contracts are not treated as derivatives for purposes of section 59A.

(i) *Direct interest.* A derivative contract does not include a direct interest in any item described in paragraph (d)(1)(i) through (v) of this section.

(ii) *Insurance contracts.* A derivative contract does not include any insurance, annuity, or endowment contract issued by an insurance company to which subchapter L applies (or issued by any foreign corporation to which the subchapter would apply if the foreign corporation were a domestic corporation).

(iii) *Securities lending and sale-repurchase transactions*—(A) *Multi-step transactions treated as financing.* For purposes of paragraph (d)(1) of this section, a derivative does not include any securities lending transaction, sale-repurchase transaction, or substantially similar transaction that is treated as a secured loan for federal tax purposes. Securities lending transaction and sale-repurchase transaction have the meanings provided in § 1.861–2(a)(7).

(B) *Special rule for payments associated with the cash collateral provided in a securities lending transaction or substantially similar transaction.* For purposes of paragraph (d)(1) of this section, a derivative does not include the cash collateral component of a securities lending transaction (or the cash payments pursuant to a sale-repurchase transaction, or similar payments pursuant to a substantially similar transaction).

(C) *Anti-abuse exception for certain transactions that are the economic equivalent of substantially unsecured cash borrowing.* For purposes of paragraph (d)(1) of this section, a derivative does not include any securities lending transaction or substantially similar transaction that is part of an arrangement that has been entered into with a principal purpose of avoiding the treatment of any payment with respect to that transaction as a base erosion payment and that provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing. The determination of whether the securities lending transaction or substantially similar transaction provides the taxpayer with the economic equivalent of a substantially unsecured cash borrowing takes into account arrangements that effectively serve as collateral due to the taxpayer's compliance with any U.S. regulatory requirements governing such transaction.

(3) *American depository receipts.* For purposes of section 59A, American depository receipts (or any similar instruments) with respect to shares of stock in a foreign corporation are treated as shares of stock in that foreign corporation.

(e) *Examples.* The following examples illustrate the rules of this section.

(1) *Example 1: Notional principal contract as QDP*—(i) *Facts.* Domestic Corporation (DC) is a dealer in securities within the meaning of section 475. On February 1, 2019, DC enters into a contract (Interest Rate Swap) with Foreign Parent (FP), a foreign related party, for a term of five years. Under the Interest Rate Swap, DC is obligated to make a payment to FP each month, beginning March 1, 2019, in an amount equal to a variable rate determined by reference to the prime rate, as determined on the first business day of the immediately preceding month, multiplied by a notional principal amount of $50x. Under the Interest Rate Swap, FP is obligated to make a payment to DC each month, beginning March 1, 2019, in an amount equal to 5% multiplied by the same notional principal amount. The Interest Rate Swap satisfies the definition of a notional principal contract under § 1.446–3(c). DC recognizes gain or loss on the Interest Rate Swap pursuant to section 475. DC reports the information required to be reported for the taxable year under § 1.6038A–2(b)(7)(ix).

(ii) *Analysis.* The Interest Rate Swap is a derivative as described in paragraph (d) of this section because it is a contract that references the prime rate and a fixed rate for determining the amount of payments. The exceptions described in paragraph (c) of this section do not apply to the Interest Rate Swap. Because DC recognizes ordinary gain or loss on the Interest Rate Swap pursuant to section 475(d)(3), it satisfies the condition in paragraph (b)(1)(ii) of this section. Because DC satisfies the requirement relating to the information required to be reported under paragraph (b)(2) of this section, any payment to FP with respect to the Interest Rate Swap will be a qualified derivative payment. Therefore, under § 1.59A–3(b)(3)(ii), the payments to FP are not base erosion payments.

(2) *Example 2: Securities lending anti-abuse rule*—(i) *Facts.* (A) Foreign Parent (FP) is a foreign corporation that owns all of the stock of domestic corporation (DC) and foreign corporation (FC). FP and FC are foreign related parties of DC under § 1.59A–1(b)(12) but not members of DC's aggregate group. On January 1 of year 1, with a principal purpose of providing financing to DC without DC making a base erosion payment to FC, FC lends 100x U.S. Treasury bills with a remaining maturity of 11 months (Securities A) to DC (Securities Lending Transaction 1) for a period of six months. Pursuant to the terms of Securities Lending Transaction 1, DC is obligated to make substitute payments to FC corresponding to the interest payments on Securities A. DC does not post cash collateral with respect to Securities Lending Transaction 1, and no other arrangements of FC or DC effectively serve as collateral under any U.S. regulatory requirements governing the transaction. Immediately thereafter, DC sells Securities A for cash.

(B) On June 30 of year 1, FC lends 100x U.S. Treasury bills with a remaining maturity of 11 months (Securities B) to DC (Securities Lending Transaction 2) for a period of six months. Pursuant to the terms of Securities Lending Transaction 2, DC is obligated to make substitute payments to FC corresponding to the interest payments on Securities B. Immediately thereafter, DC sells Securities B for cash and uses the cash to purchase U.S. Treasury bills with a remaining maturity equal to the Securities A bills that DC then transfers to FC in repayment of Securities Lending Transaction 1.

(ii) *Analysis.* Securities Lending Transaction 1 and Securities Lending Transaction 2 are not treated as derivatives for purposes of paragraph (d)(1) of this section because the transactions are part of an arrangement that has been entered into with a principal purpose of avoiding the treatment of any payment with respect to Securities Lending Transaction 1 and Securities Lending Transaction 2 as a base erosion payment and provides DC with the economic equivalent of a substantially unsecured cash borrowing by DC. As a result, pursuant to paragraph (d)(2)(iii)(C) of this section, the substitute payments made by DC to FC with respect to Securities A and Securities B are not eligible for the exception in § 1.59A–3(b)(3)(ii) (qualified derivative payment).

§ 1.59A–7 Application of base erosion and anti-abuse tax to partnerships.

(a) *Scope.* This section provides rules regarding how partnerships and their partners are treated for purposes of making certain determinations under section 59A, including whether there is a base erosion payment or base erosion tax benefit. All references to partnerships in this section include domestic and foreign partnerships. This section applies to payments to a partnership and payments from a partnership as well as transfers of partnership interests (as defined in paragraph (c)(3)(iv) of this section). The aggregate principle described in this section does not override the treatment of partnership items under any Code section other than section 59A. The aggregate principles provided in this section apply without regard to any tax avoidance purpose relating to a particular partnership. See § 1.701–2(e). Paragraph (b) of this section describes how the aggregate approach to partnerships applies for purposes of certain section 59A determinations. Paragraph (c) of this section provides rules for determining whether there is a base erosion payment with respect to a payment to or from a partnership. Paragraph (d) of this section provides rules for determining the base erosion tax benefits of a partner. Paragraph (e) of this section provides additional rules relating to the application of section 59A to partnerships. Paragraph (f) of this section provides a rule for determining whether a person is a foreign related party. Paragraph (g) of this section provides examples that illustrate the application of the rules of this section.

(b) *Application of section 59A to partnerships.* The purpose of this section is to provide a set of operating rules for the application of section 59A to partnerships and partners in a manner consistent with the purposes of section 59A. Except for purposes of determining a partner's base erosion tax benefits under paragraph (d)(1) of this section and whether a taxpayer is a registered securities dealer under paragraph (e)(3) of this section, section 59A determinations are made at the partner level in the manner described in this section. The provisions of section 59A must be interpreted in a manner consistent with this approach. If a transaction is not specifically described in this section, whether the transaction gives rise to a base erosion payment or base erosion tax benefit is determined in accordance with the principles of this section and the purposes of section 59A.

(c) *Base erosion payment.* For purposes of determining whether a taxpayer has made a base erosion payment as described in § 1.59A–3(b), the taxpayer must treat a payment to or from a partnership as made to or from each partner and the assets and liabilities of the partnership as assets and liabilities of each partner. This paragraph (c) provides specific rules for determining whether a partner has made or received a payment, including as a result of a partnership interest transfer (as defined in paragraph (c)(3)(iv) of this section).

(1) *Payments made by or to a partnership.* For purposes of determining whether a payment or accrual by a partnership is a base erosion payment described in § 1.59A–3(b)(1)(i), any amount paid or accrued by the partnership (including any guaranteed payment described in section 707(c)) is treated as paid or accrued by each partner based on the partner's distributive share of the item of deduction with respect to that amount. For purposes of determining whether a payment or accrual to a partnership is a base erosion payment described in § 1.59A–3(b)(1)(i) or (iii), any amount paid or accrued to the partnership (including any guaranteed payment described in section 707(c)) is treated as paid or accrued to each partner based on the partner's distributive share of the item of income with respect to that amount. See paragraph (e)(1) of this section to determine the partner's distributive share.

(2) *Transfers of certain property.* When a partnership transfers property, each partner is treated as transferring its proportionate share of the property transferred for purposes of determining whether there is a base erosion payment described in § 1.59A–3(b)(1)(ii) or (iv). When a partnership acquires property, each partner is treated as acquiring its proportionate share of the property acquired for purposes of determining whether there is a base erosion payment described in § 1.59A–3(b)(1)(ii) or (iv). For purposes of this paragraph (c)(2), a transfer of property does not include a transfer of a partnership interest (as defined in paragraph (c)(3)(iv) of this section). See paragraph (c)(3) of this section for rules applicable to transfers of partnership interests. See paragraphs (g)(2)(v) and (vi) of this section (*Example 5* and *Example 6*) for examples illustrating the application of this paragraph (c)(2).

(3) *Transfers of a partnership interest*—(i) *In general.* A transfer of a partnership interest (as defined in paragraph (c)(3)(iv) of this section) is generally treated as a transfer by each partner in the partnership of its proportionate share of the partnership's assets to the extent of any change in its proportionate share of any partnership asset, as well as any assumption of associated liabilities by the partner. Paragraphs (c)(3)(ii) and (iii) of this section provide rules for applying the general rule to transfers of a partnership interest by a partner and issuances of a partnership interest by the partnership for contributed property, respectively. See paragraph (g)(2)(vii) of this section (*Example 7*) for an example illustrating the application of this paragraph (c)(3)(i).

(ii) *Transfers of a partnership interest by a partner.* A transfer of a partnership interest (as defined in paragraph (c)(3)(iv) of this section) by a partner is treated as a transfer by the transferor to the recipient of the transferor's proportionate share of each of the partnership assets and an assumption by the recipient of the transferor's proportionate share of the partnership liabilities. If the partner's entire partnership interest is not transferred, only the proportionate share of each of the partnership assets and liabilities associated with the transferred partnership interest is treated as transferred and assumed. See paragraphs (g)(2)(iii), (iv), and (vi) of this section (*Example 3, Example 4,* and *Example 6*) for examples illustrating the application of this paragraph (c)(3)(ii).

(iii) *Certain issuances of a partnership interest by a partnership.* If a partnership issues an interest in the partnership in exchange for a contribution of property to the partnership, the contributing partner is treated as exchanging a portion of the contributed property and assuming any liabilities associated with the transferred partnership interest for a portion of the partners' pre-contribution interests in the partnership's assets and the partners' assumption of any liabilities transferred to the partnership. For purposes of this paragraph (c)(3)(iii), a reference to the ''partnership's assets'' includes the assets contributed by the contributing partner and any other assets that are contributed to the partnership at the same time. Each partner whose proportionate share in a partnership asset (including the assets contributed to the partnership as part of the transaction) is reduced as a result of the transaction is treated as transferring the asset to the extent of the reduction, and each person who receives a proportionate share or an increased proportionate share in an asset as a result of the transaction is treated as receiving an asset to the extent of the increase, proportionately from the partners' reduced interests. For example, if a person contributes property to a partnership in which each of two existing partners has a 50 percent pro-rata interest in the partnership in exchange for a one-third pro-rata partnership interest, each of the pre-contribution partners is treated as transferring a one-third interest in their share of existing partnership assets to the contributing partner, and the contributing partner is treated as transferring a one-third interest in the contributed assets to each of the original partners. See paragraphs (g)(2)(i) and (ii) of this section (*Example 1* and *Example 2*) for additional examples illustrating the application of this paragraph (c)(3)(iii).

(iv) *Partnership interest transfers defined.* For purposes of paragraphs (c)(3) and (4) of this section, a transfer of a partnership interest includes any issuance of a partnership interest by a partnership; any sale of a partnership interest; any increase or decrease in a partner's proportionate share of any partnership asset as a result of a contribution of property or services to a partnership, a distribution, or a redemption; or any other transfer of a proportionate share of any partnership asset (other than a transfer of a partnership asset that is not a partnership interest by the partnership to a person not acting in a partner capacity), whether by a partner or the partnership (including as a result of a deemed or actual sale or a capital shift).

(4) *Increased basis from a distribution.* If a distribution of property from a partnership to a partner results in an increase in the tax basis of either the distributed property or other partnership property, such as under section 732(b) or 734(b), the increase in tax basis attributable to a foreign related party is treated as if it was newly purchased property acquired by the taxpayer (to the extent of its proportionate share) from the foreign related party that is placed in service when the distribution occurs. See § 1.734–1(e). This increased basis treated as newly purchased property is treated as acquired with a base erosion payment, unless an exception in § 1.59A–3(b) applies. For this purpose,

in the case of a distribution to a foreign related party, the increased basis in the remaining partnership property that is treated as newly purchased property is entirely attributable to the foreign related party. In the case of a distribution to a taxpayer, the increased basis in the distributed property that is treated as newly purchased property is attributable to each foreign related party in proportion to the foreign related party's proportionate share of the asset immediately before the distribution. If the distribution is to a person other than a taxpayer or a foreign related party, there is no base erosion payment caused by the distribution under this paragraph (c)(4). See paragraphs (g)(2)(vii), (viii), and (ix) of this section (*Example 7, Example 8,* and *Example 9*) for examples illustrating the application of this paragraph (c)(4).

(5) *Operating rules applicable to base erosion payments*—(i) *Single payment characterized as separate transactions.* If a single transaction is partially characterized in one manner and partially characterized in another manner, each part of the transaction is separately analyzed. For example, if a contribution of property to a partnership is partially treated as a contribution and partially treated as a disguised sale, the contribution and sale are separately analyzed under paragraph (c) of this section.

(ii) *Ordering rule with respect to transfers of a partnership interest.* If a partnership interest is transferred (within the meaning of paragraph (c)(3)(iv) of this section), paragraph (c)(3) of this section first applies to determine the assets deemed transferred by the transferor(s) to the transferee(s) and liabilities deemed assumed by the parties. Then, to the extent applicable (such as where a partnership makes a contribution in exchange for an interest in another partnership or when a partnership receives an interest in another partnership as a contribution to it), paragraph (c)(2) of this section applies for purposes of determining the proportionate share of the property received by the partners in a partnership. See paragraph (g)(2)(vi) of this section (*Example 6*) for an illustration of this rule.

(iii) *Consideration for base erosion payment or property resulting in base erosion tax benefits.* When a partnership pays or receives property, services, or other consideration, each partner is deemed to pay or receive the property, services, or other consideration paid or received by the partnership for purposes of determining if there is a base erosion payment, except as otherwise provided in paragraph (c) of this section. See paragraphs (g)(2)(v) and (vi) of this section (*Example 5* and *Example 6*) for illustrations of this rule.

(iv) *Non-cash consideration.* When both parties to a transaction use non-cash consideration, each party must separately apply paragraph (c) of this section to determine its base erosion payment with respect to each property. For example, if two partnerships, each with a domestic corporation and a foreign corporation as partners, all of whom are related, exchange depreciable property, each transfer of property would be separately analyzed to determine whether it is a base erosion payment.

(d) *Base erosion tax benefit for partners*—(1) *In general.* A partner's distributive share of any deduction or reduction in gross receipts attributable to a base erosion payment (including as a result of sections 704(b) and (c), 707(a) and (c), 732(b) and (d), 734(b) and (d), 737, 743(b) and (d), and 751(b)) is the partner's base erosion tax benefit, subject to the exceptions in § 1.59A–3(c)(2). See paragraph (e)(1) of this section to determine the partner's distributive share for purposes of section 59A. A partner's base erosion tax benefit may be more than the partner's base erosion payment. For example, if a partnership makes a payment to a foreign related party of its domestic partner to acquire a depreciable asset, and the partnership specially allocates more depreciation deductions to a partner than its proportionate share of the asset, the partner's base erosion tax benefit includes the specially allocated depreciation deduction even if the total allocated deduction exceeds the partner's share of the base erosion payment made to acquire the asset. Base erosion tax benefits are determined separately for each asset, payment, or accrual, as applicable, and are not netted with other items. A taxpayer determines its base erosion tax benefits for non-partnership items pursuant to § 1.59A–3(c).

(2) *Exception for base erosion tax benefits of certain small partners*—(i) *In general.* For purposes of determining a partner's amount of base erosion tax benefits attributable to a base erosion payment made by a partnership, a partner does not take into account its distributive share of any base erosion tax benefits from the partnership for the taxable year if—

(A) The partner's interest in the partnership represents less than ten percent of the capital and profits of the partnership at all times during the taxable year;

(B) The partner is allocated less than ten percent of each partnership item of income, gain, loss, deduction, and credit for the taxable year; and

(C) The partner's interest in the partnership has a fair market value of less than $25 million on the last day of the partner's taxable year, determined using a reasonable method.

(ii) *Attribution.* For purposes of paragraph (d)(2)(i) of this section, a partner's interest in a partnership or partnership item is determined by adding the interests of the partner and any related party of the partner (as determined under section 59A), taking into account any interest owned directly, indirectly, or through constructive ownership (applying the section 318 rules as modified by section 59A (except section 318(a)(3)(A) through (C) will also apply so as to consider a United States person as owning stock that is owned by a person who is not a United States person), but excluding any interest to the extent already taken into account).

(e) *Other rules for applying section 59A to partnerships*—(1) *Partner's distributive share.* For purposes of section 59A, each partner's distributive share of an item of income or deduction of the partnership is determined under sections 704(b) and (c) and takes into account amounts determined under other provisions of the Code, including but not limited to sections 707(a) and (c), 732(b) and (d), 734(b) and (d), 737, 743(b) and (d), and 751(b). *See* § 1.704–1(b)(1)(iii) regarding the application of section 482. These amounts are calculated separately for each payment or accrual on a property-by-property basis, including for purposes of section 704(c), and are not netted. For purposes of section 59A, a partner's distributive share of a reduction to determine gross income is equal to a proportionate amount of the partnership's reduction to determine gross income corresponding to the partner's share of the partnership gross receipts (as determined under paragraph (e)(2)(i) of this section) related to that reduction.

(2) *Gross receipts*—(i) *In general.* For purposes of section 59A, each partner in the partnership includes a share of partnership gross receipts in proportion to the partner's distributive share (as determined under sections 704(b) and (c)) of items of gross income that were taken into account by the partnership under section 703 or 704(c) (such as remedial or curative items under § 1.704–3(c) or (d)).

(ii) *Foreign corporation.* See § 1.59A–2(d)(2) for gross receipts of foreign corporations.

(3) *Registered securities dealers.* If a partnership, or a branch of the partnership, is a registered securities dealer, each partner is treated as a registered securities dealer unless the partner's interest in the registered securities dealer would satisfy the criteria for the exception in paragraph (d)(2) of this section. For purposes of applying the de minimis exception in § 1.59A–2(e)(2)(iii), a partner takes into account its distributive share of the relevant partnership items.

(4) *Application of sections 163(j) and 59A(c)(3) to partners.* See § 1.59A–3(c)(4).

(5) *Tiered partnerships.* In the case of one or more partnerships owning an interest in another partnership (or partnerships), the rules of this section apply successively to each partnership and its partners in the chain of ownership. Paragraphs (d)(2) and (f) of this section and the small partner exception in paragraph (e)(3) of this section apply only to a partner that is not itself a partnership.

(f) *Foreign related party.* With respect to any person that owns an interest in a partnership, the related party determination in section 59A(g) applies at the partner level.

(g) *Examples.* The following examples illustrate the application of this section.

(1) *Facts.* The following facts are assumed for purposes of the examples.

(i) DC is a domestic corporation that is an applicable taxpayer for purposes section 59A.

(ii) FC is a foreign corporation that is a foreign related party with respect to DC.

(iii) UC is a domestic corporation that is not related to DC and FC.

(iv) Neither FC nor any partnership in the examples is (or is treated as) engaged in a U.S. trade or business or has a permanent establishment in the United States.

(v) All payments apply to a taxable year beginning after December 31, 2017.

(vi) Unless otherwise stated, all allocations are pro-rata and satisfy the requirements of section 704(b) and all the partners have equal interests in the partnership.

(vii) Unless otherwise stated, depreciable property acquired and placed in service by the partnership has a remaining recovery period of five years and is depreciated under the alternative depreciation system of section 168(g) using the straight line method. Solely for purposes of simplifying the calculations in these examples, assume the applicable convention rules in section 168(d) do not apply.

(viii) No exception under § 1.59A–3(b) or (c) applies to any amount paid or accrued.

(2) *Examples*—(i) *Example 1: Contributions to a partnership on partnership formation*—(A) *Facts.* DC and FC form partnership PRS, with each contributing depreciable property that has a fair market value and tax basis of $100x, Property A and Property B, respectively. Therefore, the property contributed by FC, Property B, will generate $20x of annual section 704(b) and tax depreciation deductions for five years. The depreciation deductions will be allocated $10x to each of DC and FC each year. Before the transactions, for purposes of section 59A, DC is treated as owning a 100 percent interest in Property A and a zero percent interest in Property B, and FC is treated as owning a 100 percent interest in Property B and a zero percent interest in Property A. After the formation of PRS, for purposes of section 59A, DC and FC are each treated as owning a 50 percent proportionate share of each of Property A and Property B.

(B) *Analysis.* The treatment of contributions of property in exchange for an interest in a partnership is described in paragraph (c)(3)(iii) of this section. Under paragraph (c)(3)(iii) of this section, DC is treated as exchanging a 50 percent interest in Property A for a 50 percent proportionate share of Property B. Under § 1.59A–3(b)(1)(ii), the payment to acquire depreciable property, Property B, from FC is a base erosion payment. The base erosion tax benefit is the amount of depreciation allocated to DC with respect to Property B ($10x per year) and is not netted with any other partnership item pursuant to paragraph (d)(1) of this section.

(ii) *Example 2: Section 704(c) and remedial allocations*—(A) *Facts.* The facts are the same as in paragraph (g)(2)(i)(A) of this section (the facts in *Example 1*), except that Property B has a tax basis of $40x and PRS adopts the remedial method under § 1.704–3(d).

(B) *Analysis.* The analysis and results are the same as in paragraph (g)(2)(i)(B) of this section (the analysis in *Example 1*), except that annual tax depreciation is $8x ($40x/5) and annual remedial tax deduction allocation to DC is $2x (with $2x of remedial income to FC) for five years. Both the tax depreciation and the remedial tax allocation to DC are base erosion tax benefits to DC under paragraph (d)(1) of this section.

(iii) *Example 3: Sale of a partnership interest without a section 754 election*—(A) *Facts.* UC and FC are equal partners in partnership PRS, the only asset of which is Property A, a depreciable property with a fair market value of $200x and a tax basis of $120x. PRS does not have any section 704(c) assets. DC purchases 50 percent of FC's interest in PRS for $50x. Prior to the sale, for section 59A purposes, FC is treated as owning a 50 percent proportionate share of Property A and DC is treated as owning no interest in Property A. Following the sale, for section 59A purposes, DC is treated as owning a 25 percent proportionate share of Property A, all of which is treated as acquired from FC. The partnership does not have an election under section 754 in effect. Property A will generate $24x of annual tax and section 704(b) depreciation deductions for five years. The depreciation deductions will be allocated $12x to UC and $6x to both FC and DC each year.

(B) *Analysis.* The sale of a partnership interest by a partner is analyzed under paragraph (c)(3)(ii) of this section. Under section (c)(3)(ii) of this section, FC is treated as selling to DC 25 percent of Property A. Under § 1.59A–3(b)(1)(ii), the payment to acquire depreciable property is a base erosion payment. Under paragraph (d)(1) of this section, the base erosion tax benefit is the amount of depreciation allocated to DC with respect to the base erosion payment, which would be the depreciation deductions allocated to DC with respect to Property A. DC's annual $6x depreciation deduction is its base erosion tax benefit with respect to the base erosion payment.

(iv) *Example 4: Sale of a partnership interest with section 754 election*—(A) *Facts.* The facts are the same as in paragraph (g)(2)(iii)(A) of this section (the facts in *Example 3*), except that the partnership has an election under section 754 in effect. As a result of the sale, there is a $20x positive adjustment to the tax basis in Property A with respect to DC under section 743(b) (DC's $50x basis in the PRS interest less DC's $30x share of PRS's tax basis in Property A). The section 743(b) step-up in tax basis is recovered over a depreciable recovery period of five years. Therefore, DC will be allocated a total of $10x in annual depreciation deductions for five years, comprised of $6x with respect to DC's proportionate share of PRS's common tax basis in Property A ($30x over 5 years) and $4x with respect to the section 743(b) adjustment ($20x over 5 years).

(B) *Analysis.* The analysis is the same as in paragraph (g)(2)(iii)(B) of this section (the analysis in *Example 3*); however, because section 743(b) increases the basis in Property A for DC by $20x, DC is allocated additional depreciation deductions of $4x per year as a result of the section 743(b) adjustment and has an annual base erosion tax benefit of $10x ($6x plus $4x) for five years under paragraph (d)(1) of this section.

(v) *Example 5: Purchase of depreciable property from a partnership*—(A) *Facts.* The facts are the same as in paragraph (d)(2)(iii)(A) of this section (the facts in *Example 3*), except that instead of DC purchasing an interest in the partnership, DC purchases Property A from the partnership for $200x.

(B) *Analysis.* DC must analyze whether the purchase of the depreciable property from the partnership is a base erosion payment under paragraph (c)(2) of this section. Under paragraph (c)(2) of this section, DC is treated as acquiring FC's proportionate share of Property A from FC. Because DC paid the partnership for the partnership's interest in Property A, under paragraph (c)(5)(iii) of this section, DC is treated as paying FC for FC's proportionate share of Property A. Under

§ 1.59A–3(b)(1)(ii), the payment to FC to acquire depreciable property is a base erosion payment. DC's base erosion tax benefit is the amount of depreciation allocated to DC with respect to the base erosion payment, which in this case is the amount of depreciation deductions with respect to the property acquired with a base erosion payment, or the depreciation deductions from FC's (but not UC's) proportionate share of the asset. See § 1.59A–7(d)(1).

(vi) *Example 6: Sale of a partnership interest to a second partnership*—(A) *Facts.* FC, UC1, and UC2 are equal partners in partnership PRS1. DC and UC3 are equal partners in partnership PRS2. UC1, UC2, and UC3 are not related to DC or FC. PRS1's sole asset is Property A, which is depreciable property with a fair market value and tax basis of $300x. FC sells its entire interest in PRS1 to PRS2 for $100. For section 59A purposes, FC's proportionate share of Property A prior to the sale is one-third. Following the sale, for section 59A purposes, PRS2's proportionate share of Property A is one-third and DC's proportionate share of Property A (through PRS2) is one-sixth (50 percent of one-third).

(B) *Analysis.* Under paragraph (c)(5)(ii) of this section (the ordering rule), FC's transfer of its interest in PRS1 is first analyzed under paragraph (c)(3) of this section to determine how the transfer of the partnership interest is treated. Then, paragraph (c)(2) of this section applies to analyze how the acquisition of property by PRS2 is treated. Under paragraph (c)(3)(ii) of this section, FC is deemed to transfer its proportionate share of PRS1's assets, which is one-third of Property A. Then, under paragraph (c)(2) of this section, DC is treated as acquiring its proportionate share of PRS2's proportionate share of Property A from FC, which is one-sixth (50 percent of one-third). Under paragraph (c)(5)(iii) of this section, DC is treated as paying for the property it is treated as acquiring from FC. Therefore, DC's deemed payment to FC to acquire depreciable property is a base erosion payment under § 1.59A–3(b)(1)(ii). DC's base erosion tax benefit is equal to DC's distributive share of depreciation deductions that PRS2 allocates to DC attributable to Property A. See § 1.59A–7(d)(1).

(vii) *Example 7: Distribution of cash by a partnership to a foreign related party*—(A) *Facts.* DC, FC, and UC are equal partners in a partnership, PRS, the assets of which consist of cash of $90x and a depreciable asset (Property A) with a fair market value of $180x and a tax basis of $60x. Each partner's interest in PRS has a fair market value of $90x ($270x/3) and a tax basis of $50x. Assume that all non-depreciable assets are capital assets, all depreciable assets are nonresidential real property under section 168, and that no depreciation has been claimed prior to the transaction below. PRS has an election under section 754 in effect. PRS distributes the $90x of cash to FC in complete liquidation of its interest, resulting in gain to FC of $40x ($90x minus its tax basis in PRS of $50x) under section 731(a)(1) and an increase to the tax basis of Property A under section 734(b) of $40x. Prior to the distribution, for section 59A purposes, each partner had a one-third proportionate share of Property A. After the distribution, for section 59A purposes, the remaining partners each have a 50 percent proportionate share of Property A. Each partner's pro-rata allocation of depreciation deductions with respect to Property A is in proportion to each partner's proportionate share of Property A both before and after the distribution. Half of the depreciation deductions attributable to the $40x section 734(b) step-up will be allocated to DC. In addition, DC's proportionate share of Property A increased from one-third to one-half and therefore DC will be allocated depreciation deductions with respect to half of the original basis of $60x (or $30x) instead of one-third of $60x (or $20x).

(B) *Analysis.* Distributions of property that cause an increase in the tax basis of property that continues to be held by the partnership are analyzed under paragraph (c)(4) of this section. The $40x increase in the tax basis of Property A as a result of the distribution of cash to FC is treated as newly purchased property acquired from FC under paragraph (c)(4) of this section and therefore acquired with a base erosion payment under § 1.59A–3(b)(1)(ii) to DC to the extent of DC's proportionate share. DC's base erosion tax benefit is the amount of DC's depreciation deductions attributable to that base erosion payment, which is DC's distributive share of the depreciation deductions with respect to the $40x increase in the tax basis of Property A. See § 1.59A–7(d)(1). In addition, FC transferred a partnership interest to DC (as defined in paragraph (c)(3)(iv) of this section), which is analyzed under paragraph (c)(3)(i) of this section. Under paragraph (c)(3)(i) of this section, DC is deemed to acquire a one-sixth interest in Property A from FC (the increase in DC's proportionate share from one-third to one-half). DC's base erosion tax benefit from this additional one-sixth interest in Property A is the amount of DC's depreciation deductions attributable to this interest.

(viii) *Example 8: Distribution of property by a partnership to a taxpayer*—(A) *Facts.* The facts are the same as paragraph (g)(2)(vii)(A) of this section (the facts of *Example 7*), except that PRS's depreciable property consists of two assets, Property A having a fair market value of $90x and a tax basis of $60x and Property B having a fair market value of $90x and a tax basis of zero. Instead of distributing cash to FC, PRS distributes Property B to DC in liquidation of its interest, resulting in an increase in the basis of the distributed Property B to DC of $50x (from zero to $50x) under section 732(b) because DC's tax basis in the PRS interest was $50x. For section 59A purposes, prior to the distribution, each partner had a one-third proportionate share of Property B and after the distribution, the property is wholly owned by DC.

(B) *Analysis.* Distributions of property that cause an increase in the tax basis of property that is distributed to a taxpayer are analyzed under paragraph (c)(4) of this section. Under paragraph (c)(4) of this section, the $50x increase in tax basis is treated as newly purchased property that was acquired with a base erosion payment to the extent that the increase in tax basis is attributable to FC. Under paragraph (c)(4) of this section, the portion of the increase that is attributable to FC is the proportionate share of the Property B immediately before the distribution that was treated as owned by FC. Immediately before the distribution, FC had a one-third proportionate share of Property B. Accordingly, one-third of the $50x increase in the tax basis of Property B is treated as if it was newly purchased property acquired by DC from FC with a base erosion payment under § 1.59A–3(b)(1)(ii). DC's base erosion tax benefit is the amount of DC's depreciation deductions with respect to the base erosion payment, which in this case is the depreciation deductions with respect to the one-third interest in the increased basis treated as newly purchased property deemed acquired from FC. See § 1.59A–3(c)(1). In addition, PRS transferred Property B to DC, which is analyzed under paragraph (c)(2) of this section. Prior to the distribution, DC, FC, and UC each owned one-third of Property B. After the distribution, DC entirely owned Property B. Therefore, under paragraph (c)(2) of this section, DC is treated as acquiring one-third of Property B from FC. DC's depreciation deductions with respect to the one-third of Property B acquired from FC (without regard to the basis increase) is also a base erosion tax benefit.

(ix) *Example 9: Distribution of property by a partnership in liquidation of a foreign related party's interest*—(A) *Facts.* The facts are the same as paragraph (g)(2)(viii)(A) (the facts of *Example 8*), except that Property B is not distributed to DC and, instead, Property A is distributed to FC in liquidation of its interest, resulting in a tax basis in Property A of $50x in FC's hands under section 732(b) and a section 734(b) step-up in Property B of $10x (because Property A's tax basis was reduced from $60x to $50x), allocable to DC and UC. For section 59A purposes, prior to the distribution, each partner had a one-third proportionate share of Property B and after the distribution, DC and UC each have a one-half proportionate share of Property B.

(B) *Analysis.* Distributions of property that cause an increase in the tax basis of property that continues to be held by the partnership are analyzed under paragraph (c)(4) of this section. Under paragraph (c)(4) of this section, because the distribution of Property A to FC from PRS caused an increase in the tax basis of Property B, the entire $10x increase in tax basis is treated as newly purchased property that was acquired with a base erosion payment under § 1.59A–3(b)(1)(ii). DC's base erosion tax benefit is the amount of DC's depreciation deductions attributable to the base erosion payment, which is DC's distributive share of the depreciation deductions with respect to the $10x increase in the tax basis of Property B. See § 1.59A–7(d)(1). In addition, under paragraph (c)(3)(i) of this section, DC is deemed to acquire a one-sixth interest in Property B from FC (the increase in DC's proportionate share from one-third to one-half). While this increase is a base erosion payment under § 1.59A–3(b)(1)(ii), there is no base erosion tax benefit from this additional one-sixth interest in Property B because the tax basis in Property B (without regard to the basis) is zero and therefore the increase in DC's proportionate share does not result in any additional depreciation deductions.

§ 1.59A–8 [Reserved]

§ 1.59A–9 Anti-abuse and recharacterization rules.

(a) *Scope.* This section provides rules for recharacterizing certain transactions according to their substance for purposes of applying section 59A and the section 59A regulations. Paragraph (b) of this section provides specific anti-abuse rules. Paragraph (c) of this section provides examples illustrating the rules of paragraph (b) of this section.

(b) *Anti-abuse rules*—(1) *Transactions involving unrelated persons, conduits, or intermediaries.* If a taxpayer pays or accrues an amount to one or more intermediaries (including an intermediary unrelated to the taxpayer) that would have been a base erosion payment if paid or accrued to a foreign related party, and one or more of the intermediaries makes (directly or indirectly) corresponding payments to or for the benefit of a foreign related party as part of a transaction (or series of transactions), plan or arrangement that has as a principal purpose avoiding a base erosion payment (or reducing the amount of a base erosion payment), the role of the intermediary or intermediaries is disregarded as a conduit, or the amount paid or accrued to the intermediary is treated as a base erosion payment, as appropriate.

(2) *Transactions to increase the amount of deductions taken into account in the denominator of the base erosion percentage computation.* A transaction (or component of a transaction or series of transactions), plan or arrangement that has a principal purpose of increasing the deductions taken into account for purposes of § 1.59A–2(e)(3)(i)(B) (the denominator of the base erosion percentage computation) is disregarded for purposes of § 1.59A–2(e)(3).

(3) *Transactions to avoid the application of rules applicable to banks and registered securities dealers.* A transaction (or series of transactions), plan or arrangement that occurs among related parties that has a principal purpose of avoiding the rules applicable to certain banks and registered securities dealers in § 1.59A–2(e)(2) (base erosion percentage test for banks and registered securities dealers) or § 1.59A–5(c)(2) (increased base erosion and anti-abuse tax rate for banks and registered securities dealers) is not taken into account for purposes of § 1.59A–2(e)(2) or § 1.59A–5(c)(2).

(4) *Nonrecognition transactions.* If a transaction (or series of transactions), plan or arrangement, has a principal purpose of increasing the adjusted basis of property that a taxpayer acquires in a specified nonrecognition transaction, then § 1.59A–3(b)(3)(viii)(A) will not apply to the specified nonrecognition transaction. For purposes of this paragraph (b)(4), if a transaction (or series of transactions), plan or arrangement between related parties increases the adjusted basis of property within the six month period before the taxpayer acquires the property in a specified nonrecognition transaction, the transaction (or series of transactions), plan or arrangement is deemed to have a principal purpose of increasing the adjusted basis of property that a taxpayer acquires in a nonrecognition transaction.

(c) *Examples.* The following examples illustrate the application of this section.

(1) *Facts.* The following facts are assumed for purposes of the examples.

(i) DC is a domestic corporation that is an applicable taxpayer for purposes section 59A.

(ii) FP is a foreign corporation that owns all the stock of DC.

(iii) None of the foreign corporations have income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States under an applicable provision of the Internal Revenue Code or regulations thereunder.

(iv) All payments occur in a taxable year beginning after December 31, 2017.

(2) *Example 1: Substitution of payments that are not base erosion payments for payments that otherwise would be base erosion payments through a conduit or intermediary*—(i) *Facts.* FP owns Property 1 with a fair market value of $95x, which FP intends to transfer to DC. A payment from DC to FP for Property 1 would be a base erosion payment. Corp A is a domestic corporation that is not a related party with respect to DC. As part of a plan with a principal purpose of avoiding a base erosion payment, FP enters into an arrangement with Corp A to transfer Property 1 to Corp A in exchange for $95x. Pursuant to the same plan, Corp A transfers Property 1 to DC in exchange for $100x. Property 1 is subject to the allowance for depreciation (or amortization in lieu of depreciation) in the hands of DC.

(ii) *Analysis.* The arrangement between FP, DC, and Corp A is deemed to result in a $95x base erosion payment under paragraph (b)(1) of this section because DC's payment to Corp A would have been a base erosion payment if paid to a foreign related party, and Corp A makes a corresponding payment to FP as part of the series of transactions that has as a principal purpose avoiding a base erosion payment.

(3) *Example 2: Alternative transaction to base erosion payment*—(i) *Facts.* The facts are the same as in paragraph (c)(2)(i) of this section (the facts in *Example 1*), except that DC does not purchase Property 1 from FP or Corp A. Instead, DC purchases Property 2 from Corp B, a domestic corporation that is not a related party with respect to DC and that originally produced or acquired Property 2 for Corp B's own account. Property 2 is substantially similar to Property 1, and DC uses Property 2 in substantially the same manner that DC would have used Property 1.

(ii) *Analysis.* Paragraph (b)(1) of this section does not apply to the transaction between DC and Corp B because Corp B does not make a corresponding payment to or for the benefit of FP as part of a transaction, plan or arrangement.

(4) *Example 3: Alternative financing source*—(i) *Facts.* On Date 1, FP loaned $200x to DC in exchange for Note A. DC pays or accrues interest annually on Note A, and the payment or accrual is a base erosion payment within the meaning of § 1.59A–3(b)(1)(i). On Date 2, DC borrows $200x from Bank, a corporation that is not a related party with respect to DC, in exchange for Note B. The terms of Note B are substantially similar to the terms of Note A. DC uses the proceeds from Note B to repay Note A.

(ii) *Analysis.* Paragraph (b)(1) of this section does not apply to the transaction between DC and Bank because Bank does not make a corresponding payment to or for the benefit of FP as part of the series of transactions.

(5) *Example 4: Alternative financing source that is a conduit*—(i) *Facts.* The facts are the same as in paragraph (c)(4)(i) of this section (the facts in *Example 3*) except that in addition, as part of the same plan or arrangement as the Note B transaction and with a principal purpose of avoiding a base erosion payment, FP deposits $250x with Bank. The difference between the interest rate paid by Bank to FP on FP's deposit and the interest rate paid by DC to Bank is less than one percentage point. The interest rate charged by Bank to DC would have differed absent the deposit by FP.

(ii) *Analysis.* The transactions between FP, DC, and Bank are deemed to result in a base erosion payment under paragraph (b)(1) of this section because DC's payment to Bank would have been a base erosion payment if paid to a foreign related party, and Bank makes a corresponding payment to FP as part of the series of transactions that has as a principal purpose avoiding a base erosion payment. See Rev. Rul. 87–89, 1987–2 C.B. 195, Situation 3.

(6) *Example 5: Intermediary acquisition*—(i) *Facts.* FP owns all of the stock of DC1 and DC2, each domestic corporations. FP is a manufacturer of lawn equipment. DC1 is in the trade or business of renting equipment to unrelated third parties. DC2 is a dealer in property that capitalizes its purchases into inventory and recovers the amount through cost of goods sold. Before Date 1, in the ordinary course of DC1's business, DC1 acquired depreciable property from FP that DC1 in turn rented to unrelated third parties. DC1's purchases from FP were base erosion payments within the meaning of § 1.59A–3(b)(1)(ii). On Date 1, with a principal purpose of avoiding a base erosion payment,

FP and DC2 reorganized their operations so that DC2 acquires the lawn equipment from FP and immediately thereafter, DC2 resells the lawn equipment to DC1.

(ii) *Analysis.* The transactions between FP, DC1, and DC2 are deemed to result in a base erosion payment under paragraph (b)(1) of this section because DC1's payment to DC2 would have been a base erosion payment if paid directly to FP, and DC2 makes a corresponding payment to FP as part of a series of transactions, plan, or arrangement that has a principal purpose of avoiding a base erosion payment from DC1 to FP.

(7) *Example 6: Offsetting transactions to increase the amount of deductions taken into account in the denominator of the base erosion percentage computation*—(i) *Facts.* With a principal purpose of increasing the deductions taken into account by DC for purposes of § 1.59A–2(e)(3)(i)(B), DC enters into a long position with respect to Asset with Financial Institution 1 and simultaneously enters into a short position with respect to Asset with Financial Institution 2. Financial Institution 1 and Financial Institution 2 are not related to DC and are not related to each other.

(ii) *Analysis.* Paragraph (b)(2) of this section applies to the transactions between DC and Financial Institution 1 and DC and Financial Institution 2. These transactions are not taken into account for purposes of § 1.59A–2(e)(3)(i)(B) because the transactions have a principal purpose of increasing the deductions taken into account for purposes of § 1.59A–2(e)(3)(i)(B).

(8) *Example 7: Ordinary course transactions that increase the amount of deductions taken into account in the denominator of the base erosion percentage computation*—(i) *Facts.* DC, a financial institution, enters into a long position with respect to stock in Corporation with Person 1 and later on the same day enters into a short position with respect to stock in Corporation with Person 2. Person 1 and Person 2 are not related to DC and are not related to each other. DC entered into the positions in the ordinary course of its business and did not have a principal purpose of increasing the deductions taken into account by DC for purposes of § 1.59A–2(e)(3)(i)(B).

(ii) *Analysis.* Paragraph (b)(2) of this section does not apply because the transactions between DC and Person 1 and Person 2 were not entered into with a principal purpose of increasing the deductions taken into account by DC for purposes of § 1.59A–2(e)(3)(i)(B).

(9) *Example 8: Transactions to avoid the application of rules applicable to banks and registered securities dealers*—(i) *Facts.* DC owns all of the stock of DC1 and Bank (an entity defined in section 581). DC, DC1, and Bank are members of an affiliated group of corporations within the meaning of section 1504(a) that elect to file a consolidated U.S. federal income tax return. With a principal purpose of avoiding the rules of § 1.59A–2(e)(2) or § 1.59A–5(c)(2), DC and DC1 form a new partnership (PRS). DC contributes all of its stock of Bank, and DC1 contributes cash, to PRS. DC, DC1, and Bank do not materially change their business operations following the formation of PRS.

(ii) *Analysis.* Paragraph (b)(3) of this section applies to transactions with respect to Bank because the transactions with respect to PRS were entered into with a principal purpose of avoiding the rules of § 1.59A–2(e)(2) or § 1.59A–5(c)(2). The contribution of Bank to a PRS is not taken into account, and Bank will be deemed to be part of the affiliated group including DC and DC1 for purposes of § 1.59A–2(e)(2) and § 1.59A–5(c)(2).

(10) *Example 9: Transactions that do not avoid the application of rules applicable to banks and registered securities dealers*—(i) *Facts.* The facts are the same as the facts of paragraph (c)(9)(i) of this section (the facts of Example 8), except that DC sells 90 percent of the stock of Bank to an unrelated party in exchange for cash.

(ii) *Analysis.* Paragraph (b)(3) of this section does not apply to DC's sale of the stock of Bank because the sale was not made with a principal purpose of avoiding the rules of § 1.59A–2(e)(2) or § 1.59A–5(c)(2). Bank will not be treated as part of the affiliated group including DC and DC1 for purposes of § 1.59A–2(e)(2) and § 1.59A–5(c)(2).

(11) *Example 10: Acquisition of depreciable property in a nonrecognition transaction*—(i) *Facts.* U, which is not a related party with respect to FP or DC, owns Property 1 with an adjusted basis of $50x and a fair market value of $100x. On Date 1, FP purchases property, including Property 1, from U in exchange for cash, and then FP contributes Property 1 to DC in an exchange described in section 351. Following the exchange, DC's basis in Property 1 is $100x.

(ii) *Analysis.* Paragraph (b)(4) of this section does not apply to DC's acquisition of Property 1 because the purchase of Property 1 from U (along with the purchase of other property from U that FP did not contribute to DC) did not have a principal purpose of increasing the adjusted basis of property that was subsequently transferred to DC. The transaction is economically equivalent to an alternative transaction under which FP contributed $100x to DC and then DC purchased Property 1 from U. Further, the second sentence of paragraph (b)(4) of this section (providing that certain transactions are deemed to have a principal purpose of increasing the adjusted basis of property that a taxpayer acquires in a nonrecognition transaction) does not apply because FP purchased Property 1 from an unrelated party.

(12) *Example 11: Transactions between related parties with a principal purpose of increasing the adjusted basis of property*—(i) *Facts.* The facts are the same as paragraph (c)(11)(i) of this section (the facts in *Example 10*), except that U is related to FP and DC.

(ii) *Analysis.* Paragraph (b)(4) of this section applies to DC's acquisition of Property 1 because the transaction that increased the adjusted basis of Property 1 (the purchase of Property 1 from U) was between related parties, and within six months DC acquired Property 1 from FP in a specified nonrecognition transaction. Accordingly, the purchase of property from U is deemed to have a principal purpose of increasing the adjusted basis of Property 1, the exception in § 1.59A–3(b)(3)(viii)(A) for specified nonrecognition transactions will not apply to the contribution of Property 1 to DC, and DC's depreciation deductions with respect to Property 1 will be base erosion tax benefits.

§ 1.59A–10 Applicability date.

Sections 1.59A–1 through 1.59A–9 apply to taxable years ending on or after December 17, 2018. However, taxpayers may apply these final regulations in their entirety for taxable years beginning after December 31, 2017, and ending before December 17, 2018. In lieu of applying these final regulations, taxpayers may apply the provisions matching §§ 1.59A–1 through 1.59A–9 from the Internal Revenue Bulletin (IRB) 2019–02 (*https://www.irs.gov/pub/irs-irbs/irb19-02.pdf*) in their entirety for all taxable years ending on or before December 6, 2019.

■ **Par. 3.** Section 1.383–1 is amended by adding two sentences at the end of paragraph (d)(3)(i) to read as follows:

§ 1.383–1 Special limitations on certain capital losses and excess credits.

* * * * *

(d) * * *

(3) * * *

(i) * * * The application of section 59A is not a limitation contained in subtitle A for purposes of this paragraph (d)(3)(i). Therefore, the treatment of pre-change losses and pre-change credits in the computation of the base erosion minimum tax amount will not affect whether such losses or credits result in absorption of the section 382 limitation and the section 383 credit limitation.

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■ **Par. 4.** Section 1.1502–2 is revised to read as follows:

§ 1.1502–2 Computation of tax liability.

(a) *Taxes imposed.* The tax liability of a group for a consolidated return year is determined by adding together—

(1) The tax imposed by section 11(a) in the amount described in section 11(b) on the consolidated taxable income for the year (reduced by the taxable income of a member described in paragraphs (a)(5) through (8) of this section);

(2) The tax imposed by section 541 on the consolidated undistributed personal holding company income;

(3) If paragraph (a)(2) of this section does not apply, the aggregate of the taxes imposed by section 541 on the separate undistributed personal holding company income of the members which are personal holding companies;

(4) If neither paragraph (a)(2) nor (3) of this section apply, the tax imposed by section 531 on the consolidated accumulated taxable income (see § 1.1502–43);

(5) The tax imposed by section 594(a) in lieu of the taxes imposed by section 11 on the taxable income of a life insurance department of the common parent of a group which is a mutual savings bank;

(6) The tax imposed by section 801 on consolidated life insurance company taxable income;

(7) The tax imposed by section 831(a) on consolidated insurance company taxable income of the members which are subject to such tax;

(8) Any increase in tax described in section 1351(d)(1) (relating to recoveries of foreign expropriation losses); and

(9) The tax imposed by section 59A on base erosion payments of taxpayers with substantial gross receipts.

(b) *Credits.* A group is allowed as a credit against the taxes described in paragraph (a) of this section (except for paragraph (a)(9) of this section) of this section: The general business credit under section 38 (see § 1.1502–3), the foreign tax credit under section 27 (see § 1.1502–4), and any other applicable credits provided under the Internal Revenue Code. Any increase in tax due to the recapture of a tax credit will be taken into account. See section 59A and the regulations thereunder for credits allowed against the tax described in paragraph (a)(9) of this section.

(c) *Allocation of dollar amounts.* For purposes of this section, if a member or members of the consolidated group are also members of a controlled group that includes corporations that are not members of the consolidated group, any dollar amount described in any section of the Internal Revenue Code is apportioned among all members of the controlled group in accordance with the provisions of the applicable section and the regulations thereunder.

(d) *Applicability date*—This section applies to taxable years for which the original consolidated Federal income tax return is due (without extension) after December 6, 2019.

■ **Par. 5** Section 1.1502–4 is amended by revising paragraph (d)(3) to read as follows:

§ 1.1502–4 Consolidated foreign tax credit.

* * * * *

(d) * * *

(3) *Computation of tax against which credit is taken.* The tax against which the limiting fraction under section 904(a) is applied will be the consolidated tax liability of the group determined under § 1.1502–2, but without regard to paragraphs (a)(2), (3), (4), (8), and (9) of that section, and without regard to any credit against such liability.

* * * * *

■ **Par. 6.** Section 1.1502–43 is amended by revising paragraph (b)(2)(i)(A) to read as follows:

§ 1.1502–43 Consolidated accumulated earnings tax.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) The consolidated liability for tax determined without § 1.1502–2(a)(2) through (4), and without the foreign tax credit provided by section 27, over

* * * * *

■ **Par. 7.** Section 1.1502–47 is amended by revising paragraph (f)(7)(iii) to read as follows:

§ 1.1502–47 Consolidated returns by life-nonlife groups.

* * * * *

(f) * * *

(7) * * *

(iii) Any taxes described in § 1.1502–2 (other than by paragraphs (a)(1) and (6) of that section).

* * * * *

■ **Par. 8.** Section 1.1502–59A is added to read as follows:

§ 1.1502–59A Application of section 59A to consolidated groups.

(a) *Scope.* This section provides rules for the application of section 59A and the regulations thereunder (the *section 59A regulations*) to consolidated groups and their members (as defined in § 1.1502–1(h) and (b), respectively). Rules in the section 59A regulations apply to consolidated groups except as modified in this section. Paragraph (b) of this section provides rules treating a consolidated group (rather than each member of the group) as a single taxpayer, and a single applicable taxpayer, as relevant, for certain purposes. Paragraph (c) of this section coordinates the application of the business interest stacking rule under § 1.59A–3(c)(4) to consolidated groups. Paragraph (d) of this section addresses how the base erosion minimum tax amount is allocated among members of the consolidated group. Paragraph (e) of this section coordinates the application of this section and § 1.1502–47. Paragraph (f) of this section sets forth definitions. Paragraph (g) of this section provides examples. Paragraph (h) of this section provides the applicability date.

(b) *Consolidated group as the applicable taxpayer*—(1) *In general.* For purposes of determining whether the consolidated group is an applicable taxpayer (within the meaning of § 1.59A–2(b)) and the amount of tax due pursuant to section 59A(a), all members of a consolidated group are treated as a single taxpayer. Thus, for example, members' deductions are aggregated in making the required computations under section 59A. In addition, to ensure that intercompany transactions (as defined in § 1.1502–13(b)(1)(i)) do not affect the consolidated group's base erosion percentage or base erosion minimum tax amount, items resulting from intercompany transactions are not taken into account in making such computations under section 59A. For example, additional depreciation deductions resulting from intercompany asset sales are not taken into account for purposes of applying the base erosion percentage test under § 1.59A–2(e).

(2) *Consolidated group as member of the aggregate group.* The consolidated group is treated as a single member of an aggregate group for purposes of § 1.59A–2(c).

(3) *Related party determination.* For purposes of section 59A and the section 59A regulations, if a person is a related party with respect to any member of a consolidated group, that person is a related party of the group and of each of its members.

(c) *Coordination of section 59A(c)(3) and section 163(j) in a consolidated group*—(1) *Overview.* This paragraph (c) provides rules regarding the application of § 1.59A–3(c)(4) to a consolidated group's section 163(j) interest deduction. The classification rule in paragraph (c)(3) of this section addresses how to determine if, and to what extent, the group's section 163(j) interest deduction is a base erosion tax benefit. These regulations contain a single-entity classification rule with regard to the deduction of the consolidated group's aggregate current year business interest expense (''BIE''), but a separate-entity classification rule for the deduction of the consolidated group's disallowed BIE carryforwards. Paragraph (c)(3) of this section classifies the group's aggregate current year BIE deduction, in conformity with § 1.59A–3(c)(4), as constituting domestic related current year BIE deduction, foreign related current year BIE deduction, or unrelated current year BIE deduction. The allocation rules in paragraph (c)(4) of this section then allocate to specific members of the group the domestic related current year BIE deduction, foreign related current year BIE deduction, and unrelated current year BIE deduction taken in the taxable year. Any member's current year BIE that is carried forward to the succeeding taxable year as a disallowed BIE carryforward is allocated a status as domestic related BIE carryforward, foreign related BIE carryforward, or unrelated BIE carryforward under paragraph (c)(5) of this section. The status of any disallowed BIE carryforward deducted by a member in a later year is classified on a separate-entity basis by the deducting member under paragraph (c)(3) of this section, based on the status allocated to the member's disallowed BIE carryforward under paragraph (c)(5) of this section. This paragraph (c) also provides rules regarding the consequences of the deconsolidation of a corporation that has been allocated a domestic related BIE carryforward status, a foreign related BIE carryforward status, or an unrelated BIE carryforward status; and the consolidation of a corporation with a disallowed BIE carryforward classified as from payments to a domestic related party, foreign related party, or unrelated party.

(2) *Absorption rule for the group's business interest expense.* To determine the amount of the group's section 163(j) interest deduction, and to determine the year in which the member's business interest expense giving rise to the deduction was incurred or accrued, see §§ 1.163(j)–4(d) and 1.163(j)–5(b)(3).

(3) *Classification of the group's section 163(j) interest deduction*—(i) *In general.* Consistent with § 1.59A–3(c)(4)(i) and paragraph (b) of this section, the classification rule of this paragraph (c)(3) determines whether the consolidated group's section 163(j) interest deduction is a base erosion tax benefit. To the extent the consolidated group's business interest expense is permitted as a deduction under section 163(j)(1) in a taxable year, the deduction is classified first as from business interest expense paid or accrued to a foreign related party and business interest expense paid or accrued to a domestic related party (on a pro-rata basis); any remaining deduction is treated as from business interest expense paid or accrued to an unrelated party.

(ii) *Year-by-year application of the classification rule.* If the consolidated group's section 163(j) interest deduction in any taxable year is attributable to business interest expense paid or accrued in more than one taxable year (for example, the group deducts the group's aggregate current year BIE, the group's disallowed BIE carryforward from year 1, and the group's disallowed BIE carryforward from year 2), the classification rule in paragraph (c)(3)(i) of this section applies separately to each of those years, pursuant to paragraphs (c)(3)(iii) and (iv) of this section.

(iii) *Classification of current year BIE deductions.* Current year BIE deductions are classified under the section 59A regulations and this paragraph (c) as if the consolidated group were a single taxpayer that had paid or accrued the group's aggregate current year BIE to domestic related parties, foreign related parties, and unrelated parties. The rules of paragraph (c)(4) of this section apply for allocating current year BIE deductions among members of the consolidated group. To the extent the consolidated group's aggregate current year BIE exceeds its section 163(j) limitation, the rules of paragraph (c)(5) of this section apply.

(iv) *Classification of deductions of disallowed BIE carryforwards.* Each member of the group applies the classification rule in this paragraph (c)(3) to its deduction of any part of a disallowed BIE carryforward from a year, after the group applies paragraph (c)(5) of this section to the consolidated group's disallowed BIE carryforward from that year. Therefore, disallowed BIE carryforward that is actually deducted by a member is classified based on the status of the components of that carryforward, assigned pursuant to paragraph (c)(5) of this section.

(4) *Allocation of domestic related current year BIE deduction status and foreign related current year BIE deduction status among members of the consolidated group*—(i) *In general.* This paragraph (c)(4) applies if the group has domestic related current year BIE deductions, foreign related current year BIE deductions, or both, as a result of the application of the classification rule in paragraph (c)(3) of this section. Under this paragraph (c)(4), the domestic related current year BIE, foreign related current year BIE, or both, that is treated as deducted in the current year are deemed to have been incurred pro-rata by all members that have current year BIE deduction in that year, regardless of which member or members actually incurred the current year BIE to a domestic related party or a foreign related party.

(ii) *Domestic related current year BIE deduction*—(A) *Amount of domestic related current year BIE deduction status allocable to a member.* The amount of domestic related current year BIE deduction status that is allocated to a member is determined by multiplying the group's domestic related current year BIE deduction (determined pursuant to paragraph (c)(3) of this section) by the percentage of current year BIE deduction allocable to such member in that year.

(B) *Percentage of current year BIE deduction allocable to a member.* The percentage of current year BIE deduction allocable to a member is equal to the amount of the member's current year BIE deduction divided by the amount of the group's aggregate current year BIE deduction.

(iii) *Amount of foreign related current year BIE deduction status allocable to a member.* The amount of foreign related current year BIE deduction status that is allocated to a member is determined by multiplying the group's foreign related current year BIE deduction (determined pursuant to paragraph (c)(3) of this section) by the percentage of current year BIE deduction allocable to such member (defined in paragraph (c)(4)(ii)(B) of this section).

(iv) *Treatment of amounts as having unrelated current year BIE deduction status.* To the extent the amount of a member's current year BIE that is absorbed under paragraph (c)(2) of this section exceeds the domestic related current year BIE deduction status and foreign related current year BIE deduction status allocated to the member under paragraph (c)(4)(ii) and (iii) of this section, such excess amount is treated as from payments or accruals to an unrelated party.

(5) *Allocation of domestic related BIE carryforward status and foreign related BIE carryforward status to members of the group*—(i) *In general.* This paragraph (c)(5) applies in any year the consolidated group's aggregate current year BIE exceeds its section 163(j) limitation. After the application of paragraph (c)(4) of this section, any remaining domestic related current year BIE, foreign related current year BIE, and unrelated current year BIE is deemed to have been incurred pro-rata by members of the group pursuant to the rules in paragraph (c)(5)(ii), (iii), and (iv) of this section, regardless of which member or members actually incurred the business interest expense to a domestic related party, foreign related party, or unrelated party.

(ii) *Domestic related BIE carryforward*—(A) *Amount of domestic related BIE carryforward status allocable to a member.* The amount of domestic related BIE carryforward status that is allocated to a member equals the group's domestic related BIE carryforward from that year multiplied by the percentage of disallowed BIE carryforward allocable to the member.

(B) *Percentage of disallowed BIE carryforward allocable to a member.* The percentage of disallowed BIE carryforward allocable to a member for a taxable year equals the member's disallowed BIE carryforward from that year divided by the consolidated group's disallowed BIE carryforwards from that year.

(iii) *Amount of foreign related BIE carryforward status allocable to a member.* The amount of foreign related

BIE carryforward status that is allocated to a member equals the group's foreign related BIE carryforward from that year multiplied by the percentage of disallowed BIE carryforward allocable to the member (as defined in paragraph (c)(5)(ii)(B) of this section).

(iv) *Treatment of amounts as having unrelated BIE carryforward status.* If a member's disallowed BIE carryforward for a year exceeds the amount of domestic related BIE carryforward status and foreign related BIE carryforward status that is allocated to the member pursuant to paragraphs (c)(5)(ii) and (iii) of this section, respectively, the excess carryforward amount is treated as from payments or accruals to an unrelated party.

(v) *Coordination with section 381.* If a disallowed BIE carryforward is allocated a status as a domestic related BIE carryforward, foreign related BIE carryforward, or unrelated BIE carryforward under the allocation rule of paragraph (c)(5) of this section, the acquiring corporation in a transaction described in section 381(a) will succeed to and take into account the allocated status of the carryforward for purposes of section 59A. See § 1.381(c)(20)–1.

(6) *Member deconsolidates from a consolidated group*—(i) *General rule.* When a member deconsolidates from a group (the original group), the member's disallowed BIE carryforwards retain their allocated status, pursuant to paragraph (c)(5) of this section, as a domestic related BIE carryforward, foreign related BIE carryforward, or unrelated BIE carryforward (as applicable). Following the member's deconsolidation, the status of the disallowed BIE carryforwards of the remaining members is not redetermined.

(ii) *Gross receipts exception.* This paragraph (c)(6)(ii) applies if the original group had insufficient gross receipts to satisfy the gross receipts test under § 1.59A–2(d) and thus was not an applicable taxpayer in the year in which the deconsolidating member's disallowed BIE carryforward was incurred. If this paragraph (c)(6)(ii) applies, the deconsolidating member may determine the status of its disallowed BIE carryforward from that year by applying the classification rule of § 1.59A–3(c)(4) solely to the interest payments or accruals of the deconsolidating member, rather than by applying § 1.1502–59A(c)(3).

(iii) *Failure to substantiate.* If the deconsolidating member fails to substantiate a disallowed BIE carryforward as a domestic related BIE carryforward, foreign related BIE carryforward, or unrelated BIE carryforward, then the disallowed BIE carryforward is treated as a foreign related BIE carryforward.

(7) *Corporation joins a consolidated group.* If a corporation joins a consolidated group (the acquiring group), and that corporation was allocated a domestic related BIE carryforward status, foreign related BIE carryforward status, or unrelated BIE carryforward status pursuant to paragraph (c)(5) of this section from another consolidated group (the original group), or separately has a disallowed BIE carryforward that is classified as from payments or accruals to a domestic related party, foreign related party, or unrelated party, the status of the carryforward is taken into account in determining the acquiring group's base erosion tax benefit when the corporation's disallowed BIE carryforward is absorbed.

(d) *Allocation of the base erosion minimum tax amount to members of the consolidated group.* For rules regarding the allocation of the base erosion minimum tax amount, see section 1552. Allocations under section 1552 take into account the classification and allocation provisions of paragraphs (c)(3) through (5) of this section.

(e) [Reserved]

(f) *Definitions.* The following definitions apply for purposes of this section—

(1) *Aggregate current year BIE.* The consolidated group's *aggregate current year BIE* is the aggregate of all members' current year BIE.

(2) *Aggregate current year BIE deduction.* The consolidated group's *aggregate current year BIE deduction* is the aggregate of all members' current year BIE deductions.

(3) *Applicable taxpayer.* The term *applicable taxpayer* has the meaning provided in § 1.59A–2(b).

(4) *Base erosion minimum tax amount.* The consolidated group's *base erosion minimum tax amount* is the tax imposed under section 59A.

(5) *Base erosion tax benefit.* The term *base erosion tax benefit* has the meaning provided in § 1.59A–3(c)(1).

(6) *Business interest expense.* The term *business interest expense,* with respect to a member and a taxable year, has the meaning provided in § 1.163(j)–1(b)(2), and with respect to a consolidated group and a taxable year, has the meaning provided in § 1.163(j)–4(d)(2)(iii).

(7) *Consolidated group's disallowed BIE carryforwards.* The term *consolidated group's disallowed BIE carryforwards* has the meaning provided in § 1.163(j)–5(b)(3)(i).

(8) *Current year BIE.* A member's *current year BIE* is the member's business interest expense that would be deductible in the current taxable year without regard to section 163(j) and that is not a disallowed business interest expense carryforward from a prior taxable year.

(9) *Current year BIE deduction.* A member's *current year BIE deduction* is the member's current year BIE that is permitted as a deduction in the taxable year.

(10) *Domestic related BIE carryforward.* The consolidated group's *domestic related BIE carryforward* for any taxable year is the excess of the group's domestic related current year BIE over the group's domestic related current year BIE deduction (if any).

(11) *Domestic related current year BIE.* The consolidated group's *domestic related current year BIE* for any taxable year is the consolidated group's aggregate current year BIE paid or accrued to a domestic related party.

(12) *Domestic related current year BIE deduction.* The consolidated group's *domestic related current year BIE deduction* for any taxable year is the portion of the group's aggregate current year BIE deduction classified as from interest paid or accrued to a domestic related party under paragraph (c)(3) of this section.

(13) *Domestic related party.* A *domestic related party* is a related party that is not a foreign related party and is not a member of the same consolidated group.

(14) *Disallowed BIE carryforward.* The term *disallowed BIE carryforward* has the meaning provided in § 1.163(j)–1(b)(9).

(15) *Foreign related BIE carryforward.* The consolidated group's *foreign related BIE carryforward* for any taxable year, is the excess of the group's foreign related current year BIE over the group's foreign related current year BIE deduction (if any).

(16) *Foreign related current year BIE.* The consolidated group's *foreign related current year BIE* for any taxable year is the consolidated group's aggregate current year BIE paid or accrued to a foreign related party.

(17) *Foreign related current year BIE deduction.* The consolidated group's *foreign related current year BIE deduction* for any taxable year is the portion of the consolidated group's aggregate current year BIE deduction classified as from interest paid or accrued to a foreign related party under paragraph (c)(3) of this section.

(18) *Foreign related party.* A *foreign related party* has the meaning provided in § 1.59A–1(b)(12).

(19) *Related party.* The term *related party* has the meaning provided in

§ 1.59A–1(b)(17), but excludes members of the same consolidated group.

(20) *Section 163(j) interest deduction.* The term *section 163(j) interest deduction* means, with respect to a taxable year, the amount of the consolidated group's business interest expense permitted as a deduction pursuant to § 1.163(j)–5(b)(3) in the taxable year.

(21) *Section 163(j) limitation.* The term *section 163(j) limitation* has the meaning provided in § 1.163(j)–1(b)(31).

(22) *Unrelated BIE carryforward.* The consolidated group's *unrelated BIE carryforward* for any taxable year is the excess of the group's unrelated current year BIE over the group's unrelated current year BIE deduction.

(23) *Unrelated current year BIE.* The consolidated group's *unrelated current year BIE* for any taxable year is the consolidated group's aggregate current year BIE paid or accrued to an unrelated party.

(24) *Unrelated current year BIE deduction.* The consolidated group's *unrelated current year BIE deduction* for any taxable year is the portion of the group's aggregate current year BIE deduction classified as from interest paid or accrued to an unrelated party under paragraph (c)(3) of this section.

(25) *Unrelated party.* An *unrelated party* is a party that is not a related party.

(g) *Examples.* The following examples illustrate the general application of this section. For purposes of the examples, a foreign corporation (FP) wholly owns domestic corporation (P), which in turn wholly owns S1 and S2. P, S1, and S2 are members of a consolidated group. The consolidated group is a calendar year taxpayer.

(1) *Example 1: Computation of the consolidated group's base erosion minimum tax amount.* (i) *The consolidated group is the applicable taxpayer*—(A) *Facts.* The members have never engaged in intercompany transactions. For the 2019 taxable year, P, S1, and S2 were permitted the following amounts of deductions (within the meaning of section 59A(c)(4)), $2,400x, $1,000x, and $2,600x; those deductions include base erosion tax benefits of $180x, $370x, and $230x. The group's consolidated taxable income for the year is $150x. In addition, the group satisfies the gross receipts test in § 1.59A–2(d).

(B) *Analysis.* Pursuant to paragraph (b) of this section, the receipts and deductions of P, S1, and S2 are aggregated for purposes of making the computations under section 59A. The group's base erosion percentage is 13% (($180x + $370x + $230x)/($2,400x + $1,000x + $2,600x)). The consolidated group is an applicable taxpayer under § 1.59A–2(b) because the group satisfies the gross receipts test and the group's base erosion percentage (13%) is higher than 3%. The consolidated group's modified taxable income is computed by adding back the members' base erosion tax benefits (and, when the consolidated group has consolidated net operating loss available for deduction, the consolidated net operating loss allowed multiplied by the base erosion percentage) to the consolidated taxable income, $930x ($150x + $180x + $370x + $230x). The group's base erosion minimum tax amount is then computed as 10 percent of the modified taxable income less the regular tax liability, $61.5x ($930x × 10% − $150x × 21%).

(ii) *The consolidated group engages in intercompany transactions*—(A) *Facts.* The facts are the same as in paragraph (g)(1)(i)(A) of this section (the facts in *Example 1*(i)), except that S1 sold various inventory items to S2 during 2019. Such items are depreciable in the hands of S2 (but would not have been depreciable in the hands of S1) and continued to be owned by S2 during 2019.

(B) *Analysis.* The result is the same as paragraph (g)(1)(i)(A) of this section (the facts in *Example 1*(i)). Pursuant to paragraph (b)(2) of this section, items resulting from the intercompany sale (for example, gross receipts, depreciation deductions) are not taken into account in computing the group's gross receipts under § 1.59A–2(d) and base erosion percentage under § 1.59A–2(e)(3).

(2) *Example 2: Business interest expense subject to section 163(j) and the group's domestic related current year BIE and foreign related current year BIE for the year equals its section 163(j) limitation*—(i) *Facts.* During the current year (Year 1), P incurred $150x of business interest expense to domestic related parties; S1 incurred $150x of business interest expense to foreign related parties; and S2 incurred $150x of business interest expense to unrelated parties. The group's section 163(j) limitation for the year is $300x. After applying the rules in § 1.163(j)–5(b)(3), the group deducts $150x of P's Year 1 business interest expense, and $75x each of S1 and S2's Year 1 business interest expense. Assume the group is an applicable taxpayer for purposes of section 59A.

(ii) *Analysis*—(A) *Application of the absorption rule in paragraph (c)(2) of this section.* Following the rules in section 163(j), the group's section 163(j) interest deduction for Year 1 is $300x, and the entire amount is from members' Year 1 business interest expense.

(B) *Application of the classification rule in paragraph (c)(3) of this section.* Under paragraph (c)(3) of this section, the group's aggregate current year BIE deduction of $300x is first classified as payments or accruals to related parties (pro-rata among domestic related parties and foreign related parties), and second as payments or accruals to unrelated parties. For Year 1, the group has $150x of domestic related current year BIE and $150x of foreign related current year BIE, and the group's aggregate current year BIE deduction will be classified equally among the related party expenses. Therefore, $150x of the group's deduction is classified as domestic related current year BIE deduction and $150x is classified as a foreign related current year BIE deduction.

(C) *Application of the allocation rule in paragraph (c)(4) of this section.* After the application of the classification rule in paragraph (c)(3) of this section, the group has $150x each of domestic related current year BIE deduction and foreign related current year BIE deduction from the group's aggregate current year BIE in Year 1. The domestic related current year BIE deduction and foreign related current year BIE deduction will be allocated to P, S1, and S2 based on each member's deduction of its Year 1 business interest expense.

(*1*) *Allocations to P.* The percentage of current year BIE deduction attributable to P is 50% (P's deduction of its Year 1 current year BIE, $150x, divided by the group's aggregate current year BIE deduction for Year 1, $300x). Thus, the amount of domestic related current year BIE deduction status allocated to P is $75x (the group's domestic related current year BIE deduction, $150x, multiplied by the percentage of current year BIE deduction allocable to P, 50%); and the amount of foreign related current year BIE deduction status allocated to P is $75x (the group's foreign related current year BIE deduction, $150x, multiplied by the percentage of current year BIE deduction allocable to P, 50%).

(*2*) *Allocations to S1 and S2.* The percentage of current year BIE deduction attributable to S1 is 25% (S1's deduction of its Year 1 current year BIE, $75x, divided by the group's aggregate current year BIE deduction for Year 1, $300x). Thus, the amount of domestic related current year BIE deduction status allocated to S1 is $37.5x (the group's domestic related current year BIE deduction, $150x, multiplied by the percentage of current year BIE deduction allocable to S1, 25%); and the amount of foreign related current year BIE deduction status allocated to S1 is $37.5x (the group's foreign related current year BIE deduction, $150x, multiplied by the percentage of current year BIE deduction allocable to S1, 25%). Because S2 also deducted $75 of its Year 1 current year BIE, S2's deductions are allocated the same pro-rata status as those of S1 under this paragraph (f)(2)(ii)(C)(*2*).

(D) *Application of the allocation rule in paragraph (c)(5) of this section.* Although the group will have disallowed BIE carryforwards after Year 1 (the group's aggregate current year BIE of $450x ($150x + $150x + $150x) exceeds the section 163(j) limitation of $300x), all of the domestic related current year BIE and foreign related current year BIE in Year 1 has been taken into account pursuant to the classification rule in paragraph (c)(3) of this section. Thus, under paragraph (c)(5)(iv) of this section, each member's disallowed BIE carryforward is treated as from payments or accruals to unrelated parties.

(3) *Example 3: Business interest expense subject to section 163(j)*—(i) *The group's domestic related current year BIE and foreign related current year BIE for the year exceeds its section 163(j) limitation.* (A) *Facts.* During the current year (Year 1), P incurred $60x of business interest expense to domestic related parties; S1 incurred $40x of business interest expense to foreign related parties; and S2 incurred $80x of business interest expense to unrelated parties. The group's section 163(j) limitation for the year is $60x. After applying

the rules in § 1.163(j)–5(b)(3), the group deducts $20x each of P, S1, and S2's current year business interest expense. Assume the group is an applicable taxpayer for purposes of section 59A.

(B) *Analysis*—(*1*) *Application of the absorption rule in paragraph (c)(2) of this section.* Following the rules in section 163(j), the group's section 163(j) interest deduction is $60x, and the entire amount is from members' Year 1 business interest expense.

(*2*) *Application of the classification rule in paragraph (c)(3) of this section.* Under paragraph (c)(3) of this section, the group's $60x of aggregate current year BIE deduction is first classified as payments or accruals to related parties (pro-rata among domestic related parties and foreign related parties), and second as payments or accruals from unrelated parties. The group's total related party interest expense in Year 1, $100x (sum of the group's Year 1 domestic related current year BIE, $60x, and the group's Year 1 foreign related current year BIE, $40x), exceeds the group's aggregate current year BIE deduction of $60x. Thus, the group's aggregate current year BIE deduction will be classified, pro-rata, as from payments or accruals to domestic related parties and foreign related parties. Of the group's aggregate current year BIE deduction in Year 1, $36x is classified as a domestic related current year BIE deduction (the group's aggregate current year BIE deduction, $60x, multiplied by the ratio of domestic related current year BIE over the group's total Year 1 related party interest expense ($60x/($60x + $40x))); and $24x of the group's aggregate current year BIE deduction is classified as a foreign related current year BIE deduction (the group's section 163(j) interest deduction, $60x, multiplied by the ratio of foreign related current year BIE over the group's total Year 1 related party interest expense ($40x/($60x + $40x))).

(*3*) *Application of the allocation rule in paragraph (c)(4) of this section.* After the application of the classification rule in paragraph (c)(3) of this section, the group has $36x of domestic related current year BIE deduction and $24x of foreign related current year BIE deduction from the group's aggregate current year BIE in Year 1. The domestic related current year BIE deduction and foreign related current year BIE deduction will be allocated to P, S1, and S2 based on each member's current year BIE deduction in Year 1.

(*i*) *Allocation of the group's domestic related current year BIE deduction status.* Because each member is deducting $20x of its Year 1 business interest expense, all three members have the same percentage of current year BIE deduction attributable to them. The percentage of current year BIE deduction attributable to each of P, S1, and S2 is 33.33% (each member's current year BIE deduction in Year 1, $20x, divided by the group's aggregate current year BIE deduction for Year 1, $60x). Thus, the amount of domestic related current year BIE deduction status allocable to each member is $12x (the group's domestic related current year BIE deduction, $36x, multiplied by the percentage of current year BIE deduction allocable to each member, 33.33%).

(*ii*) *Allocations of the group's foreign related current year BIE deduction status.* The amount of foreign related current year BIE deduction status allocable to each member is $8x (the group's foreign related current year BIE deduction, $24x, multiplied by the percentage of current year BIE deduction allocable to each member, 33.33%, as computed earlier in paragraph (f)(3) of this section (*Example 3*).

(*4*) *Application of the allocation rule in paragraph (c)(5) of this section.* In Year 1 the group has $60x of domestic related current year BIE, of which $36x is deducted in the year (by operation of the classification rule). Therefore, the group has $24x of domestic related BIE carryforward. Similarly, the group has $40x of foreign related current year BIE in Year 1, of which $24x is deducted in the year. Therefore, the group has $16x of foreign related BIE carryforward. The $24x domestic related BIE carryforward status and $16x foreign related BIE carryforward status will be allocated to P, S1, and S2 in proportion to the amount of each member's disallowed BIE carryforward.

(*i*) *Allocation to P.* The percentage of disallowed BIE carryforward allocable to P is 33.33% (P's Year 1 disallowed BIE carryforward, $40x ($60x − $20x), divided by the group's Year 1 disallowed BIE carryforward, $120x ($60x + $40x + 80x − $60x)). Thus, the amount of domestic related BIE carryforward status allocated to P is $8x (the group's domestic related BIE carryforward, $24x, multiplied by the percentage of disallowed BIE carryforward allocable to P, 33.33%); and the amount of foreign related BIE carryforward status allocated to P is $5.33x (the group's foreign related BIE carryforward, $16x, multiplied by the percentage of disallowed BIE carryforward allocable to P, 33.33%). Under paragraph (c)(5)(iv) of this section, P's disallowed BIE carryforward that has not been allocated a status as either a domestic related BIE carryforward or a foreign related BIE carryforward will be treated as interest paid or accrued to an unrelated party. Therefore, $26.67x ($40x P's disallowed BIE carryforward −$8x domestic related BIE carryforward status allocated to P −$5.33x foreign related BIE carryforward status allocated to P) is treated as interest paid or accrued to an unrelated party.

(*ii*) *Allocation to S1.* The percentage of disallowed BIE carryforward allocable to S1 is 16.67% (S1's Year 1 disallowed BIE carryforward, $20x ($40x − $20x), divided by the group's Year 1 disallowed BIE carryforward, $120x ($60x + $40x + 80x − $60x). Thus, the amount of domestic related BIE carryforward status allocated to S1 is $4x (the group's domestic related BIE carryforward, $24x, multiplied by the percentage of disallowed BIE carryforward allocable to S1, 16.67%); and the amount of foreign related BIE carryforward status allocated to S1 is $2.67x (the group's foreign related BIE carryforward, $16x, multiplied by the percentage of disallowed BIE carryforward allocable to S1, 16.67%). Under paragraph (c)(5)(iv) of this section, S1's disallowed BIE that has not been allocated a status as either a domestic related BIE carryforward or a foreign related BIE carryforward will be treated as interest paid or accrued to an unrelated party. Therefore, $13.33x ($20x S1's disallowed BIE carryforward −$4x domestic related BIE carryforward status allocated to S1 − $2.67x foreign related BIE carryforward status allocated to S1) is treated as interest paid or accrued to an unrelated party.

(*iii*) *Allocation to S2.* The percentage of disallowed BIE carryforward allocable to S2 is 50% (S2's Year 1 disallowed BIE carryforward, $60x ($80x − $20x), divided by the group's Year 1 disallowed BIE carryforward, $120x ($60x + $40x + 80x − $60x). Thus, the amount of domestic related BIE carryforward status allocated to S2 is $12x (the group's domestic related BIE carryforward, $24x, multiplied by the percentage of disallowed BIE carryforward allocable to S2, 50%); and the amount of foreign related BIE carryforward status allocated to S2 is $8x (the group's foreign related BIE carryforward, $16x, multiplied by the percentage of disallowed BIE carryforward allocable to S2, 50%). Under paragraph (c)(5)(iv) of this section, S2's disallowed BIE that has not been allocated a status as either a domestic related BIE carryforward or a foreign related BIE carryforward will be treated as interest paid or accrued to an unrelated party. Therefore, $40x ($60x S2's disallowed BIE carryforward −$12x domestic related BIE carryforward status allocated to S2 − $8x foreign related BIE carryforward status allocated to S2) is treated as interest paid or accrued to an unrelated party.

(ii) *The group deducting its disallowed BIE carryforwards*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(i)(A) of this section (the facts in *Example 3*(i)), and in addition, none of the members incurs any business interest expense in Year 2. The group's section 163(j) limitation for Year 2 is $30x.

(B) *Analysis*—(*1*) *Application of the absorption rule in paragraph (c)(2) of this section.* Following the rules in section 163(j), each member of the group is deducting $10x of its disallowed BIE carryforward from Year 1. Therefore, the group's section 163(j) deduction for Year 2 is $30x.

(*2*) *Application of the classification rule in paragraph (c)(3) of this section.* Under paragraph (c)(3)(iv) of this section, to the extent members are deducting their Year 1 disallowed BIE carryforward in Year 2, the classification rule will apply to the deduction in Year 2 after the allocation rule in paragraph (c)(5) of this section has allocated the related and unrelated party status to the member's disallowed BIE carryforward in Year 1. The allocation required under paragraph (c)(5) of this section is described in paragraph (f)(3)(i)(B)(*4*) of this section.

(*i*) *Use of P's allocated domestic related BIE carryforward status and foreign related BIE carryforward status.* P has $40x of Year 1 disallowed BIE carryforward, and P was allocated $8x of domestic related BIE carryforward status and $5.33x of foreign related BIE carryforward status. In Year 2, P deducts $10x of its Year 1 disallowed BIE carryforward. Under the classification rule of paragraph (c)(3) of this section, P is treated as deducting pro-rata from its allocated status of domestic related BIE carryforward and foreign related BIE carryforward. Therefore, P is treated as deducting $6x of its allocated domestic related BIE carryforward ($10x × $8x/($8x + $5.33x)), and $4x of its allocated foreign related BIE carryforward ($10x × $5.33x/$8x + $5.33x)). After Year 2, P has remaining $30x of Year 1 disallowed BIE carryforward, of which $2x has a status of domestic related BIE carryforward, $1.33x has the status of foreign related BIE carryforward, and $26.67x of interest treated as paid or accrued to unrelated parties.

(*ii*) *Use of S1's allocated domestic related BIE carryforward status and foreign related BIE carryforward status.* S1 has $20x of Year 1 disallowed BIE carryforward, and S1 was allocated $4x of domestic related BIE carryforward status and $2.67x of foreign related BIE carryforward status. In Year 2, S2 deducts $10x of its Year 1 disallowed BIE carryforward. Because S2's deduction of its Year 1 disallowed BIE carryforward, $10x, exceeds its allocated domestic related BIE carryforward status ($4x) and foreign related BIE carryforward status ($2.67x), all of the allocated related party status are used up. After Year 2, all of S1's Year 1 disallowed BIE carryforward, $10x, is treated as interest paid or accrued to an unrelated party.

(*iii*) *Use of S2's allocated domestic related BIE carryforward status and foreign related BIE carryforward status.* S2 has $60x of Year 1 disallowed BIE carryforward, and S2 was allocated $12x of domestic related BIE carryforward status and $8x of foreign related BIE carryforward status. In Year 2, S2 deducts $10x of its Year 1 disallowed BIE carryforward. Under the classification rule of paragraph (c)(3) of this section, S2 is treated as deducting $6x of its allocated domestic related BIE carryforward ($10x × $12x/($12x + $8x)), and $4x of its allocated foreign related BIE carryforward ($10x × $8x/$8x + $12x)). After Year 2, P has remaining $50x of Year 1 disallowed BIE carryforward, of which $6x has a status of domestic related BIE carryforward, $4x has the status of foreign related BIE carryforward, and $40x of interest treated as paid or accrued to unrelated parties.

(h) *Applicability date.* This section applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after December 6, 2019.

■ **Par. 9.** Section 1.1502–100 is amended by revising paragraph (b) to read as follows:

§ 1.1502–100 Corporations exempt from tax.

* * * * *

(b) The tax liability for a consolidated return year of an exempt group is the tax imposed by section 511(a) on the consolidated unrelated taxable income for the year (determined under paragraph (c) of this section), and by allowing the credits provided in § 1.1502–2(b).

* * * * *

■ **Par. 10.** Section 1.6038A–1 is amended by

■ 1. Re-designating paragraph (n)(2) as paragraph (n)(2)(i) and adding a subject heading for newly re-designated paragraph (n)(2)(i).

■ 2. Adding a sentence to the end of newly re-designated paragraph (n)(2)(i).

■ 3. Adding paragraph (n)(2)(ii).

■ 4. Revising the last sentence of paragraph (n)(3).

The additions and revision read as follows:

§ 1.6038A–1 General requirements and definitions.

* * * * *

(n) * * *

(2) *Section 1.6038A–2*—(i) *In general.* * * * Section 1.6038A–2(a)(3), (b)(6), and (b)(7) apply to taxable years ending on or after December 17, 2018. However, taxpayers may apply these final regulations in their entirety for taxable years ending before December 17, 2018.

(ii) *Transition rule.* No penalty under sections 6038A(d) or 6038C(c) will apply to a failure solely under § 1.6038A–2(a)(3), (b)(6), or (b)(7) that is corrected by March 6, 2020.

(3) * * * For taxable years ending on or before December 31, 2017, see § 1.6038A–4 as contained in 26 CFR part 1 revised as of April 1, 2018.

* * * * *

■ **Par. 11.** Section 1.6038A–2 is amended by

■ 1. Revising the subject headings for paragraphs (a) and (a)(1).

■ 2. Revising paragraph (a)(2).

■ 3. Adding paragraph (a)(3).

■ 4. Revising paragraphs (b)(1)(ii), (b)(2)(iv), and the second sentence of paragraph (b)(3).

■ 5. Redesignating paragraphs (b)(6) through (9) as paragraphs (b)(8) through (11).

■ 6. Adding new paragraphs (b)(6) and (7).

■ 7. Revising paragraph (c) and the first sentence of paragraph (d).

■ 8. Removing the language "Paragraph (b)(8)" from the second sentence of paragraph (g) and adding the language "Paragraph (b)(10)" in its place.

■ 9. Adding three sentences to the end of paragraph (g).

The revisions and additions read as follows:

§ 1.6038A–2 Requirement of return.

(a) *Forms required*—(1) *Form 5472.* * * *

(2) *Reportable transaction.* A reportable transaction is any transaction of the types listed in paragraphs (b)(3) and (4) of this section, and, in the case of a reporting corporation that is an applicable taxpayer, as defined under § 1.59A–2(b), any other arrangement that, to prevent avoidance of the purposes of section 59A, is identified on Form 5472 as a reportable transaction. However, except as the Secretary may prescribe otherwise for an applicable taxpayer, the transaction is not a reportable transaction if neither party to the transaction is a United States person as defined in section 7701(a)(30) (which, for purposes of section 6038A, includes an entity that is a reporting corporation as a result of being treated as a corporation under § 301.7701–2(c)(2)(vi) of this chapter) and the transaction—

(i) Will not generate in any taxable year gross income from sources within the United States or income effectively connected, or treated as effectively connected, with the conduct of a trade or business within the United States, and

(ii) Will not generate in any taxable year any expense, loss, or other deduction that is allocable or apportionable to such income.

(3) *Form 8991.* Each reporting corporation that is an applicable taxpayer, as defined under § 1.59A–2(b), must make an annual information return on Form 8991. The obligation of an applicable taxpayer to report on Form 8991 does not depend on applicability of tax under section 59A or obligation to file Form 5472.

(b) * * *

(1) * * *

(ii) The name, address, and U.S. taxpayer identification number, if applicable, of all its direct and indirect foreign shareholders (for an indirect 25-percent foreign shareholder, explain the attribution of ownership); whether any 25-percent foreign shareholder is a surrogate foreign corporation under section 7874(a)(2)(B) or a member of an expanded affiliated group as defined in section 7874(c)(1); each country in which each 25-percent foreign shareholder files an income tax return as a resident under the tax laws of that country; the places where each 25-percent shareholder conducts its business; and the country or countries of organization, citizenship, and incorporation of each 25-percent foreign shareholder.

* * * * *

(2) * * *

(iv) The relationship of the reporting corporation to the related party (including, to the extent the form may prescribe, any intermediate relationships).

(3) * * * The total amount of such transactions, as well as the separate amounts for each type of transaction described below, and, to the extent the form may prescribe, any further

description, categorization, or listing of transactions within these types, must be reported on Form 5472, in the manner the form or its instructions may prescribe. * * *

* * * * *

(6) *Compilation of reportable transactions across multiple related parties.* A reporting corporation must, to the extent and in the manner Form 5472 or its instructions may prescribe, include a schedule tabulating information with respect to related parties for which the reporting corporation is required to file Forms 5472. The schedule will not require information (beyond totaling) that is not required for the individual Forms 5472. The schedule may include the following:

(i) The identity and status of the related parties;

(ii) The reporting corporation's relationship to the related parties;

(iii) The reporting corporation's reportable transactions with the related parties; and

(iv) Other items required to be reported on Form 5472.

(7) *Information on Form 5472 and Form 8991 regarding base erosion payments.* If any reporting corporation is an applicable taxpayer, as defined under § 1.59A–2(b), it must report the information required by Form 8991 and by any Form 5472 it is required to file (including the information required by their accompanying instructions), regarding:

(i) Determination of whether a taxpayer is an applicable taxpayer;

(ii) Computation of base erosion minimum tax amount, including computation of regular tax liability as adjusted for purposes of computing base erosion minimum tax amount;

(iii) Computation of modified taxable income;

(iv) Base erosion tax benefits;

(v) Base erosion percentage calculation;

(vi) Base erosion payments;

(vii) Amounts with respect to services as described in § 1.59A–3(b)(3)(i), including a breakdown of the amount of the total services cost and any mark-up component;

(viii) Arrangements or transactions described in § 1.59A–9;

(ix) Any qualified derivative payment, including:

(A) The aggregate amount of qualified derivative payments for the taxable year; and

(B) A representation that all payments satisfy the requirements of § 1.59A–6(b)(2); and

(x) Any other information necessary to carry out section 59A.

* * * * *

(c) *Method of reporting.* All statements required on or with the Form 5472 or Form 8991 under this section and § 1.6038A–5 must be in the English language. All amounts required to be reported under paragraph (b) of this section must be expressed in United States currency, with a statement of the exchange rates used, and, to the extent the forms may require, must indicate the method by which the amount of a reportable transaction or item was determined.

(d) * * * A Form 5472 and Form 8991 required under this section must be filed with the reporting corporation's income tax return for the taxable year by the due date (including extensions) of that return. * * *

* * * * *

(g) * * * Paragraph (b)(7)(ix) of this section applies to taxable years beginning June 7, 2021. Before these final regulations are applicable, a taxpayer will be treated as satisfying the reporting requirement described in § 1.59A–6(b)(2) only to the extent that it reports the aggregate amount of qualified derivative payments on Form 8991. *See* § 1.59A–6(b)(2)(iv) (transition period for qualified derivative payment reporting).

§ 1.6038A–4 [Amended]

■ **Par. 12.** For each paragraph listed in the table, remove the language in the ''Remove'' column from wherever it appears and add in its place the language in the ''Add'' column as set forth below and in paragraph (f), designate Examples 1 and 2 as paragraphs (f)(1) and (2), respectively.

Paragraph	Remove	Add
(a)(1)	$10,000	$25,000
(a)(3)	10,000	25,000
(d)(1)	10,000	25,000
(d)(4)	10,000	25,000
(f)	10,000	25,000
(f)	30,000	75,000
(f)	90,000	225,000

§ 1.6655–5 [Amended]

■ **Par. 13.** Section 1.6655–5 is amended in paragraph (e) by designating Examples 1 through 13 as paragraphs (e)(1) through (13), respectively, and by removing the language ''§ 1.1502–2(h)'' in newly designated paragraph (e)(10) and adding the language ''§ 1.1502–1(h)'' in its place.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: November 13, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2019–25744 Filed 12–2–19; 4:15 pm]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–112607–19]

RIN 1545–BP36

Additional Rules Regarding Base Erosion and Anti-Abuse Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance regarding the base erosion and anti-abuse tax imposed on certain large corporate taxpayers with respect to certain payments made to foreign related parties. The proposed regulations would affect corporations with substantial gross receipts that make payments to foreign related parties.

DATES: Written or electronic comments and requests for a public hearing must be received by February 4, 2020.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–112607–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG–112607–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–112607–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Sheila Ramaswamy, Azeka J. Abramoff, or Karen Walny at (202) 317–6938; concerning submissions of comments and requests for a public hearing, Regina Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 1 under sections 59A and 6031 of the Internal Revenue Code (the ''Code''). The Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the ''Act''), which was enacted on December 22, 2017, added section 59A to the Code. Section 59A imposes on each applicable taxpayer a tax equal to the base erosion minimum tax amount for the taxable year (the ''base erosion and anti-abuse tax'' or ''BEAT'').

The Act also added reporting obligations regarding this tax for 25-percent foreign-owned corporations subject to section 6038A and foreign corporations subject to section 6038C and addressed other issues for which information reporting under those sections is important to tax administration.

On December 21, 2018, the Treasury Department and the IRS published proposed regulations (REG–104259–18) under section 59A, and proposed amendments to 26 CFR part 1 under sections 383, 1502, 6038A, and 6655 in the **Federal Register** (83 FR 65956) (the ''2018 proposed regulations''). On December 6, 2019, the Treasury Department and the IRS published final regulations (the ''final regulations'') under sections 59A, 383, 1502, 6038A, and 6655. These proposed regulations propose other regulations under sections 59A and 6031.

Explanation of Provisions

I. Overview

These proposed regulations provide guidance under sections 59A and 6031 regarding certain aspects of the BEAT. Part II of this Explanation of Provisions describes proposed modifications to the rules set forth in the final regulations relating to how a taxpayer determines its aggregate group for purposes of determining gross receipts and the base erosion percentage. Part III of this Explanation of Provisions describes proposed regulations providing an election to waive deductions. Part IV of this Explanation of Provisions describes proposed regulations addressing the application of the BEAT to partnerships.

II. Determination of a Taxpayer's Aggregate Group

For certain purposes, including the determination of gross receipts described in section 59A(e)(2) and the base erosion percentage described in section 59A(c)(4), section 59A(e)(3) and § 1.59A–1(b)(1) generally aggregate a group of corporations (''aggregate group'') on the basis of persons treated as a single employer under section 52(a), which treats members of the same controlled group of corporations (as defined in section 1563(a) with certain modifications) as one person. To determine gross receipts, section 59A(e)(2) requires the application of rules similar to, but not necessarily the same as, section 448(c)(3)(B), (C), and (D). The 2018 proposed regulations provided rules for determining the aggregate group for applying the gross receipts test as well as the base erosion percentage test. Generally, the 2018 proposed regulations provided that each taxpayer determines its gross receipts and base erosion percentage by reference to its own taxable year, taking into account the results of other members of its aggregate group during that taxable year. *See* 2018 proposed § 1.59A–2(d)(2).

Comments to the 2018 proposed regulations recommended that the determination of gross receipts and the base erosion percentage of a taxpayer's aggregate group be made on the basis of the taxpayer's taxable year and the taxable year of each member of its aggregate group that ends with or within the applicable taxpayer's taxable year (the ''with-or-within method''). In response to the comments to the 2018 proposed regulations, the final regulations generally adopt the with-or-within method. § 1.59A–2(c)(3). The final regulations do not include specific rules regarding how the with-or-within method applies in certain situations. These proposed regulations provide guidance regarding certain applications of the aggregate group rules and request comments regarding these rules in light of the with-or-within method.

A. Rules Relating to the Determination of Gross Receipts for a Short Taxable Year

The 2018 proposed regulations provided guidance regarding the determination of gross receipts for purposes of section 59A. In the case of a taxpayer that has a short taxable year, the 2018 proposed regulations annualized the gross receipts of the taxpayer by multiplying the gross receipts for the short taxable year by 365 and dividing the result by the number of days in the short taxable year. *See* 2018 proposed § 1.59A–2(d)(7).

One comment to the 2018 proposed regulations expressed concern that determining the gross receipts of a taxpayer by annualizing a short taxable year could yield inappropriate results when combined with the rule providing that any reference to a taxpayer includes a reference to its predecessor. For example, the comment asserted that if the taxpayer has a full taxable year but a predecessor had a short taxable year, it is not clear whether the taxable year of the predecessor should be annualized first and then combined with the year of the taxpayer or whether the taxable years of the taxpayer and its predecessor should be combined first, in which case no annualization may be necessary. The final regulations do not include a rule on short taxable years. Instead, and to allow taxpayers an additional opportunity to comment, these proposed regulations provide updated guidance with respect to short taxable years (in particular, for situations when an aggregate group has a member with a short taxable year).

In the case of a taxpayer that has a short taxable year, solely for purposes of section 59A, these proposed regulations continue to annualize the gross receipts of the taxpayer by multiplying the gross receipts for the short taxable year by 365 and dividing the result by the number of days in the short taxable year. Proposed § 1.59A–2(c)(5). However, the Treasury Department and the IRS recognize that the with-or-within method in § 1.59A–2(c)(3) must be adjusted to prevent the understatement or overstatement of the gross receipts, base erosion tax benefits, and deductions of an aggregate group in the case of a taxpayer with a short taxable year. For example, the with-or-within method would completely exclude the taxable year of certain members of an aggregate group if the taxable year of those members did not end with or within the taxpayer's short taxable year.[1] In other instances, the with-or-within method combined with an annualization approach might over-count the gross receipts of other aggregate group members if the method is applied by annualizing the full taxable years of the other members of the aggregate group that end with or within the taxpayer's short taxable year. Specifically, the regulation's requirement that a taxpayer annualize gross receipts when it has a short taxable year could be read to mean that gross receipts of aggregate group members (which may have full taxable years that end with or within the taxpayer's taxable year) also be annualized on the basis of the taxpayer's short taxable year, which could result in over-counting. In light of these concerns, these proposed regulations provide that a taxpayer with a short taxable year must use a reasonable approach to determine the base erosion percentage of its aggregate group and whether the taxpayer or its aggregate group satisfies the gross receipts test and base erosion percentage in section 59A. A reasonable approach should neither over-count nor under-count the gross receipts, base erosion tax benefits, and deductions of the aggregate group of the taxpayer.

The Treasury Department and the IRS request comments on whether more specific guidance is needed, and if so, the best approach for determining the gross receipts and base erosion percentage of an aggregate group for purposes of section 59A when the applicable taxpayer or another member of an aggregate group has a short taxable year. The approach should neither over-count nor under-count the gross receipts, base erosion tax benefits, and deductions of the aggregate group. The approach should also appropriately account for short taxable years that result from a change in a taxpayer's taxable year end (in which case the preceding and following taxable years would be full taxable years) and short taxable years that result from changes in ownership, such as a joining or leaving a consolidated group (in which case the preceding or succeeding taxable year may also be a short taxable year).

B. Members Leaving and Joining an Aggregate Group

A member may join or leave the aggregate group of a taxpayer because of a change in ownership of the member such as a sale of the member to a third party. A comment to the 2018 proposed regulations requested clarity on whether the determination of gross receipts and the base erosion percentage of an aggregate group takes into account the gross receipts, base erosion tax benefits, and deductions of a member of the aggregate group for the period before the member joins the group or the period after the member leaves the group. In response to this comment, the proposed regulations provide guidance that clarifies the treatment of members that join or leave the aggregate group of a taxpayer.

To determine the gross receipts and the base erosion percentage of a taxpayer with respect to its aggregate group for purposes of section 59A, these proposed regulations take into account only items of members that occur during the period that they were members of the taxpayer's aggregate group. Proposed § 1.59A–2(c)(4). Items of members that occur before a member joins an aggregate group of a taxpayer or after a member leaves an aggregate group of a taxpayer are not taken into account by the taxpayer. Solely for purposes of determining which items occurred while a corporation was a member of an aggregate group under section 59A, a corporation is treated as having a deemed taxable year end when the corporation joins or leaves an aggregate group of a taxpayer. The taxpayer may determine items attributable to this deemed short taxable year by either deeming a close of the corporation's books or, in the case of items other than extraordinary items (as defined in § 1.1502–76(b)(2)(ii)(C)), making a pro-rata allocation. *See* proposed § 1.59A–2(c)(4). For an illustration of this proposed rule, see proposed § 1.59A–2(f)(2), Example 2.

C. Consolidated Groups

A comment to the 2018 proposed regulations expressed concern that gross receipts arising from intercompany transactions (as defined in § 1.1502–13(b)(1)) might be treated as gross receipts of the selling member (S) when S deconsolidates from a consolidated group (original consolidated group) and separately joins a different aggregate group (new aggregate group). For purposes of section 59A, the comment to the 2018 proposed regulations recommended that the gross receipts resulting from intercompany transactions in which S engaged while a member of the original consolidated group should not be counted even after S becomes a member of the new aggregate group, despite S no longer being a member of the original consolidated group.

The Treasury Department and the IRS are studying whether it is appropriate to continue to eliminate gross receipts resulting from intercompany transactions when members deconsolidate and join a different aggregate group. Furthermore, the Treasury Department and the IRS are aware of more general questions regarding the proper treatment of gross receipts when members join or deconsolidate from a consolidated group. These issues are currently under study, and the proposed regulations reserve on such issues. The Treasury Department and the IRS request comments on the appropriate treatment of a deconsolidating member's gross receipts history as it relates to the original consolidated group and the acquiring consolidated group in the context of the BEAT aggregate group.

[1] For example, assume FC, a foreign corporation, wholly owns DC1, DC2, and DC3, each domestic corporations. DC1, DC2, and DC3 each have a calendar year taxable year. Pursuant to the with-or-within method, DC1 includes in its aggregate group for Year 1 the taxable years of DC2 and DC3 ending on December 31, Year 1. Subsequently, DC1 changes its taxable year end to November 30. Accordingly, DC1 has a short taxable year beginning January 1, Year 2 and ending November 30, Year 2. No taxable year of DC2 or DC3 ends with or within the taxable year of DC1 ending November 30, Year 2. Nonetheless, it would not be appropriate to wholly exclude the gross receipts, base erosion tax benefits, and deductions of DC2 and DC3 from the aggregate group of DC1 for the taxable year ending November 30, Year 2.

D. Predecessors

For purposes of determining gross receipts, the 2018 proposed regulations provided that a reference to a taxpayer includes a reference to any predecessor of the taxpayer. 2018 proposed § 1.59A–2(c)(6)(i). The Treasury Department and the IRS, however, recognize that the aggregate groups of a taxpayer and its predecessor may overlap. As a result, an interpretation of the predecessor rule that simply adds the gross receipts of the predecessor to the gross receipts of the taxpayer's aggregate group could result in double counting of the gross receipts of corporations that are members of both aggregate groups. These proposed regulations clarify that, for purposes of section 59A, the gross receipts of those corporations included in both aggregate groups are not double counted. Proposed § 1.59A–2(c)(6)(ii). The Treasury Department and the IRS request comments on appropriate methods of taking into account predecessors for purposes of determining gross receipts of an applicable taxpayer's aggregate group. An appropriate method should avoid double-counting and address whether to take into account the taxable year of a predecessor in determining whether to annualize a short taxable year of a taxpayer.

III. Election To Waive Allowable Deductions

The final regulations provide that, in general, the base erosion percentage for a taxable year is computed by dividing (1) the aggregate amount of base erosion tax benefits (the ''numerator'') by (2) the sum of the aggregate amount of deductions allowed plus certain other base erosion tax benefits (the ''denominator''). *See* § 1.59A–2(e)(3). In general, and consistent with section 59A(c)(2), the final regulations provide that a base erosion tax benefit is any deduction that is *allowed* under chapter 1 of subtitle A of the Code for the taxable year with respect to a base erosion payment. *See* § 1.59A–3(c)(1)(i). The final regulations, consistent with section 59A(d)(1), define one category of a base erosion payment as any amount paid or accrued by the taxpayer to a foreign related party of the taxpayer and with respect to which a deduction is *allowable* under chapter 1 of subtitle A of the Internal Revenue Code. § 1.59A–3(b)(1)(i).

Comments to the 2018 proposed regulations requested that the final regulations clarify that allowable deductions that a taxpayer declines to claim on its tax return are not ''allowed'' deductions, and therefore, the foregone deductions are not base erosion tax benefits. These proposed regulations provide that a taxpayer may forego a deduction and that those foregone deductions will not be treated as a base erosion tax benefit if the taxpayer waives the deduction for all U.S. federal income tax purposes and follows specified procedures. Proposed § 1.59A–3(c)(6). If the taxpayer waives a deduction for purposes of section 59A, these proposed regulations provide that the taxpayer cannot claim the deduction for any purpose of the Code or regulations except as otherwise provided under the proposed regulations. *See* proposed § 1.59A–3(c)(6)(ii).

The Treasury Department and the IRS are concerned that in adopting this approach, absent certain procedural rules, taxpayers that waive a deduction pursuant to the proposed regulations to reduce their amount of base erosion tax benefits could benefit by using some or all of the foregone deductions in a subsequent year, while still benefiting from the reduction of base erosion tax benefits made in the prior year. Accordingly, proposed § 1.59A–3(c)(6) provides rules to address this concern. The proposed regulations also include certain reporting rules concerning deductions that are waived pursuant to the proposed regulations, and provide guidance on the time and manner for electing to waive deductions. Proposed § 1.59A–3(c)(6)(i) and (iii).

Specifically, the proposed regulations provide that as a baseline, all deductions that could be properly claimed by a taxpayer for the taxable year, determined after giving effect to the taxpayer's permissible method of accounting and to any election, (such as the election under section 173 to capitalize circulation expenditures or the election under section 168(g)(7) to use the alternative depreciation system of depreciation), are treated as allowed deductions solely for purposes of section 59A(c)(2)(A)(i), unless a taxpayer elects to waive certain deductions. *See* proposed § 1.59A–3(c)(5) and (6). As a result, if a taxpayer does not make an election to waive a deduction that could be properly claimed by a taxpayer for the taxable year pursuant to the procedures in proposed § 1.59A–3(c)(6), and the deduction otherwise meets the definition of a base erosion tax benefit, the deduction is treated as a base erosion tax benefit for purposes of section 59A. Consequently, the deduction is taken into account in the base erosion percentage, and is taken into account as an adjustment to modified taxable income. The proposed regulations provide that if a taxpayer elects to waive certain deductions, those deductions are waived for all tax purposes (except for certain purposes as explained in part III of this Explanation of Provisions) and, thus, are not taken into account as base erosion tax benefits. Proposed § 1.59A–3(c)(6)(ii)(A)(*1*). The waiver applies only to the deduction, not to the underlying cost or expense. Thus, a waiver of any portion of a deduction associated with a particular cost or expense does not cause the corresponding portion of that cost or expense not to be a ''cost'' or ''expense.''

A taxpayer may make the election to waive deductions on its original filed Federal income tax return, by an amended return, or during the course of an examination of the taxpayer's income tax return for the relevant tax year pursuant to procedures prescribed by the Commissioner. Proposed § 1.59A–3(c)(6)(iii). Unless the Commissioner prescribes specific procedures with respect to waiving deductions during the course of an examination, the same procedures that generally apply to affirmative tax return changes during an examination will apply. The Treasury Department and the IRS request comments related to the process for submitting an election under the proposed regulations during the course of an examination. The information related to this waiver must be reported on the appropriate forms, which are expected to include Form 8991, *Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts,* (or a successor form). Until these proposed regulations are final, a taxpayer choosing to rely on these proposed regulations may attach a statement to the Form 8991 to make this election and include the information listed in proposed § 1.59A–3(c)(6)(i) on that statement. A taxpayer makes the election on an annual basis, and the taxpayer does not need the consent of the Commissioner if the taxpayer chooses not to make the election for a subsequent taxable year. The proposed regulations provide that the election to waive a deduction pursuant to proposed § 1.59A–3(c)(6) is disregarded for determining (1) the taxpayer's overall method of accounting or the taxpayer's method of accounting for any item; (2) whether a change in the taxpayer's overall plan of accounting or the taxpayer's treatment of a material item is a change in method of accounting under section 446(e) and § 1.446–1(e); and (3) the amount allowable for depreciation or amortization for purposes of section 167(c) and section

1016(a)(2) or (3), and any other adjustment to basis under section 1016(a). Proposed § 1.59A–3(c)(6)(ii)(B)(*1*)–(*3*). The proposed regulations also provide that the election to waive deductions does not constitute a method of accounting under section 446. Proposed § 1.59A–3(c)(6)(ii)(C).

In addition, the proposed regulations provide that the waiver of deductions is treated as occurring before the allocation and apportionment of deductions under §§ 1.861–8 through –14T and 1.861–17 (such as for purposes of section 904). Proposed § 1.59A–3(c)(6)(ii)(A)(*2*). However, the waiver of a deduction for interest expense that is directly allocable to income produced by a particular asset should not result in the allocation and apportionment of additional interest expense to that asset. Accordingly, the proposed regulations provide that to the extent a deduction for certain interest expense is waived that would have been directly allocated and resulted in a reduction of value of any asset for purposes of allocating and apportioning other interest expense, the asset value is still reduced as if the deduction had not been waived. Proposed § 1.59A–3(c)(6)(ii)(A)(*3*).

The waiver of a deduction is also disregarded for purposes of applying the exclusive apportionment rule in § 1.861–17(b), in determining the geographic source where the research and experimental activities that account for more than fifty percent of the amount of the deduction for research and experimentation was performed. Proposed § 1.59A–3(c)(6)(ii)(B)(*4*). For example, if this exclusive apportionment rule would not apply in the absence of waiving deductions for research and experimentation performed outside the United States, then waiving those deductions will not result in the exclusive apportionment rule applying (on the basis of a smaller pool of deducted expenses, more than fifty percent of which relate to research and experimentation performed in the United States).

The waiver of a deduction is also disregarded for purposes of determining the price of a controlled transaction under section 482. Proposed § 1.59A–3(c)(6)(ii)(B)(*5*). Accordingly, in determining whether a deduction that a taxpayer reports on its Federal income tax return with respect to a controlled transaction clearly reflects the taxpayer's income with respect to the controlled transaction, the IRS will consider the amount waived as if it were actually deducted. In addition, if a taxpayer applies a transfer pricing method that uses costs or expenses as an input (such as the cost plus method described in § 1.482–3(d)), the costs or expenses associated with waived deductions continue to be treated as "costs" or "expenses" for purposes of the section 482 regulations because the waiver impacts the deductible amount only, not the amount of the underlying cost or expense.

Furthermore, the waiver of a deduction is disregarded for purposes of determining: (1) The amount of a taxpayer's earnings and profits, (2) any item as necessary to prevent a taxpayer from receiving the benefit of a waived deduction, and (3) any other item that is expressly identified in published guidance. Proposed § 1.59A–3(c)(6)(ii)(B)(*6*)–(*8*).

To ensure a taxpayer is not able to reduce the amount of its base erosion tax benefits via a waiver of deductions in a prior year and then recover the waived deductions in a subsequent year by making an accounting method change, the proposed regulations provide that, by making the election to waive deductions, the taxpayer agrees that if a change in method of accounting is made with respect to an item that had been waived, the previously waived portion of the item is not taken into account in determining the amount of adjustment under section 481(a). Proposed § 1.59A–3(c)(6)(ii)(D). For an illustration of this proposed rule, see proposed § 1.59A–3(d), Example 9. More generally, the Treasury Department and the IRS are studying the treatment of changes in method of accounting and the related section 481 adjustments for purposes of the BEAT. To the extent that a negative adjustment under section 481(a) relates to an increase in an item that would be a base erosion tax benefit, it is expected that the section 481(a) adjustment would also be taken into account as a base erosion tax benefit. In addition, the Treasury Department and the IRS are considering other consequences of adjustments under section 481(a), including (a) how positive adjustments under section 481(a) are taken into account for BEAT purposes and (b) whether a waiver similar to the waiver provided in proposed § 1.59A–3(c)(6) should be permitted with respect to negative section 481(a) adjustments.

The Treasury Department and the IRS request comments regarding the election to waive deductions, including the reporting requirements and additional rules necessary to prevent a taxpayer from claiming a waived deduction in a subsequent year. The Treasury Department and the IRS also request comments on the effect of adjustments under section 481(a) on the BEAT, including in the context of waived items.

IV. Application of the BEAT to Partnerships

A. Allocations by a Partnership of Income Instead of Deductions

In general, the final regulations treat deductions allocated by the partnership to an applicable taxpayer resulting from a base erosion payment as a base erosion tax benefit. However, the Treasury Department and the IRS are cognizant that a partner in a partnership can obtain a similar economic result if the partnership allocates income items away from the partner instead of allocating a deduction to the partner through curative allocations. To the extent the partnership places a taxpayer in such an economically equivalent position by allocating less income to that partner in lieu of allocating a deduction to the partner through curative allocations, the proposed regulations provide that the partner is similarly treated as having a base erosion tax benefit to the extent of that substitute allocation. Proposed § 1.59A–7(b)(5)(v).

B. Effectively Connected Income ("ECI")

Comments to the 2018 proposed regulations recommended that contributions of depreciable (or amortizable) property by a foreign related party to a partnership (in which an applicable taxpayer is a partner) or distributions of depreciable or amortizable property by a partnership (in which a foreign related party is a partner) to an applicable taxpayer be excluded from the definition of a base erosion payment to the extent that the foreign related party would receive (or would be expected to receive) allocations of income from that partnership interest that would be taxable to the foreign related party as ECI.

The Treasury Department and the IRS are considering additional guidance to address the treatment of a contribution by a foreign person to a partnership engaged in a U.S. trade or business, as well as transfers of partnership interests by a foreign person and transfers of property by the partnership with a foreign person as a partner to a related U.S. person. The Treasury Department and the IRS request comments addressing how these issues should be addressed, including rules to ensure that the foreign partner is treating the items allocated with respect to the property and any gain from the property as ECI.

C. Partnership Anti-Abuse Rules

1. Derivatives on Partnership Interests

Section 1.59A–9(b) of the final regulations provides that certain transactions that have a principal purpose of avoiding section 59A will be disregarded or deemed to result in a base erosion payment. These proposed regulations provide an additional anti-abuse rule relating to derivatives on partnership interests. *See* proposed § 1.59A–9(b)(5). The rule provides that a taxpayer is treated as having a direct interest in the partnership interest or asset if the taxpayer acquires a derivative on a partnership interest or asset with a principal purpose of eliminating or reducing a base erosion payment.

2. Allocations by a Partnership To Prevent or Reduce a Base Erosion Payment

The proposed regulations also provide an additional anti-abuse rule to prevent a partnership from allocating items of income with a principal purpose of eliminating or reducing the base erosion payments to a taxpayer not acting in a partner capacity on amounts paid to or accrued by a partnership that do not change the economic arrangement of the partners. For example, assume that a domestic corporation and a third party both pay equal amounts to a partnership with a foreign related party partner and an unrelated partner (each having equal interests in the partnership) for services. If the partnership allocates the income it receives from the domestic corporation to the unrelated partner while allocating an equivalent amount of income from the third party to the foreign related party partner with a principal purpose of eliminating the domestic corporation's base erosion payment, the domestic corporation must determine its base erosion payment as if the allocations had not been made and the partners shared the income proportionately. As a result, half of the domestic corporation's payment would be a base erosion payment.

D. Return of a Partnership With Respect to Base Erosion Payments and Base Erosion Tax Benefits

Pursuant to section 6031 and § 1.6031(a)–1(a), a domestic partnership must file a return of partnership income for each taxable year on the form prescribed for the partnership return. Pursuant to § 1.6031(a)–1(b), with limited exceptions, a foreign partnership that has gross income that is, or is treated as, effectively connected with the conduct of a trade or business within the United States or gross income (including gains) derived from sources within the United States must file a partnership return for its taxable year in accordance with the rules for domestic partnerships (such a foreign partnership, a ''reporting foreign partnership''). The partnership return must contain the information required by the prescribed form and the accompanying instructions. The IRS plans to update Form 1065, Schedule K, and Schedule K–1 to incorporate certain information that will be necessary for its partners to complete their Form 8991 or a successor form. The IRS expects that these revisions to the Form 1065, Schedule K, and Schedule K–1 will track the information required by the Form 8991.

As a result of these planned revisions, a domestic partnership and a reporting foreign partnership will be required to report the information required by Form 8991. *See* § 1.6031(a)–1(a) and (b)(1)(i). Proposed § 1.6031(a)–1(b)(7) provides that United States partners must determine the relevant information with respect to the base erosion payments and base erosion tax benefits of a foreign partnership that is not required to file a partnership return. For a partnership that is required to file a Form 1065 and Schedule K–1, the Commissioner is expected to receive sufficient information to examine the accuracy of the partners' liability under section 59A, including as a result of items allocated to the partner by the partnership. For a foreign partnership that is not required to file a Form 1065 and Schedule K–1, proposed § 1.6031(a)–1(b)(7) is intended to ensure that the Commissioner receives similar information from the partners of that foreign partnership.

Proposed Applicability Date

The rules in the section 59A proposed regulations generally apply to taxable years beginning on or after the date that final regulations are filed with the **Federal Register**. The rules in proposed §§ 1.59A–7(c)(5)(v) and (g)(2)(x) and 1.59A–9(b)(5) and (6) apply to taxable years ending on or after December 2, 2019. As proposed, the section 59A regulations will permit taxpayers to apply the rules therein in their entirety for taxable years beginning after December 31, 2017, and before the regulations apply. See section 7805(b)(7). If a taxpayer applies the 2018 proposed regulations to a taxable year ending on or before December 6, 2019, the determination as to whether the taxpayer is applying these proposed regulations in their entirety to such taxable year is made without regard to the application of § 1.59A–2(c)(2)(ii), (c)(4), (c)(5), and (c)(6).

In addition, taxpayers may rely on the rules in the section 59A proposed regulations in their entirety for taxable years beginning after December 31, 2017, and before the final regulations are applicable.

The rules in the section 6031(a) proposed regulations generally apply to taxable years ending on or after the date that final regulations are filed with the **Federal Register**.

Special Analyses

Regulatory Planning and Review—Economic Analysis

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Executive Order 13771 designation for any final rule resulting from the proposed regulation will be informed by comments received. The preliminary Executive Order 13771 designation for this proposed regulation is regulatory.

These proposed regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs (OIRA) has designated these proposed regulations as significant under section 1(b) of the MOA. Accordingly, these proposed regulations have been reviewed by OIRA.

A. Background

The Tax Cuts and Jobs Act of 2017 (the ''Act'') added new section 59A, which imposes a Base Erosion and Anti-Abuse Tax (''BEAT'') on certain deductions paid or accrued to foreign related parties. By taxing such payments, the BEAT ''aims to level the playing field between U.S. and foreign-owned multinational corporations in an administrable way.'' Senate Committee on Finance, Explanation of the Bill, S. Prt. 115–20, at 391 (November 22, 2017).

In plain language, the tax is levied only on corporations with substantial gross receipts (a determination referred to as the gross receipts test) and for which the relevant deductions are three percent or higher (two percent or higher in the case of certain banks or registered securities dealers) of their total deductions (with certain exceptions), a determination referred to as the base erosion percentage test. This cut-off for the base erosion percentage test is referred to in these Special Analyses as the base erosion threshold.

A taxpayer that satisfies both the gross receipts test and the base erosion percentage test is referred to as an applicable taxpayer. A taxpayer is not an applicable taxpayer, and thus does not have any BEAT liability, if its base erosion percentage is less than the base erosion threshold.

Additional features of the BEAT also enter its calculation. The BEAT operates as a minimum tax, so an applicable taxpayer is only subject to additional tax under the BEAT if the tax at the BEAT rate multiplied by the taxpayer's modified taxable income exceeds the taxpayer's regular tax liability, reduced by certain credits. Because of this latter provision, the BEAT formula has the effect of imposing the BEAT on the amount of those tax credits. In general, tax credits are subject to the BEAT except the research credit under section 41, and a portion of low income housing credits, renewable electricity production credits under section 45, and certain investment tax credits under section 46. Notably, this means that the foreign tax credit is currently subject to the BEAT. In taxable years beginning after December 31, 2025, all tax credits are subject to the BEAT.

B. Need for the Proposed Regulations

Section 59A does not explicitly state whether an amount that is permitted as a deduction under the Code or regulations but that is not claimed as a deduction on a taxpayer's tax return is potentially a base erosion tax benefit for purposes of the BEAT and the base erosion percentage test. Comments recommended that the Treasury Department and the IRS clarify the treatment of amounts that are allowable as a deduction but not claimed as a deduction on a taxpayer's tax return. These proposed regulations are needed to respond to these comments and to clarify the treatment of these amounts under section 59A. The proposed regulations are also needed to clarify certain aspects of the rules set forth in the final regulations relating to how a taxpayer determines its aggregate group for purposes of determining gross receipts and the base erosion percentage, and how the BEAT applies to partnerships.

C. Overview of the Proposed Regulations

The proposed regulations provide taxpayers an election to waive deductions that would otherwise be taken into account in determining whether the taxpayer is an applicable taxpayer subject to the BEAT. This change is analyzed in part D of these Special Analyses.

These proposed regulations also include modifications to the rules set forth in the final regulations relating to how a taxpayer determines its aggregate group for purposes of determining gross receipts and the base erosion percentage, and how the BEAT applies to partnerships. These latter modifications to the existing final rule are not expected to result in any substantial changes in taxpayer behavior.

D. Economic Analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of the proposed regulations compared to a no-action baseline that reflects anticipated Federal income tax-related behavior in the absence of these proposed regulations.

2. Economic Effects of the Election To Waive Deductions (Part III of the Explanation of Provisions)

a. Background and Alternatives Considered

Section 59A does not explicitly state whether an amount that is permitted as a deduction under the Code or regulations but that is not claimed as a deduction on the taxpayer's tax return is potentially a base erosion tax benefit for the purposes of the base erosion percentage test. A taxpayer may find waiving certain deductions advantageous if the waived deductions lower the taxpayer's base erosion percentage below the base erosion threshold, thus making section 59A inapplicable to the taxpayer. Comments recommended that the Treasury Department and the IRS clarify the treatment of allowable amounts that are not claimed as a deduction on the taxpayer's tax return for purposes of section 59A.

To address concerns about the treatment of these amounts permitted as deductions under law, the Treasury Department and the IRS considered two alternatives for the proposed guidance: (1) Providing that all deductions that could be properly claimed by a taxpayer for the taxable year are taken into account for purposes of the base erosion percentage test (and for other purposes of the BEAT) even if a deduction is not claimed on the taxpayer's tax return (the ''alternative regulatory approach''); or (2) providing that an allowable deduction that a taxpayer does not claim on its tax return is not taken into account in the base erosion percentage test or for other purposes of the BEAT, provided that certain procedural steps are followed. The proposed regulations adopt the latter approach.

Under the alternative regulatory approach, base erosion payments allowable as deductions but not claimed by a taxpayer would nonetheless be taken into account in the base erosion percentage. Thus, a taxpayer could not avoid satisfying the base erosion percentage test by not claiming certain deductions. Under the proposed regulations, base erosion payments allowable as deductions but waived by a taxpayer are not taken into account in the base erosion percentage test, assuming certain procedural steps are followed. The waived deductions are waived for all U.S. federal income tax purposes and thus, for example, the deductions are also not allowed for regular income tax purposes. If the taxpayer is not an applicable taxpayer because it waives deductions so as not to satisfy the base erosion percentage test, the taxpayer may continue to claim deductions for base erosion payments that are not waived, provided these deductions would otherwise be allowed.

b. Example

Consider a U.S.-parented multinational enterprise that satisfies the gross receipts test and that is not a bank or registered securities dealer. The U.S. corporation has gross income from domestic sources of \$1000x and also has a net global intangible low-taxed income (''GILTI'') inclusion of \$500x.[2] The taxpayer has \$870x of deductions pertinent to this example that are not base erosion tax benefits and \$30x of deductions that are base erosion tax benefits. It is also assumed that the amount of foreign tax credits permitted under section 904(a) is \$105x. This taxpayer's regular U.S. taxable income is \$600x (\$1000x + \$500x − \$870x − \$30x), its regular U.S. tax rate is 21.0 percent, and its regular U.S. tax liability is \$21x (\$600x × 21% = \$126x, less

[2] For simplification of this example, the \$500x GILTI income is presented as the net of the global intangible low-tax income amount of the domestic corporation under section 951A, plus the section 78 gross up amount for foreign taxes, less the GILTI deduction under section 250(a)(1)(B). The deduction under section 250(a)(1)(B) is not taken into account in determining the base erosion percentage. See section 59A(c)(4)(B)(i).

foreign tax credits of $105x ($126x − $105x)).

Under the alternative regulatory approach, the taxpayer is an applicable taxpayer because its base erosion percentage is 3.33 percent ($30x/$900x), which is greater than the three percent base erosion threshold. Because the taxpayer is subject to the BEAT, it must further compute its modified taxable income, which is $630x—its regular U.S. taxable income ($600x) plus its base erosion tax benefits ($30x). The taxpayer determines its base erosion minimum tax amount as the excess of the BEAT rate (10 percent) multiplied by its modified taxable income $63x ($630x × 10%) over its regular U.S. tax liability of $21x, which is equal to $42x ($63x − $21x). In this example the total U.S. tax bill is $63x ($21x of regular tax and $42x of BEAT).

Under the proposed regulations, this taxpayer would have the option to waive all or part of its deductions that are base erosion payments so that its base erosion percentage would fall below the base erosion threshold. Specifically, the taxpayer could waive $3.10x of its deductions that are base erosion payments, yielding a base erosion percentage of less than the three percent base erosion threshold (base erosion tax benefits = $26.90x ($30x − $3.10x); base erosion percentage = $26.90x/($870x + $26.90x) = 2.99%). After taking into account this waiver, the taxpayer's regular taxable income would increase to $603.10x ($1000x + $500x − $870x − $26.90x), and its regular tax liability would increase to $21.65x ($603.10x × 21% = $126.65, less foreign tax credits of $105x = $21.65x).[3] The waiver is valuable to this taxpayer because its tax bill in this simple example is lower by $41.35x ($63x − $21.65x).

This example shows the difference in tax liability caused by allowing deductions to be waived and thus, the difference between the proposed regulations and the alternative regulatory approach. The next part D.2.c of these Special Analyses discusses the behavioral incentives and economic effects that can result from this tax treatment.

c. Economic Effects of These Proposed Regulations

The proposed regulations effectively allow a taxpayer to make payments that would be base erosion payments without becoming an applicable taxpayer. This provision reduces the effective tax on base erosion payments for at least some taxpayers, relative to the alternative regulatory approach. Because of this reduction, the proposed regulations may lead to a higher amount of base erosion payments than under the alternative regulatory approach.

Any additional base erosion payments under the proposed regulations would come from taxpayers who, under the alternative regulatory approach, would not be applicable taxpayers but would be close to being applicable taxpayers; that is, they would have base erosion percentages that were close to but below the base erosion threshold.

Taxpayers that would be applicable taxpayers under the alternative regulatory approach will not increase their base erosion payments under the proposed regulations. To see this point, consider an applicable taxpayer under the alternative regulatory approach with base erosion payments of $Y. If this taxpayer were to increase its base erosion payments by $10 and reduce its non-base erosion payments by $10 (that is, it has substituted base erosion payments for non-base erosion payments), its tax bill would generally increase by $1. The fact that this taxpayer chose base erosion payments of $Y rather than $Y+10 suggests that this substitution would be worth less than $1 to the taxpayer. The substitution is not worth the increased tax. Next consider this taxpayer under the proposed regulations. If it elects to waive sufficient deductions such that it is not an applicable taxpayer, then the marginal increase in its tax bill from the hypothetized substitution is $2.10. Thus, if this increase in base erosion payments (and substitution away from non-base erosion payments) is not worthwhile to the taxpayer under the alternative regulatory approach, it will not be worthwhile under the proposed regulations.

This example suggests that to the extent that there is any increase in base erosion payments under the proposed regulations, it will not come from taxpayers that would be applicable taxpayers under the alternative regulatory approach and will instead come from those taxpayers that would not be applicable taxpayers under the alternative regulatory approach. These taxpayers would be able, under the proposed regulations, to take on activities that increase their base erosion payments but, by waiving all or part of the deduction for these activities, avoid crossing the base erosion threshold. This is the set of taxpayers that will be the source of any economic effects arising from the proposed regulations.

As a result of the ability to waive deductions in the proposed regulations, taxpayers may change business behavior in two possible ways. First, businesses may expand economic activities in the United States even if those activities result in payments to foreign related parties (*i.e.,* base erosion payments). For example, under the alternative regulatory approach a multinational enterprise may decide not to open an office or manufacturing plant in the United States if that incremental activity also resulted in incremental base erosion payments that would cause the taxpayer to become an applicable taxpayer. Under the proposed regulations, this business can expand its activities in the U.S. and avoid becoming an applicable taxpayer, provided it waived sufficient deductions to stay below the base erosion threshold.

Second, businesses already operating in the United States may not be discouraged from structuring transactions as base erosion payments under the proposed regulations. Under the alternative regulatory approach, a business might conduct its transactions through unrelated parties rather than with a foreign related party so that its base erosion percentage would remain below the base erosion threshold. Under the proposed regulations, this business could use a foreign related party rather than an unrelated party for these transactions, without paying the BEAT, again provided it waived sufficient deductions to stay below the base erosion threshold.

In each of these cases, a business adopting these strategies would be presumed to accrue a non-tax, economic benefit from using a foreign related party rather than an unrelated party to conduct this aspect of its business. Under the proposed regulations, there is no U.S. tax-related benefit tax associated with transacting with a foreign related party and thus any decisions made by a business to make a base erosion payment would occur because of the economic advantage it provides to the business, rather than that payment being avoided, diverted or otherwise distorted because it would result in the taxpayer becoming an applicable taxpayer subject to the BEAT. This economic advantage might arise, for example, because the business has a closer relationship with the foreign related party and its transactions with the foreign related party provide enhanced managerial control. This economic benefit accruing to this business would generally be beneficial to the U.S. economy; this is

[3] Although the waiver increases the taxpayer's regular taxable income, the taxpayer's gross income (in the context of this example) is unchanged. Thus, only the tax liability needs to be compared across the regulatory approaches to determine whether the taxpayer would benefit from waiving deductions.

particularly true in the first case described in the preceding paragraphs. While taxpayers may have compliance costs related to deciding whether to waive deductions and ensuring that procedural rules are followed, any changes in compliance costs are expected to be small because the accounting required for the relevant deductions is essentially the same under both the proposed regulations and the alternative regulatory approach.

Note that under the proposed regulations, a taxpayer would in general face a marginal tax rate that is 21 percentage points higher on its base erosion payments than on comparable deductions that are not base erosion payments. Economic analysis would conclude that the business will undertake a base erosion payment rather than a non-base erosion payment only if it provides a non-tax benefit at least this large. Businesses will choose a different mix of base erosion and non-base erosion payments under the alternative regulatory approach, but an analogous inference about the marginal value of a base erosion payment here (and thus of the difference between the proposed regulations and the alternative regulatory approach) is more complex because the marginal tax incurred by base erosion payments near the base erosion threshold depends on (i) how close the taxpayer would be to the threshold; (ii) the quantity of its base erosion payments that are below the base erosion threshold and subject to tax if the base erosion threshold is exceeded; and (iii) other factors affecting the potential BEAT liability. Because of these factors, the difference in the non-tax value to businesses of a marginal base erosion payment between the proposed regulations and alternative regulatory approach is complex and not readily inferred.

This said, as a general matter, for taxpayers who chose to waive deductions under the proposed regulations in order not to be applicable taxpayers, the Treasury Department and the IRS expect that relative to the alternative regulatory approach, the proposed regulations would tend to:

- Reduce tax costs of additional economic activity in the United States by those taxpayers in the situation where additional economic activity in the United States would tend to increase base erosion payments;
- Reduce tax-related incentives for otherwise economically inefficient business, contractual or accounting changes designed to avoid the taxpayer being an applicable taxpayer;
- Continue to fulfill the general intent and purpose of the statute by not providing tax incentives for certain large corporations to make deductible payments to foreign related parties in excess of 3 percent of the taxpayer's deductions; and
- Reduce the number of taxpayers that are applicable taxpayers and the overall amount of BEAT collected. This revenue effect is likely to be offset to some degree by the fact that some taxpayers are likely to elect to waive allowable deductions.

The Treasury Department and the IRS have not attempted to provide a quantitative estimate of the economic consequences of the proposed regulations relative to the alternative regulatory approach. Any increase in base erosion payments under the proposed regulations depends on the number of taxpayers that would be close to the base erosion threshold under the alternative regulatory approach, the quantity of base erosion payments they would have under the alternative regulatory approach, and, most importantly, the economic value provided by those base erosion payments relative to alternative economic decisions. These items are difficult to estimate with any reasonable precision in part because they involve economic activities, including potential new economic activity in the United States, that cannot be readily inferred from existing data or models available to the Treasury Department and the IRS.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the proposed regulations relative to the alternative regulatory approach.

The Treasury Department and the IRS solicit comments on these findings and more generally on the economic effects of these proposed regulations. The Treasury Department and the IRS particularly solicit data, other evidence, or models that could be used to enhance the rigor of the process by which the final regulations might be developed.

d. Number of Affected Taxpayers

These proposed regulations affect all corporate taxpayers that satisfy the gross receipts test, base erosion percentage test, and have base erosion payments. The Treasury Department and the IRS project that 3,500–4,500 taxpayers may be applicable taxpayers under the BEAT. This estimate is based on the number of filers that (1) filed the Form 1120 series of tax returns (except for the Form 1120–S), (2) filed a Form 5471 or Form 5472, and (3) reported gross receipts of at least $500 million. Because an applicable taxpayer is defined under section 59A(e)(1)(A) as a corporation other than a regulated investment company, a real estate investment trust, or an S corporation, the Treasury Department and the IRS have determined that taxpayers who filed the Form 1120 series of tax returns will be most likely to be affected by these proposed regulations. Additionally, the Treasury Department and the IRS estimated the number of filers likely to make payments to a foreign related party based on filers of the Form 1120 series of tax returns who also filed a Form 5471 or Form 5472 to determine the number of respondents. Finally, because an applicable taxpayer is defined under section 59A(e)(1)(B) as a taxpayer with average annual gross receipts of at least $500 million for the 3-taxable-year period ending with the preceding taxable year, the Treasury Department and the IRS estimated the scope of Affected Taxpayers based on the amount of gross receipts reported by taxpayers filing the Form 1120 series of tax returns.

These projections are based solely on data with respect to the taxpayer, without taking into account any members of the taxpayer's aggregate group. As many as 100,000–110,000 additional taxpayers may be applicable taxpayers as a result of being members of an aggregate group.[4] This estimate is based on the number of taxpayers who filed a Form 1120 and also filed a Form 5471 or a Form 5472, but without regard to the gross receipts test. Current data do not permit an estimate of the number of taxpayers that would be close to the base erosion threshold.

E. Paperwork Reduction Act

The collections of information in these proposed regulations with respect to section 59A are in proposed §§ 1.59A–3(c)(5), and 1.6031(a)–1(b)(7). The collection of information in proposed §§ 1.59A–3(c)(5) is an election to waive deductions allowed under the Code. The election to waive deductions is made by a taxpayer on its original or amended income tax return. A taxpayer makes the election on an annual basis by completing Form 8991 or as provided in applicable instructions. The IRS is contemplating making additional changes to the Form 8991 to take these proposed regulations into account.

The collection of information in proposed § 1.6031(a)–1(b)(7) requires a partner in a foreign partnership that: (1)

[4] These estimates are based on current tax filings for taxable year 2017 and do not yet include the BEAT. At this time, the Treasury Department and the IRS do not have readily available data to determine whether a taxpayer that is a member of an aggregate group will meet all tests to be an applicable taxpayer for purposes of the BEAT.

Is not required to file a partnership return and (2) has made a payment or accrual that is treated as a base erosion payment of a partner under § 1.59A–7(b)(2), to provide the information necessary to report any base erosion payments on Form 8991. The IRS intends that this information will be collected by completing Form 8991, *Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts,* Form 1065, and Schedule K–1. The IRS is contemplating making revisions to Form 1065, Schedule K, and Schedule K–1 to take these proposed regulations into account.

For purposes of the Paperwork Reduction Act, the reporting burden associated with the collections of information with respect to section 59A, will be reflected in the Paperwork Reduction Act Submission, associated with Form 8991 (OMB control number 1545–0123).

The current status of the Paperwork Reduction Act submissions related to BEAT is provided in the following table. The BEAT provisions are included in aggregated burden estimates for the OMB control numbers listed below which, in the case of 1545–0123, represents a total estimated burden time, including all other related forms and schedules for corporations, of 3.157 billion hours and total estimated monetized costs of $58.148 billion ($2017). The burden estimates provided in the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the OMB control number, and will in the future include but not isolate the estimated burden of only the BEAT requirements. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. The Treasury Department and IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burden that international tax provisions imposed prior to the Act. No burden estimates specific to the proposed regulations are currently available. The Treasury Department has not estimated the burden, including that of any new information collections, related to the requirements under the proposed regulations. Those estimates would capture both changes made by the Act and those that arise out of discretionary authority exercised in the proposed regulations. The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the proposed regulations. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm.*

Form	Type of filer	OMB No.(s)	Status
Form 8991	Business (NEW Model) Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd.*	1545–0123	Published in the FRN on 10/11/18. Public Comment period closed on 12/10/18.

RELATED NEW OR REVISED TAX FORMS

	New	Revision of existing form	Number of respondents (2018, estimated)
Form 8991	Y		3,500–4,500

The number of respondents in the Related New or Revised Tax Forms table was estimated by Treasury's Office of Tax Analysis based on data from IRS Compliance Planning and Analytics using tax return data for tax years 2015 and 2016. Data for Form 8991 represent preliminary estimates of the total number of taxpayers which may be required to file the new Form 8991. Only certain large corporate taxpayers with gross receipts of at least $500 million are expected to file this form.

F. Regulatory Flexibility Act

It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that these regulations will primarily affect aggregate groups of corporations with average annual gross receipts of at least $500 million and that make payments to foreign related parties. Generally only large businesses both have substantial gross receipts and make payments to foreign related parties.

Notwithstanding this certification, the Treasury Department and the IRS invite comments from the public about the impact of this proposed rule on small entities.

Pursuant to section 7805(f), these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2019, that threshold is approximately $154 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

H. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Comments and Request for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the ''Addresses'' heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. See also parts II and III of the Explanation of Provisions (requesting specific comments related to the aggregate group rules in light of the with-or-without method and the election to waive allowable deductions, respectively) and parts II.C., II.D., and IV.B. of the Explanation of Provisions (requesting specific comments related to the appropriate treatment of a deconsolidating member's gross receipts history, appropriate methods of taking into account predecessors and successors for purposes of determining gross receipts of an applicable taxpayer's aggregate group, and the treatment of transactions involving partnerships engaged in a U.S. trade or business, respectively).

All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of the proposed regulations are Azeka J. Abramoff, Sheila Ramaswamy and Karen Walny of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section1.59A–2, as added in a final rule published elsewhere in this issue of the **Federal Register**, effective December 6, 2019, is amended by adding paragraphs (c)(2)(ii), (c)(4) through (6), and paragraph (f)(2) to read as follows:

§ 1.59A–2 Applicable taxpayer.

* * * * *

(c) * * *

(2) * * *

(ii) *Change in the composition of an aggregate group.* A change in ownership of the taxpayer (for example, a sale of the taxpayer to a third party) does not cause the taxpayer to leave its own aggregate group. Instead, any members of the taxpayer's aggregate group before the change in ownership that are no longer members following the change in ownership are treated as having left the taxpayer's aggregate group, and any new members that become members of the taxpayer's aggregate group following the change in ownership are treated as having joined the taxpayer's aggregate group. A change in ownership of another member of the aggregate group of the taxpayer (for example, a sale of the member to a third party) may result in the member joining or leaving the aggregate group of the taxpayer. See paragraph (c)(4) of this section for the treatment of members joining or leaving the aggregate group of a taxpayer.

* * * * *

(4) *Periods before and after a corporation is a member of an aggregate group.* Solely for purposes of this section, to determine the gross receipts and the base erosion percentage of the aggregate group of a taxpayer, the taxpayer takes into account only the portion of another corporation's taxable year during which the corporation is a member of the aggregate group of the taxpayer. The gross receipts of an aggregate group of a taxpayer attributable to a member of the aggregate group are not reduced as a result of the member leaving the aggregate group of the taxpayer. Solely for purposes of this paragraph (c), when a member joins or leaves the aggregate group of a taxpayer in a transaction that does not result in the member having a taxable year-end, the member is treated as having a taxable year end (deemed taxable year-end) immediately before joining or leaving the group. For purposes of this paragraph (c)(4), a corporation that has a deemed taxable year-end may determine gross receipts, base erosion tax benefits, and deductions attributable to that year by either treating the corporation's books as closing at the deemed taxable year-end or, in the case of items other than extraordinary items (as defined in § 1.1502–76(b)(2)(ii)(C)), allocating those items on a pro-rata basis without a closing of the books.

(5) *Treatment of short taxable year.* Solely for purposes of this section, if a taxpayer has a taxable year of fewer than 12 months (a short period), gross receipts are annualized by multiplying the gross receipts for the short period by 365 and dividing the result by the number of days in the short period. When a taxpayer has a taxable year that is a short period, the taxpayer must use a reasonable approach to determine the gross receipts and base erosion percentage of its aggregate group for the short period. A reasonable approach should neither over-count nor under-count the gross receipts, base erosion tax benefits, and deductions of the aggregate group of the taxpayer, even if the taxable year of a member or members of the aggregate group does not end with or within the short period.

(6) *Treatment of predecessors*—(i) *In general.* Solely for purposes of this section, in determining gross receipts under paragraph (d) of this section, any reference to a taxpayer includes a reference to any predecessor of the taxpayer. For this purpose, a predecessor includes the distributor or transferor corporation in a transaction described in section 381(a) in which the taxpayer is the acquiring corporation.

(ii) *No duplication.* If the taxpayer or any member of its aggregate group is also a predecessor of the taxpayer or any member of its aggregate group, the gross receipts, base erosion tax benefits, and deductions of each member are taken into account only once.

* * * * *

(f) * * *

(2) *Example 2: Member leaving an aggregate group*—(i) *Facts.* Parent Corporation wholly owns Corporation 1 and Corporation 2. Each corporation is a domestic corporation and a calendar year taxpayer that does not file a consolidated return. The aggregate group of Corporation 1 includes Parent Corporation and Corporation 2. At noon on June 30, Year 1, Parent Corporation sells the stock of Corporation 2 to Corporation 3, an unrelated domestic corporation, in exchange for cash consideration. Before the acquisition, Corporation 3 was not a member of an aggregate group. Corporation 2 and Corporation 3 do not file a consolidated return.

(ii) *Analysis.* (A) For purposes of section 59A, to determine the gross receipts and base erosion percentage of the aggregate group of Corporation 1 for calendar Year 1, Corporation 2 is treated as having a taxable year end immediately before noon on June 30, Year 1, as a result of the sale. The aggregate group of Corporation 1 takes into account only the gross receipts, base erosion tax benefits, and deductions of Corporation 2 attributable to the period from January 1 to immediately before noon on June 30 of Year 1. The same results apply to the aggregate group of Parent Corporation for calendar Year 1.

(B) For purposes of section 59A, to determine the gross receipts and base erosion percentage of the aggregate group of Corporation 2 for calendar Year 1, each of Parent Corporation, Corporation 1, and Corporation 3 are treated as having a taxable year end at immediately before noon on June 30, Year 1. Because Corporation 2 does not have a short taxable year, paragraph (c)(5) of this section does not apply. The aggregate group of Corporation 2 takes into account the gross receipts, base erosion tax benefits, and deductions of Parent Corporation and Corporation 1 attributable to the period from January 1 to immediately before noon on June 30 of Year 1, and the gross receipts, base erosion tax benefits, and deductions of Corporation 3 attributable to the period from noon on June 30 to December 31 of Year 1.

■ **Par. 3.** Section 1.59A–3, as added in a final rule published elsewhere in this issue of the **Federal Register**, effective December 6, 2019, is amended by adding paragraphs (c)(5) and (6) and (d)(8) and (9) to read as follows:

§ 1.59A–3 Base erosion payments and base erosion tax benefits.

* * * * *

(c) * * *

(5) *Allowed deduction.* Solely for purposes of paragraph (c)(1) of this section, all deductions that could be properly claimed by a taxpayer for the taxable year (determined after giving effect to the taxpayer's permissible method of accounting and to any election, such as the election under section 173 to capitalize circulation expenditures or the election under section 168(g)(7) to use the alternative depreciation system of depreciation) are treated as allowed deductions under chapter 1 of subtitle A of the Internal Revenue Code.

(6) *Election to waive allowed deductions*—(i) *In general.* Solely for purposes of paragraph (c)(1) of this section, if a taxpayer elects to waive certain deductions, the amount of allowed deductions as defined in paragraph (c)(5) of this section is reduced by the amount of deductions that are properly waived under this paragraph (c)(6)(i). To make this election, a taxpayer must provide information related to each deduction waived as required by applicable forms and instructions issued by the Commissioner, including—

(A) A detailed description of the item or property to which the deduction relates, including sufficient information to identify that item or property on the taxpayer's books and records;

(B) The date on which, or period in which, the waived deduction was paid or accrued;

(C) The provision of the Internal Revenue Code (and regulations, as applicable) that allows the deduction for the item or property to which the election relates;

(D) The amount of the deduction that is claimed for the taxable year with respect to the item or property;

(E) The amount of the deduction being waived for the taxable year with respect to the item or property;

(F) A description of where the deduction is reflected (or would have been reflected) on the Federal income tax return (schedule and line number); and

(G) The name, EIN (if applicable), and country of organization of the foreign related party that is or will be the recipient of the payment that generates the deduction.

(ii) *Effect of election to waive deduction*—(A) *In general*—(*1*) *Consistent treatment.* Except as otherwise provided in this paragraph (c)(6)(ii), any deduction waived under paragraph (c)(6) of this section is treated as having been waived for all purposes of the Code and regulations.

(*2*) *No allocation and apportionment of waived deductions.* The waiver of deductions described in this paragraph (c)(6) is treated as occurring before the allocation and apportionment of deductions under §§ 1.861–8 through –14T and 1.861–17 (such as for purposes of section 904).

(*3*) *Effect of waiver of deductions described in §§ 1.861–10 and § 1.861–10T.* To the extent that any waived deduction is interest expense that would have been directly allocated under the rules of §§ 1.861–10 or § 1.861–10T and would have resulted in the reduction of value of any assets for purposes of allocating other interest expense under §§ 1.861–9 and 1.861–9T, the value of the assets is reduced to the same extent as if the taxpayer had not elected to waive the deduction.

(B) *Effect of the election to waive deductions disregarded for certain purposes.* If a taxpayer makes the election to waive a deduction, in whole or in part, under paragraph (c)(6)(i) of this section, the election is disregarded for determining—

(*1*) The taxpayer's overall method of accounting, or the taxpayer's method of accounting for any item, under section 446 and the regulations in this part under section 446;

(*2*) Whether a change in the taxpayer's overall plan of accounting or the taxpayer's treatment of a material item is a change in method of accounting under section 446(e) and § 1.446–1(e);

(*3*) The amount allowable under subtitle A of the Code for depreciation or amortization for purposes of section 167(c) and section 1016(a)(2) or section 1016(a)(3) and any other adjustment to basis under section 1016(a);

(*4*) For purposes of applying the exclusive apportionment rule in § 1.861–17(b), the geographic source where the research and experimental activities which account for more than fifty percent of the amount of the deduction for research and experimentation was performed;

(*5*) The application of section 482 and the regulations under section 482;

(*6*) The amount of the taxpayer's earnings and profits; and

(*7*) Any other item as necessary to prevent a taxpayer from receiving the benefit of a waived deduction.

(C) *Not a method of accounting.* The election described in paragraph (c)(6)(i) of this section is not a method of accounting under section 446 and the regulations in this part under section 446.

(D) *Effect of the election in determining section 481(a) adjustments.* A taxpayer making the election described in paragraph (c)(6)(i) of this section agrees that if the method of accounting for a waived deduction is changed, the amount of adjustment taken into account under section 481(a)(2) is determined without regard to the election described in paragraph (c)(6)(i) of this section. As a result, a waived deduction has no effect on the amount of a section 481(a) adjustment compared to what the adjustment would have been if the deduction had not been waived.

(iii) *Time and manner for election to waive deduction.* A taxpayer may make the election described in paragraph (c)(6)(i) of this section on its original filed Federal income tax return. In addition, a taxpayer may elect to waive deductions or increase the amount of deductions waived pursuant to the election described in paragraph (c)(6)(i) of this section on an amended Federal income tax return filed within the later of 3 years from the date the original return was filed, taking into account section 6501(b)(1), for the taxable year for which the election is made or the period described in section 6501(c)(4), or during the course of an examination of the taxpayer's income tax return for the relevant tax year pursuant to procedures prescribed by the Commissioner. However, a taxpayer may not decrease the amount of deductions waived by the election, or otherwise revoke the election that is described in paragraph (c)(6)(i) of this section on any amended Federal income tax return or during the course of an examination. To make the election, a taxpayer must complete the appropriate part of Form 8991, *Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts,* (or successor), including the information described in paragraph (c)(6)(i) of this section and any other information required by the form or instructions. A taxpayer makes the election described in paragraph (c)(6)(i) of this section on an annual basis, and the taxpayer does not need the consent of the Commissioner if the taxpayer chooses not to make the election for a subsequent taxable year. The election described in paragraph (c)(6)(i) of this section may not be made in any other manner (for example, by filing an application for a change in accounting method).

(d) * * *

(8) *Example 8: Effect of election to waive deduction on method of accounting*—(i) *Facts.* DC, a domestic corporation, purchased and placed in service a depreciable asset (Asset A) from a foreign related party on the first day of its taxable year 1 for $100x. DC elects to use the alternative depreciation system under section 168(g) to depreciate all properties placed in service during taxable year 1. Asset A is not eligible for the additional first year depreciation deduction. Beginning in taxable year 1, DC depreciates Asset A under the alternative depreciation system using the straight-line depreciation method, a 5-year recovery period, and the half-year convention. This depreciation method, recovery period, and convention are permissible for Asset A under section 168(g). On its timely filed original Federal income tax return for taxable year 1, DC does not elect to waive any deductions and DC claims a depreciation deduction of $10x for Asset A. On its timely filed original Federal income tax return for taxable year 2, DC does not elect to waive any deductions and DC claims a depreciation deduction of $20x for Asset A. During taxable year 3, DC files an amended return for taxable year 1 to elect to waive the depreciation deduction for Asset A and reports in accordance with paragraph (c)(6)(i) of this section with its amended return for taxable year 1 that the amount of the waived depreciation deduction for Asset A is $10x and the amount of the claimed depreciation deduction is $0x.

(ii) *Analysis*— Pursuant to paragraph (c)(6)(ii)(B)(*1*) of this section, DC's election to waive the depreciation deduction for Asset A for taxable year 1 is disregarded for determining DC's method of accounting for Asset A. Accordingly, after DC's election to waive the depreciation deduction for Asset A for taxable year 1, DC's method of accounting for depreciation for Asset A continues to be the straight-line depreciation method, a 5-year recovery period, and the half-year convention. Pursuant to paragraph (c)(6)(ii)(C) of this section, the election made by DC in taxable year 3 on its amended return for taxable year 1 is not a method of accounting.

(9) *Example 9: Change of accounting method when taxpayer has waived a deduction*—(i) *Facts.* DC, a domestic corporation, purchased and placed in service a depreciable asset (Asset B) from a foreign related party on the first day of its taxable year 1 for $100x. DC elects to use the alternative depreciation system under section 168(g) to depreciate all properties placed in service during taxable year 1. Asset B is not eligible for the additional first year depreciation deduction. Beginning in taxable year 1, DC depreciates Asset B under the alternative depreciation system using the straight-line depreciation method, a 10-year recovery period, and the half-year convention. Under this method of accounting, the depreciation deductions for Asset B are $5x for taxable year 1 and $10x for taxable year 2. However, for taxable years 1 and 2, DC elects to waive $3x and $6x, respectively, of the depreciation deductions for Asset B and reports the information required under paragraph (c)(6)(i) of this section with its returns. In taxable year 3, DC realizes that the correct recovery period for Asset B is 5 years. If DC had used the correct recovery period for Asset B, the depreciation deductions for Asset B would have been $10x for taxable year 1 and $20x for taxable year 2. DC timely files a Form 3115 to change its method of accounting for Asset B from a 10-year recovery period to a 5-year recovery period, beginning with taxable year 3. DC was not under examination as of the date on which it timely filed this Form 3115.

(ii) *Analysis*—(A) *Computation of the section 481(a) adjustment.* In determining the net negative section 481(a) adjustment for this method change, DC compares the depreciation deductions under its present method of accounting to the depreciation deductions under its proposed method of accounting. Pursuant to paragraph (c)(6)(ii)(D) of this section, DC agreed that, by making the election to waive depreciation deductions for Asset B, DC will not take into account the fact that depreciation deductions for Asset B were waived under paragraph (c)(6)(i) of this section. Accordingly, DC's net negative section 481(a) adjustment for this method change is $15x, which is calculated by determining the difference between the depreciation deductions for Asset B for taxable years 1 and 2 under DC's present method of accounting ($15x) and the depreciation deductions that would have been allowable for Asset B for taxable years 1 and 2 under DC's proposed method of accounting ($30x).

(B) *Computation of basis adjustments.* Pursuant to paragraph (c)(6)(ii)(B)(*3*) of this section, DC's elections to waive the depreciation deductions for Asset B for taxable years 1 and 2 are disregarded for determining the amount allowable for depreciation for purposes of section 1016(a)(2). The amount allowable for depreciation of Asset B is determined based on the proper method of computing depreciation for Asset B. Accordingly, Asset B's adjusted basis at the end of taxable year 1 is $90x ($100x − $10x) and at the end of taxable year 2 is $70x ($90x − $20x).

■ Par. 4. Section 1.59A–7, as added in a final rule published elsewhere in this issue of the **Federal Register**, effective December 6, 2019, is amended by adding paragraphs (c)(5)(v) and (g)(2)(x) to read as follows:

§ 1.59A–7 Application of base erosion and anti-abuse tax to partnerships.

* * * * *

(c) * * *

(5) * * *

(v) *Allocations of income in lieu of deductions.* If a partnership adopts the curative method of making section 704(c) allocations under § 1.704–3(c), the allocation of income to the contributing partner in lieu of a deduction allocation to the non-contributing partner is treated as a deduction for purposes of section 59A in an amount equal to the income allocation. See paragraph (g)(2)(x) of this section (*Example 10*) for an example illustrating the application of this paragraph (c)(5)(v).

* * * * *

(g) * * *

(2) * * *

(x) *Example 10: Section 704(c) and curative allocations*—(A) *Facts.* The facts are the same as in paragraph (d)(2)(ii)(A) of this section (the facts in *Example 2*), except that DC's property is not depreciable, PRS uses the traditional method with curative allocations under § 1.704–3(c), and the curative allocations are to be made from operating income. Also assume that the partnership has $20x of gross operating income in each year and a curative allocation of the operating income satisfies the ''substantially the same effect'' requirement of § 1.704–3(c)(3)(iii)(A).

(B) *Analysis.* The analysis and results are the same as in paragraph (d)(2)(i)(B) of this section (the analysis in *Example 1*), except that actual depreciation is $8x ($40x/5) per year and the ceiling rule shortfall under § 1.704–3(b)(1) of $2x per year is corrected with a curative allocation of income from DC to FC is $2x per year. Solely for U.S. federal income tax purposes, each year FC is allocated $12x of total operating income and DC is allocated $8x of operating income. Both the actual depreciation deduction to DC and the curative allocation of income from DC are base erosion tax benefits to DC under paragraph (d)(1) of this section.

■ Par. 5. Section1.59A–9, as added in a final rule published elsewhere in this issue of the **Federal Register**, effective December 6, 2019, is amended by adding paragraphs (b)(5) and (6) to read as follows:

§ 1.59A–9 Anti-abuse and recharacterization rules.

* * * * *

(b) * * *

(5) *Transactions involving derivatives on a partnership interest.* If a taxpayer acquires a derivative on a partnership interest (or partnership assets) as part of a transaction (or series of transactions),

plan or arrangement that has as a principal purpose avoiding a base erosion payment (or reducing the amount of a base erosion payment) and the partnership interest (or partnership assets) would have resulted in a base erosion payment had the taxpayer acquired that interest (or partnership asset) directly, then the taxpayer is treated as having a direct interest instead of a derivative interest for purposes of applying section 59A. A derivative interest in a partnership includes any contract (including any financial instrument) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined in whole or in part by reference to the partnership, including the amount of partnership distributions, the value of partnership assets, or the results of partnership operations.

(6) *Allocations to eliminate or reduce a base erosion payment.* If a partnership receives (or accrues) income from a person not acting in a partner capacity (including a person who is not a partner) and allocates that income to its partners with a principal purpose of avoiding a base erosion payment (or reducing the amount of a base erosion payment), then the taxpayer transacting with the partnership will determine its base erosion payment as if the allocations had not been made and the items of income had been allocated proportionately. The preceding sentence applies only when the allocations, in combination with any related allocations, do not change the economic arrangement of the partners to the partnership.

* * * * *

■ **Par. 6.** Section 1.59A–10, as added in a final rule published elsewhere in this issue of the **Federal Register**, effective December 6, 2019, is revised to read as follows:

§ 1.59A–10 Applicability date.

(a) *General applicability date.* Sections 1.59A–1 through 1.59A–9, other than the provisions described in the first sentence of paragraph (b) of this section, apply to taxable years ending on or after December 17, 2018. However, taxpayers may apply these regulations in their entirety for taxable years beginning after December 31, 2017, and ending before December 17, 2018. In lieu of applying these regulations, taxpayers may apply the provisions matching §§ 1.59A–1 through 1.59A–9 from the Internal Revenue Bulletin (IRB) 2019–02 (*https://www.irs.gov/pub/irs-irbs/irb19-02.pdf*) in their entirety for all taxable years ending on or before December 6, 2019.

(b) *Exception.* Sections 1.59A–2(c)(2)(ii) and (c)(4) through (6) and 1.59A–3(c)(5) and (6) apply to taxable years beginning on or after [EFFECTIVE DATE OF FINAL RULE], and §§ 1.59A–7(c)(5)(v) and 1.59A–9(b)(5) and (6) apply to taxable years ending on or after December 2, 2019. However, taxpayers may apply these provisions in their entirety for taxable years beginning after December 31, 2017, and before the final regulations are applicable. If a taxpayer is applying the provisions described in the last sentence of paragraph (a) of this section, the taxpayer's failure to apply § 1.59A–2(c)(2)(ii) and (c)(4) through (6) to taxable years ending on or before December 6, 2019 is not taken into account for purposes of applying the preceding sentence.

* * * * *

■ **Par. 7.** Section 1.6031(a)–1 is amended by adding paragraphs (b)(7) and (f)(3) to read as follows:

§ 1.6031(a)–1 Return of partnership income.

* * * * *

(b) * * *

(7) *Filing obligation for certain partners of certain foreign partnerships with respect to base erosion payments.* If a foreign partnership is not required to file a partnership return and the foreign partnership has made a payment or accrual that is treated as a base erosion payment of a partner as provided in § 1.59A–7(b)(2), a person required to file a Form 8991 (or successor) who is a partner in the partnership must provide the information necessary to report any base erosion payments on Form 8991 (or successor) or the related instructions. This paragraph does not apply to any partner described in § 1.59A–7(b)(4).

* * * * *

(f) * * *

(3) Paragraph (b)(7) of this section applies to taxable years ending on or after the date that final regulations are filed with the **Federal Register**.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Beardless Chinchweed With Designation of Critical Habitat, and Threatened Species Status for Bartram's Stonecrop With Section 4(d) Rule; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2018–0104; 4500030113]

RIN 1018–BD35

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Beardless Chinchweed With Designation of Critical Habitat, and Threatened Species Status for Bartram's Stonecrop With Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list *Pectis imberbis* (beardless chinchweed), a plant species from southern Arizona and northern Mexico, as an endangered species and to designate critical habitat for Beardless chinchweed under the Endangered Species Act of 1973 (Act), as amended. In total, we propose to designate approximately 10,604 acres (4,291 hectares) in southern Arizona as critical habitat for this plant. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for beardless chinchweed.

In addition, we propose to list *Graptopetalum bartramii* (Bartram's stonecrop), a plant species from southern Arizona and northern Mexico, as a threatened species under the Act and to issue a rule under section 4(d) of the Act to provide for the conservation of Bartram's stonecrop. We are not proposing to designate critical habitat for Bartram's stonecrop because we find that a designation is not prudent. If we make this rule final as proposed, it would extend the Act's protections to both of these species and to beardless chinchweed's critical habitat.

DATES: We will accept comments received or postmarked on or before February 4, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by January 21, 2020.

ADDRESSES:

Written comments: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2018–0104, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2018–0104; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Document availability: The draft economic analysis is available at *http://www.fws.gov/southwest/es/arizona/Docs_Species.htm,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2018–0104, and at the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates or plot points or both from which the map is generated are included in the administrative record for this critical habitat designation and are available at *https://www.fws.gov/southwest/es/arizona/Docs_Species.htm,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2018–0104, and at the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service website and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeff Humphrey, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517; telephone 602–242–0210. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of threatened species. Critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species, adopting provisions under section 4(d) of the Act for a threatened species, and designations and revisions of critical habitat can only be completed by issuing a rule.

What this document does. We propose to list beardless chinchweed as an endangered species and Bartram's stonecrop as a threatened species. This proposed rule assesses all available information regarding status of and stressors to beardless chinchweed and Bartram's stonecrop. We also propose a rule issued under section 4(d) of the Act to provide for the conservation of Bartram's stonecrop. In addition, we propose to designate critical habitat for beardless chinchweed. We are not proposing critical habitat for Bartram's stonecrop as we have determined that the designation of critical habitat for this species is not prudent.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

For beardless chinchweed, we have determined that the key factors supporting the proposed endangered finding are: Loss of habitat due to invasion by nonnative species (Factor A); altered fire regime exacerbated by nonnative invasion (Factors A and E); altered precipitation, drought, and temperature (Factors A and E); road and trail maintenance, mining, livestock, wildlife, and post-wildfire runoff (Factors A and E); grazing from wildlife and livestock (Factor C); and small population size exacerbating all other stressors (Factor E). The existing regulatory mechanisms are not adequate to address these factors such that the species does not meet the definition of an endangered or threatened species (Factor D).

For Bartram's stonecrop, we have determined the key factors supporting the proposed threatened finding are: Reduction in water availability (Factors A and E); erosion, sedimentation, and burial (Factors A and E); trampling (Factor E); altered fire regime (Factors A and E); loss of shade (Factors A and E); altered flooding regime (Factors A and E); drought (Factors A and E); predation of individuals and shade trees (Factors A, C, and E); illegal collection (Factor B); and small population size (Factor E). The existing regulatory mechanisms are not adequate to address these factors such that the species does not meet the definition of an endangered or threatened species (Factor D).

Under the Act, any species that is determined to be an endangered or a threatened species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. Under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of threatened species.

We prepared an economic analysis of the proposed designation of critical habitat. In order to consider economic impacts, we prepared an analysis of the economic impacts of the proposed critical habitat designation. We hereby announce the availability of the draft economic analysis and seek public review and comment.

Peer review. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we have sought the expert opinions of three appropriate and independent specialists regarding the scientific information in the species status assessment upon which this proposed rule is based. The purpose of peer review is to ensure that our listing determinations and critical habitat designation are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise with beardless chinchweed's or Bartram's stonecrop's biology, habitat, physical or biological factors, or stressors. Species status assessment reports for beardless chinchweed and Bartram's stonecrop were developed (Service 2018a and 2018b, entire), which represent a compilation of the best scientific and commercial data available concerning the status of the species, including the past, present, and future stressors to the species. We requested peer review of each species status assessment report from three independent specialists, with expertise with the species, to ensure that we based our determinations on scientifically sound data, assumptions, and analyses. The peer reviewers' comments have been considered and incorporated where appropriate in the species status assessment reports (Service 2018a and 2018b, entire), which are available at *https://www.fws.gov/southwest/es/arizona/Docs_Species.htm,* and at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2018–0104. The peer review comments will be available along with other public comments in the docket for this proposed rule on *http://www.regulations.gov* (Docket No. FWS–R2–ES–2018–0104).

Information Requested

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Beardless chinchweed and Bartram's stonecrop biology, range, and population trends, including:

(a) Biological or ecological requirements of these species, including habitat requirements for germination, growth, and reproduction;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution in Mexico;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for these species, their habitats, or both.

(2) Factors that may affect the continued existence of these species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any stressors (or lack thereof) to these species and existing regulations that may be addressing those stressors.

(4) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(5) Information related to climate change within the range these species and how it may affect these species' habitats.

(6) Information on regulations that are necessary and advisable to provide for the conservation of these species and that the Service can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether any other forms of take should be excepted from the prohibitions in the 4(d) rule.

(7) The reasons why areas should or should not be designated as critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*) including information to inform the following factors such that a designation of critical habitat may be determined to be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(d) No areas meet the definition of critical habitat.

(8) The following specific information on:

(a) The amount and distribution of habitat;

(b) What areas, that are currently occupied and that contain the physical and biological features essential to the conservation of these species, should be included in a critical habitat designation and why;

(c) Special management considerations or protection that may be needed for the essential features in potential critical habitat areas, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments regarding:

(i) Whether occupied areas are inadequate for the conservation of the species; and,

(ii) Specific information that supports the determination that unoccupied areas will, with reasonable certainty, contribute to the conservation of the species and, contain at least one physical or biological feature essential to the conservation of the species.

(9) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(10) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that may be impacted.

(11) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(12) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(13) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the draft economic analysis, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(15) Additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of the proposed 4(d) rule for Bartram's stonecrop.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register** (see **DATES**, above). Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Previous Federal Actions

Beardless Chinchweed

Beardless chinchweed was a candidate for listing from 1980 to 1996. It was first a Category 1 candidate species, as identified in our December 15, 1980, notice of review (45 FR 82480). Category 1 is a term no longer in use, having been replaced by the term ''candidate species.'' A candidate species is a species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but issuance of the proposed rule is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. In 1983, beardless chinchweed was reclassified as a Category 2 species (48 FR 53640; November 28, 1983). A Category 2 species referred to a species for which the Service had some indication that listing as endangered or threatened might be warranted, but there were insufficient data available to justify a proposal to list. The species remained so designated in subsequent annual candidate notices of review (50 FR 39526, September 27, 1985; 55 FR 6184, February 21, 1990; 58 FR 51144; September 30, 1993). In 1996, the Service eliminated Category 2 species; consequently, this species dropped off the candidate list. The Service received a petition in July 2010 to list beardless chinchweed and designate critical habitat under the Act (Center for Biological Diversity 2010, entire). The Service published a 90-day finding on August 8, 2012 (77 FR 47352), concluding that the petition presented substantial scientific or commercial information indicating that listing of the species may be warranted.

Bartram's Stonecrop

Bartram's stonecrop was a candidate for listing from 1980 to 1996. It was first a Category 1 candidate species, as identified in our December 15, 1980, notice of review (45 FR 82480), and then in 1983, it was reclassified as a Category 2 species (48 FR 53640; November 28, 1983). The species remained so designated in subsequent annual candidate notices of review (50 FR 39526, September 27, 1985; 55 FR 6184, February 21, 1990; 58 FR 51144; September 30, 1993). In 1996, the Service eliminated Category 2 species; consequently, this species dropped off the candidate list. The Service received a petition in July 2010 to list Bartram's stonecrop and designate critical habitat under the Act (Center for Biological Diversity 2010, entire). The Service published a 90-day finding on August 8, 2012 (77 FR 47352), concluding that the petition presented substantial scientific or commercial information indicating that listing of the species may be warranted.

I. Proposed Listings

Background

To provide the necessary and most up-to-date information and background on which to base our determination, we completed a species status assessment (SSA) report for beardless chinchweed (Service 2018a, entire), and an SSA report for Bartram's stonecrop (Service 2018b, entire), which are available online at *http://www.regulations.gov,* under Docket No. FWS–R2–ES–2018–0104. The SSA reports document the results of the comprehensive biological status review for each species, and each provides an account of the applicable species' overall viability through the forecasting of the condition of populations into the future. We generally define viability as the ability of the species to persist over the long term and, conversely, to avoid extinction (Service 2016, entire). In the SSA reports, we summarize the relevant biological data; describe the past, present, and likely future risk factors (causes and effects); and conduct an analysis of the viability of the species. The SSA reports provide the scientific basis that informs our regulatory decision regarding whether these species should be listed under the Act. This decision involves the application of standards within the Act, its implementing regulations, and Service policies (see Determination, below). Further, these SSA reports contain the risk analysis on which this determination is based, and the following discussion is a summary of the results and conclusions from these SSA reports. Species experts and appropriate agencies provided input into the development of these SSA reports.

Beardless Chinchweed

Beardless chinchweed is plant of the Asteraceae, or sunflower, family. Beardless chinchweed was first collected by Charles Wright in the early 1850s in Sonora, Mexico (now part of Santa Cruz County, Arizona), and was described by Asa Gray in 1853 (Phillips *et al.* 1982, p. 1; Keil 1978, p. 135). The name has remained unchanged since that time, and there are no known synonyms. Based on this information as the best available scientific and commercial data, we accept the characterization of beardless chinchweed as a valid species.

Beardless chinchweed is an erect, many-branched, perennial herb growing 3 to 12 decimeters (1 to 4 feet (ft)) from a slender, woody, taprooted caudex (stem base) (Keil 1978, p. 143; Phillips *et al.* 1982, p. 2; Keil 2017, pers. comm.). The glabrous (without hairs) leaves are 1 to 5 centimeters (cm) (0.4 to 2 inches (in)) in length and 1 to 2 millimeters (mm) (0.04 to 0.08 in) wide with pointed tips (Phillips *et al.* 1982, p. 2). Daisy-like flower heads containing yellow ray and disk flowers are solitary or in open, flat-topped clusters at the tips of the branches (Phillips *et al.* 1982, p. 2). In fruit, the heads have red to purple drying phyllaries (bracts around the flower head of a composite plant) and have small (<5 mm (0.2 in) long), spreading, awned black achenes (simple dry fruit) (Fishbein and Warren 1994, p. 19). Although we do not know exactly how long individual beardless chinchweed live, experts estimate 5 to 10 years (Keil 2017, pers. comm.).

Young beardless chinchweed plants have been noted in April (Dahlby 2017, pers. comm.), and are still present in November (Westland 2010, p. 10). Flowering occurs from August to October, when the plants are more than 0.5 meters (m) (1.6 ft) in height (Kearney and Peebles 1951, p. 935; Phillips *et al.* 1982, p. 8). There have been no reports of the plant from winter months, when beardless chinchweed is presumed to die back to the ground. It is unknown how long flowers remain open. In one measurement of the number of flowers per stem, these range from 0 to 55, with an average of 28.3 per stem (Service 2015, p. 1). It was estimated that there were 6 to 8 seeds per head, resulting in a potential of roughly 832 seeds per plant, although seed loss to grazing, desiccation, and abortion were not accounted for. Germination and establishment may be sporadic or require specific conditions for success (Keil 1978, p. 144). There is no information available on the seedbank longevity of the species; however, we are aware that within populations, a variety of age classes are represented (Phillips *et al.* 1982, p. 7; Service 2011, p. 4; Service 2014a, p. 2; Service 2015, p. 1; Sebesta 2017, pers. comm.). Therefore, we believe viable seeds are being produced and reproduction is occurring.

The species has been reported to reproduce both by seed and rhizomes (Westland 2010, p. 10), although there is no evidence that the species is rhizomatous (Keil 2017, pers. comm.). It is not known whether plants are able to pollinate themselves or require the pollen of another plant. However, it is likely that the plant requires pollinators. The pollinators of beardless chinchweed are not known, but other *Pectis* species are reported to be pollinated by bees and flies (Cockerell 1897, pp. 148–149; Cockerell 1911, pp. 136–137, 141–142; Simpson and Neff 1987, p. 434; Phillip *et al.* 2006, pp. 532, 535–536, 538), and both an *Acmaeodera* beetle and a *Diadasia* bee were noted visiting beardless chinchweed plants (Sebesta 2017, pers. comm.). Butterflies may also use this species, as showy yellow heads containing both ray and disk flowers serve as landing platforms and are easily accessible to a variety of low energy pollinators such as butterflies (Schmitt 1980, p. 935; Keil 2017, pers. comm.).

Beardless chinchweed is typically found in oak woodlands at higher elevations, and desert grasslands and oak savannas at lower elevations (McLaughlin *et al.* 2001, pp. 119, 121). However, it has also been found on disturbed road cuts, arroyo cuts, and unstable rocky slopes, where it has little competition for sunlight and nutrients (Phillips *et al.* 1982, pp. 4, 6; Fishbein and Warren 1994, p. 19). It is found at elevations from 1,158–1,737 m (3,799–5,699 ft) (SEINet 2017, entire). Plants are typically noted to occur on steep, south-facing, sunny to partially shaded hillslopes, with eroding bedrock and open areas with little competition from other plants. The nonstable substrate, which could be moved through gravity, erosion, or impact, reduces competition with other vegetation, favoring beardless chinchweed. It is presumed to be a poor competitor due to its preferred open habitat and inability to find the species under dense vegetation conditions.

Beardless chinchweed requires a lack of competition from other plants. The different shaped and sized canopy and root systems of associated plant species within healthy grasslands, savannas, and woodlands create heterogeneity of form, height, and open patches needed by beardless chinchweed. Open patches are created and maintained through a variety of abiotic and biotic mechanisms (Porensky *et al.* 2013, p. 591), including natural erosion (from things like precipitation events, gravity, and animals); the grazing and browsing of native animals, such as black-tailed prairie dogs (*Cynomys ludovicianus*) and pronghorn antelope (*Antilocapra americana*) (BANWR 2012, entire; Bahre 1995, p. 231; McPherson and Weltzin 2000, p. 4); and low severity, frequent wildfires (Hoffmeister 1986, pp. 194–195; McPherson and Weltzin 2000, p. 5; Brooks and Pyke 2002, p. 6; McDonald and McPherson 2011a, p. 385; Fryer and Leunsmann 2012, entire). The desert grasslands, oak savannas, and oak woodlands of southern Arizona historically had large-scale, low severity fire roughly every 10 to 20 years and following periods of adequate moisture (McPherson and Weltzin 2000, p. 5; Brooks and Pyke 2002, p. 6; McDonald and McPherson 2011a, p. 385; Fryer and

Leunsmann 2012, entire). Precipitation within the mountain ranges is bimodal, with dormant season snow and rain, and growing season monsoon rain. Data are lacking to indicate how beardless chinchweed uses dormant season versus growing season precipitation; however, we believe that dormant season precipitation is more important because this is needed for seed germination and growth.

The historical range of beardless chinchweed was larger than the current range, with a greater number of populations than persist today in southeastern Arizona and northern Sonora and Chihuahua Mexico. The historical distribution included 21 separate beardless chinchweed populations within the Atascosa-Pajarito, Huachuca, Patagonia, and Santa Rita Mountains and Canelo Hills of Cochise, Pima, and Santa Cruz Counties, Arizona, as well as in northern Chihuahua and Sonora Mexico (see Table 1, below). We define a population of beardless chinchweed as one or more subpopulations that occur within 1 kilometer (km) (0.62 miles (mi)) of other beardless chinchweed individuals allowing for gene flow and movement through cross-pollination. Because many bees and butterflies can travel a distance of 1 km (0.62 mi), we believe plants within this distance to be a single population. Subpopulations within a population are separated by between 300 and 999 m (984.3 and 3,278 ft). Of the 21 populations, 15 were in Arizona and 6 were in Mexico. The number of individuals seen historically in Mexico is not available, and no beardless chinchweed have been reported from Mexico since 1940. Nine populations and one subpopulation in Arizona have become extirpated since 1962.

TABLE 1—CURRENT STATUS OF BEARDLESS CHINCHWEED POPULATIONS

Mountain range/country	Population name	Population status	Subpopulation name *	Subpopulation status
Atascosa-Pajarito Mountains, USA.	Pena Blanca Lake	Extirpated	N/A	Extirpated.
	Ruby Road	Extant	N/A	Extant.
	Summit Motorway	Extirpated	N/A	Extirpated.
Canelo Hills, USA	Audubon Research Ranch	Extant	Post Canyon	Extirpated.
			Tributary of O'Donnell Canyon.	Extant.
	Copper Mountain	Extirpated	N/A	Extirpated.
	Harshaw Creek	Extirpated	N/A	Extirpated.
	Lampshire Well	Extirpated	N/A	Extirpated.
Huachuca Mountains, USA	Scotia Canyon	Extant	N/A	Extant.
	Coronado National Memorial.	Extant	State of Texas Mine	Extant.
			Visitor Center	Extant.
	Joe's Canyon Trail	Extirpated	N/A	Extirpated.
Patagonia Mountains, USA	Flux Canyon	Extirpated	N/A	Extirpated.
	Washington Camp	Extirpated	N/A	Extirpated.
Santa Rita Mountains, USA.	Box Canyon Road	Extirpated	N/A	Extirpated.
	McCleary Canyon—Gunsight Pass.	Extant	N/A	Extant.
	McCleary Canyon—Wasp Canyon.	Extant	N/A	Extant.
Chihuahua, Mexico	Batopililas	Unknown; presume extant	N/A	Unknown; presume extant.
	Guasaremos	Unknown; presume extant	N/A	Unknown; presume extant.
Sonora, Mexico	Canon de la Petaquilla	Unknown; presume extant	N/A	Unknown; presume extant.
	Canyon Estrella	Unknown; presume extant	N/A	Unknown; presume extant.
	Horconcitos	Unknown; presume extant	N/A	Unknown; presume extant.
	Los Conejos	Unknown; presume extant	N/A	Unknown; presume extant.

* In this column of the table, N/A means "not applicable."

Currently, there are 12 populations in Arizona and Mexico. In Arizona, there are currently 387 individual beardless chinchweed spread across less than 2 hectares (ha) (5 acres (ac)) within six extant populations spread across the following four mountain ranges: The Atascosa-Pajarito, Huachuca, Santa Rita mountain ranges, and the Canelo Hills (see Table 1, above). Five of the six populations in Arizona contain fewer than 50 individuals. Most of the mountain ranges in the United States have been surveyed for beardless chinchweed, and it is unlikely that any large populations remain unaccounted for therein. In addition, there are six populations in northern Mexico for which we have no current information. Inquiries between February 17 and December 12, 2017, with 11 researchers familiar with the flora of Chihuahua and Sonora revealed no information on the status of the species in Mexico. We believe these populations are extant, but with few individuals and with poor habitat condition (similar to the smallest extant populations in the United States), because much of the grasslands in beardless chinchweed' historical range in Mexico have been invaded by nonnative species (Romo *et al.,* 2012, entire; Arriaga *et al.,* 2004, entire).

For beardless chinchweed to maintain viability, its populations or some representative portion thereof must be resilient. Resiliency describes the ability of populations to withstand stochastic events (arising from random factors). We can measure resiliency based on metrics of population health (for example, germination versus death rates and population size). Highly resilient populations are better able to withstand disturbances such as random fluctuations in germination rates (demographic stochasticity), variations in rainfall (environmental stochasticity), or the effects of anthropogenic activities. A beardless chinchweed population with high resiliency is one in which abundance is high, the number of subpopulations is high and spatially dispersed, seed production is high, recruitment is such that the population remains stable or increases, and the population is able to withstand stochastic events or recover to current or better condition from stochastic events from seed bank. Population resiliency categories for beardless chinchweed are described in section 3.2 of the SSA report (Service 2018a).

In addition to the above demographic needs, populations also need habitat elements for resiliency. Based on where the species has typically been found, a resilient population needs eroding granite or limestone soils or rock outcrops with native-dominated habitat, on sunny to partly shaded southern exposures. Beardless chinchweed plants are also often associated with active disturbances from frequent, low severity wildfire; grazing and browsing of native animals; and natural erosion of nonstable substrates, thus reducing competition for beardless chinchweed. In addition, resilient populations need soil moisture for seed germination, growth, and reproduction in the form of dormant season (October through March) precipitation. The minimum amount of precipitation needed for individual survival is unknown. We believe that deviation from the timing and amount of precipitation would impact the resiliency of a population, because soil moisture would be impacted. This would lead to decreased seed germination, reduced growth, reduced flowering, and decreased seed production. Further, the presence of pollinators is needed for effective fertilization, out-crossing, and seed production in beardless chinchweed. Habitat resiliency categories for beardless chinchweed are described in Table 2, below, and in section 3.2 of the SSA report (Service 2018a).

TABLE 2—POPULATION RESILIENCY CATEGORY DEFINITIONS FOR BEARDLESS CHINCHWEED

Condition category	Subpopulations	Abundance	Native-dominated habitat	Dormant season (October through March) precipitation
High (3)	Three or more subpopulations per population.	Number of adults in each population is >300 individuals.	No nonnative plants	More than 12 inches of winter rain on average during the past 5 years as recorded at the nearest weather station.
Moderate (2)	Two subpopulations per population.	Number of individuals in each population is 100 to 300 individuals.	Native plants dominate	Between 6.1 and 12 inches of winter rain on average during the past 5 years as recorded at the nearest weather station.
Low (1)	One subpopulation per population.	Number of individuals in each population is <100 individuals.	Mix of nonnative and native plants, where there is not a clear dominance of either.	6 or fewer inches of winter rain on average during the past 5 years as recorded at the nearest weather station.
Ø	No subpopulations; population is extirpated.	No individuals are found during surveys.	Nonnative plants dominate the habitat.	6 or fewer inches of winter rain on average during the past 5 years as recorded at the nearest weather station.

Maintaining representation in the form of genetic or ecological diversity is important to maintain the capacity of beardless chinchweed to adapt to future environmental changes. Representation describes the ability of a species to adapt to changing environmental conditions. Representation can be measured by the breadth of genetic or ecological diversity within and among populations. The more representation, or diversity a species has, the more it is capable of adapting to changes (natural or human-caused) in its environment. In the absence of species-specific genetic and ecological diversity information, we evaluate representation based on the extent and variability of habitat characteristics across the geographical range.

Genetic analysis of beardless chinchweed has not been conducted within or among populations or mountain ranges. However, populations on different mountain ranges are widely separated, making cross-pollination highly unlikely, and most of the populations contain small numbers of individuals. Therefore, there is the potential for genetic diversity among mountain ranges. However, these populations are isolated and contain small numbers of individuals. Small, isolated populations are susceptible to the loss of genetic diversity, genetic drift, and inbreeding. This could mean that between-population genetic diversity may be greater than within-population diversity (Smith and Wayne 1996, p. 333; Lindenmayer and Peakall 2000, p. 200). It is possible that there has been a loss of genetic diversity in the species due to the fact that multiple populations are already extirpated. Currently, there are six extant populations across four widely separated mountain ranges in the United States, and six populations in northern Mexico that are presumed extant.

Beardless chinchweed has been reported from both decomposing granite and limestone substrates. This variability of substrate preference may be important in maintaining environmental and genetic diversity. Similarly, the species is found over a relatively wide range of elevations of 1,158 to 1,737 m (3,799 to 5,699 ft) and vegetation communities (oak woodlands at higher elevations, and grasslands and oak savannas at lower elevations), which could be important in terms of representation. The precise genetic and ecological diversity needed is unknown, but given the loss of populations, the low number of individuals in the majority of the populations, and the distance among populations, it is likely that some diversity has been lost. Consequently, at a minimum, we likely need to retain populations throughout the range of the species to maintain the overall potential genetic and life-history attributes that can buffer the species' response to environmental changes over time.

Beardless chinchweed needs to have multiple resilient populations distributed throughout its range to provide for redundancy. Redundancy describes the ability of a species to withstand catastrophic events, measured by the number of populations, and their resiliency, distribution, and connectivity. The more populations, and the wider the distribution of those populations, the more redundancy the species will exhibit. Redundancy reduces the risk that a large portion of the species' range will be negatively affected by a catastrophic natural or anthropogenic event at a given point in time. Species that are well-distributed across their historical range are considered less susceptible to extinction and more likely to be viable than species confined to a small portion of their range (Carroll *et al.* 2010, entire).

With the known six extant populations being separated by as much as 35 km (21.8 mi) in southern Arizona and even farther with the six populations believed to be extant in northern Mexico, a localized stressor such as grazing during flowering would impact only those groups of plants nearby the activity. Conversely, such distance among populations reduces connectivity among populations and mountain ranges, which may be important for genetic exchange and recolonization. Nonnative plant invasion and repeated, large-scale, moderate and high severity fires have impacted and will continue to impact many populations throughout the plant's range. The minimum number of populations needed to provide for sufficient redundancy is unknown. However, based on the number of populations now extirpated and the wide-ranging impacts from nonnatives and wildfire, the species likely needs to retain its existing population redundancy across multiple mountain ranges throughout the range to minimize impacts from catastrophic events.

Bartram's Stonecrop

Bartram's stonecrop is a plant of the Crassulaceae or stonecrop family (Phillips *et al.* 1982, p. 2; Moran 1994, p. 192). Acevedo *et al.* (2004, entire) investigated the phylogenetic relationship of *Graptopetalum* and other genera of Crassulaceae. Their work clearly separates Bartram's stonecrop from other species (Acevedo *et al.* 2004, p. 1101). The Flora of North America (2008, p. 227) recognizes *Graptopetalum* and *Dudleya* as distinct, and recognizes this species as Bartram's stonecrop in the genus *Graptopetalum.* Based on this information as the best available scientific and commercial data, the Service accepts this taxonomy.

Bartram's stonecrop is a small, succulent (fleshy), acaulescent (without a stem) perennial plant (Phillips *et al.* 1982, p. 2; Moran 1994, p. 192). Bartram's stonecrop has a basal rosette that is 7 to 16 centimeters (cm) (2.75 to 6.3 in) wide comprised of 20 or more flat to concave, smooth, blue-green leaves (Rose 1926, p. 2; Phillips *et al.* 1982, p. 2; Moran 1994, p. 192). One to seven showy inflorescences (includes stems, stalks, bracts, and flowers) up to 30.5 cm (12 in) in height are produced in equilateral panicles (pyramidal loosely branched flower cluster). The branches of the panicles produce one to six (usually three) flowers each (Rose 1926, p. 2). The fruits are follicles (capsule that splits along one side to release seeds), with minute seeds (0.5 to 0.9 mm (0.02 to 0.04 in) in length)) having little or no endosperm (tissue surrounding the embryo that provides nutrition; Shohet 1999, pp. 3, 48). The lifespan of Bartram's stonecrop is thought to be approximately 5 years (Ferguson, 2017b, tables 1–3; Ferguson 2017, pers. comm.).

The inflorescence stalks of Bartram's stonecrop grow for 30 to 40 days, around July and August, before coming to their full height, with the flowers then opening primarily between September and November (Kearney and Peebles 1951, p. 361; Phillips *et al.* 1982, pp. 2, 7; Shohet 1999, p. 25). Individual flowers produce both male and female parts, but the timing of male and female flower stages differs. Individual flowers open in succession, such that the length of time each flower remains open overlaps, allowing for various stages of flowering and fruiting to be simultaneous within an individual plant for a month or more. The two stages of floral growth may reduce the probability of self-pollination, though it likely does still occur (Ferguson 2017, pers. comm.). Flowering is triggered by fall rains and does not occur during periods of water stress (Shohet 1999, pp. 22, 25, 36, 39).

Bartram's stonecrop requires pollination for reproduction. The major pollinators of Bartram's stonecrop are *Sarcophaga* spp. (true flies) and *Musca* spp. (house flies), although *Apis mellifera* (honey bee) may also play a role in pollination. Other species noted on Bartram's stonecrop include wasps, butterflies, and Tachinidae and Bombyliidae flies (Shohet 1999, p. 41; Ferguson 2014, p. 26; Ferguson 2017b, p. 13). Fertilization success is greatest in earliest opening flowers, possibly due to more pollinators being available earlier in the season, but having a long period of flowering increases overall chance of pollination (Shohet 1999, p. 57). Of the seeds produced, approximately 20 percent are viable under optimal conditions (Shohet 1999, p. 48). Because seedlings (plants less than 1.5 cm [0.6 in] in diameter) have been located in most populations, we believe pollinator availability is not a limiting factor for this species. Given their geographic location in the landscape (*i.e.,* in canyons with springs and streams), it is possible that seeds are transported by water and that populations may have been founded by a single individual plant or seed (Shohet 1999, p. 58). Seeds may also be dispersed via gravity and wind.

There is little information available regarding the seedbank of Bartram's stonecrop. In general, a seed that is very tiny has evolved a requirement of sunlight for germination, as they cannot successfully emerge from deep burial (Venable and Brown 1987, p. 360). Similarly, it is thought that Bartram's stonecrop seeds reside at the soil surface beneath the litter (Shohet 1999, p. 48). It is possible that because the seed is so small, with little endosperm, mycorrhizae (the symbiotic association of a fungus with the roots of plants) may be required for seedling establishment and growth, but this has not been studied (Felger 2017, pers. comm.). Researchers at the Desert Botanical Gardens have attempted to grow Bartram's stonecrop from seed. They had no difficulty with seed germination; however, they have experienced high seedling mortality, perhaps related to a requirement for mycorrhizae for seedling establishment.

The species typically occurs on rocky outcrops with erodible soils in deep, narrow canyons in heavy cover of litter and shade within Madrean woodlands at elevations ranging from 1,067 to 2,042 m (3,500 to 6,700 ft). Madrean woodlands are a forested community dominated by evergreen oaks, but also containing junipers and pine trees, and characterized by mild winters and warm wet summers (Brown 1982, p. 59). Madrean evergreen woodland is typically bounded by semi-desert grasslands and savanna at warmer, drier sites in the lower elevations, and by evergreen and broadleaf forests on more mesic and cooler sites at higher elevation, at north aspect, or near riparian areas. Bartram's stonecrop root into crevices on rock ledges and cliffs on slopes of various aspects (Shohet 1999, p. 22; Ferguson 2014, p. 41; NPS 2016, p. 7). In addition, Bartram's stonecrop are almost always located near water sources (springs, seeps, or intermittent streams), but above the floodline (Phillips *et al.* 1982, p. 4; Shohet 1999, p. 22; NPS 2014, p. 2). Plants are typically within 10 m (32.8 ft) from a streambed in the bottom of canyons on rocky outcrops, but can be much farther on occasion (Shohet 1999, p. 5; Ferguson 2014, p. 41; NPS 2014, p. 2; Ferguson 2016a, p. 14). Based on microhabitats in which the species is typically found, the species' needs include crevices (with or without soil) for seeds to lodge and germinate, shade and deep leaf litter to help maintain soil moisture, and a humid microhabitat in this arid environment. Proximity to water may provide humidity for the plant's microclimate. The deep, narrow canyons and associated overstory species provide shade during a portion of the day, creating a cooler temperature and aiding in maintaining a humid microenvironment. In addition, the vegetation litter provides retention of soil moisture, further promoting the humid microenvironment. The specific substrate component does not seem to be critical. In addition, for reestablishment, moist soil for seedbank may be important for this species following extended periods of drought.

Madrean evergreen woodlands of the sky island mountain ranges have evolved with frequent, low-severity fire and have warm wet summers and mild winters. The maximum interval between the relatively widespread fires typically ranged from about 10 to 30 years in the pine-dominant forests (Swetnam *et al.* 2001, p. 4). Precipitation within the sky island mountain ranges is bimodal, with winter snow and rain, and summer monsoon rain. Mean annual precipitation in the Madrean woodland habitat of southern Arizona is 250 to 450 mm (10 to 17 in), with more than 50 percent occurring in summer. The winter snow and rain coincide with Bartram's stonecrop seed germination and growth. Winter precipitation is needed for Bartram's stonecrop germination (although some germination likely occurs following summer rains), and both summer (July and August) and fall precipitation (captured partially in the October and November ''winter'' data) is needed for Bartram's stonecrop flower production.

Bartram's stonecrop is known to have historically occurred in 33 separate populations within 13 isolated sky island mountain ranges, 10 in southern Arizona and 3 in northern Mexico. While the overall range of the species is likely unchanged, the number and size of populations has been reduced. Four populations have become extirpated in the United States in recent years, and a fifth population has contracted in size. In three instances, extirpation was associated with the drying of habitat, which rendered it no longer suitable for the species to persist; we do not know the cause of extirpation in the fourth instance. In addition, there have been many changes in the southeastern Arizona landscape since the 1890s due to intensive cattle grazing, water development, and fire suppression (*e.g.,* Bahre 1991, entire). These impacts may have reduced the range or number of populations and individuals.

We define a population as occurring within the same water course (*i.e.,* stream) in a sky island range and within the distance pollinators can travel. A population may consist of one or more subpopulations of Bartram's stonecrop. These subpopulations are separated by up to 8 km (5 mi). Within each subpopulation are groupings of plants. Groupings are separated by up to 1.7 km (1 mi).

As of 2017, when the SSA analysis was completed, there were 29 extant populations across 12 mountain ranges in the United States and Mexico: 26 extant populations from 9 mountain ranges in southern Arizona and 3 presumed extant populations from 3 mountain ranges in northern Mexico (see Table 3, below). Within these 29 populations, there are approximately 3,756 individuals within about 2 ha (5 ac).

In 2018, four additional populations were located in the United States in the Rincon Mountains, one additional population was located in Mexico, and a known population in Mexico, which we did not have recent data for, was confirmed. The new populations in the United States included the Upper Rincon Creek population with 38 individuals (including ''many'' seedlings), Turkey Creek population with 4 individuals (seedlings not differentiated, but photos look like adult rosettes and flowering), Deer Creek population with 10 individuals (adult rosettes and flowering), and Chiminea Tributary population with 13 plants (seedlings not differentiated). In Sonora, Mexico, a new population (Mesa Tres Rios population) with 80 living and 28 dead plants was found in Mesa Tres Rios. In the Río Piedras Verdes near Colonia Pacheo area of Chihuahua, seven individuals were located, confirming the presence of an extant population ''near Colonia Pacheco''; it is unknown if this is the exact historical location. Seedlings were not differentiated in either of the Mexico surveys. In total, only 145 new individuals were found, including seedlings, with 65 from the United States and 80 from Mexico. All but one population (Mesa Tres Rios) are small populations with fewer than 150 individuals. The number of extant populations as of 2018 is 34 across 13 mountain ranges in the United States and Mexico.

TABLE 3—CURRENT STATUS OF BARTRAM'S STONECROP POPULATIONS

Mountain ranges	Population	Population status	Subpopulation	Subpopulation status
UNITED STATES				
Baboquivari Mountains	Brown Canyon	Extant	Brown Canyon	Extant.
	Thomas Canyon	Extant	Thomas Canyon	Extant.
Chiricahua Mountains	Echo Canyon	Extant	Echo Canyon	Extant.
			Rhyolite Canyon	Extant.
			Sugarloaf Mountain	Extant.
	Indian Creek	Extirpated	Indian Creek Canyon	Extirpated.
Dragoon Mountains	Carlink Canyon	Extirpated	Carlink Canyon	Extirpated.
	Jordan Canyon	Extant	Jordan Canyon	Extant.
	Sheepshead	Extant	Sheepshead	Extant.
	Slavin Gulch	Extant	Lower Slavin Gulch	Extant.
	Stronghold Canyon East	Extant	Cochise Spring	Extant.
			Park Canyon	Extant.
	Stronghold Canyon West	Extant	Rockfellow Dome Trail	Extant.
			Stronghold Canyon West	Extant.
			Stronghold Canyon—hanging canyon drainage.	Extant.
Empire Mountains	Empire Mountains	Extirpated	Empire Mountains	Extirpated.
Mule Mountains	Juniper Flat	Extant	Juniper Flat and vicinity	Extant.
Pajarito/Atascosa Mountains	Alamo Canyon	Extant	Alamo Canyon	Extant.
	Holden Canyon	Extant	Holden Canyon	Extant.
	Sycamore Canyon	Extant	Montana Peak Vicinity	Extant.
			Montana Canyon	Extant.
			Mule Ridge	Extant.

TABLE 3—CURRENT STATUS OF BARTRAM'S STONECROP POPULATIONS—Continued

Mountain ranges	Population	Population status	Subpopulation	Subpopulation status
			Penasco Canyon; below dam	Extant.
			Summit Motorway	Extant.
			Sycamore Canyon	Extant.
	Warsaw Canyon	Extant	Warsaw/Old Glory Canyons	Extant.
Patagonia Mountains	Alum Gulch	Extant	Alum Gulch	Extant.
			Flux Canyon	Extant.
Rincon Mountains	Chimenea-Madrona Canyons	Extant	Chimenea Canyon + Manning Camp Trail + Madrona Canyon.	Extant.
	Happy Valley North	Extirpated	Happy Valley North	Extirpated.
	Happy Valley South	Extant	Happy Valley South	Extant.
	Upper Rincon Creek	Extant	Upper Rincon Creek	Extant.
	Turkey Creek	Extant	Turkey Creek	Extant.
	Deer Creek	Extant	Deer Creek	Extant.
	Chiminea Tributary	Extant	Chiminea Tributary	Extant.
Santa Rita Mountains	Adobe Canyon	Extant	Adobe Canyon	Extant.
	Gardner Canyon	Extant	Cave Creek Canyon	Extant.
			Gardner Canyon	Extant.
			Sawmill Canyon	Extant.
	Josephine Canyon	Extant	Bond Canyon	Extant.
			Josephine Canyon	Extant.
	Madera Canyon	Extant	Madera Canyon	Extant.
	Squaw Gulch	Extant	Squaw Gulch	Extant.
	Sycamore Canyon	Extant	Sycamore Canyon	Extant.
	Temporal Gulch	Extant	Temporal Gulch	Extant.
			Upper Jones Canyon	Extant.
	Walker Canyon	Extant	Big Casa Blanca Canyon	Extant.
			Walker Canyon Basin	Extant.
Whetstone Mountains	Death Trap Canyon	Extant	Death Trap Springs	Extant.
	French Joe Canyon	Extant	French Joe Canyon	Extant.
MEXICO				
Sierra Las Avispas, Sonora	Sierra Las Avispas, Sonora	Presumed Extant.	Sierra Las Avispas, (Nogales County).	Presumed Extant.
Sierra La Escuadra, Chihuahua	Sierra La Escuadra, Chihuahua	Extant	Near Colonia Pacheco (in the Municipio Nuevo Casas Grandes).	Extant.
Sierra La Estancia, Chihuahua	Sierra La Estancia, Chihuahua	Presumed Extant.	Cuarenta Casas (northwest of Las Varas, Municipio Madera).	Presumed Extant.
Sierra Los Mojones	Mesa Tres Rios	Extant	Mesa Tres Rios	Extant.

The number of populations within each sky island mountain ranges from one population (*e.g.,* Mule Mountains) to as many as eight populations (*e.g.,* Santa Rita Mountains). Each of these populations contains from one to eight subpopulations, which can be separated by up to 8 km (5 mi). Within each subpopulation, plants grow in groups or clusters of one to eight groups, which are separated by up to 1.7 km (1 mi). Within each subpopulation, plants grow across an area of 1 to 140 m (3.3 to 459 ft) (Ferguson 2014, entire; Ferguson 2016a, p. 14).

Bartram's stonecrop typically occurs in small populations with limited numbers of individuals. Most populations contain fewer than 100 plants (Ferguson 2014, entire; Ferguson 2016a, entire), but occasionally hundreds of plants can be found within a single population. The number of individuals in a given population can vary greatly from year to year and from season to season, depending on weather and stressors present (Ferguson 2017b, pp. 8, 15).

For Bartram's stonecrop to maintain viability, its populations or some representative portion thereof must be resilient. Resiliency describes the ability of populations to withstand stochastic events (arising from random factors). We can measure resiliency based on metrics of population health (for example, germination versus death rates and population size). Highly resilient populations are better able to withstand disturbances such as random fluctuations in germination rates (demographic stochasticity), variations in rainfall (environmental stochasticity), or the effects of anthropogenic activities. Resilient Bartram's stonecrop populations must be large enough that stochastic events do not eliminate the entire population. A highly resilient population of Bartram's stonecrop consists of multiple subpopulations, with a large number of individuals in each subpopulation. Highly resilient Bartram's stonecrop populations must also produce and disperse seeds, establish seedlings that survive, and maintain mature reproductive individuals in the population; recruitment should exceed or be equal to mortality. This allows for shared pollinators and seed dispersal between subpopulations and groups within the population, which can allow the population to recover from disturbance events and maintain or increase genetic diversity. Population resiliency categories for Bartram's stonecrop are described in section 3.2 of the SSA report (Service 2018b, entire).

In addition to the above demographic needs, populations also need habitat elements for resiliency. Based on where the species has typically been found, a resilient population needs riparian characteristics (*i.e.,* proximity to water and associated vegetation), precipitation, shade, and bedrock or soil pockets in rock ledges and cliffs. Precipitation is needed to maintain soil moisture, cooler temperatures, and humidity in the microenvironment; shade from trees, canyon walls, and leaf litter aid in moisture retention. Small population size has the potential to decrease Bartram's stonecrop's population resiliency, as all stressors are exacerbated in populations with only a small number of individuals. Area of occupied habitat, abundance, number of subpopulations, and recruitment all affect population resiliency. Habitat resiliency categories for Bartram's stonecrop are described in Table 4, below, and in section 3.2 of the SSA report (Service 2018b).

TABLE 4—POPULATION RESILIENCY CATEGORY DEFINITIONS FOR BARTRAM'S STONECROP

Condition category	Population factors			Habitat factors		
	Subpopulations	Abundance	Recruitment	Riparian elements	Winter (October through March) precipitation	Shade
High (3)	Three or more subpopulations of plants/population.	Number of adults in each population is >300 individuals.	Populations contain more seedlings (<1.5 cm [0.6 in]) than dying individuals.	Water is within 10 m from individuals or riparian vegetation present indicating subsurface water nearby.	More than 12 inches of winter rain on average during the past 5 years as recorded at the nearest weather station.	Overstory cover of *Juniperus, Quercus, Pinus* or other is >80%.
Moderate (2)	Two subpopulations of plants/population.	Number of individuals in each population is 150 to 300 individuals.	Populations contain an equal number of seedlings (<1.5 cm [0.6 in]) to dying individuals.	Water at or near the surface (riparian vegetation present indicating subsurface water) is within 10–20 m from individuals.	Between 6.1 and 12 inches of winter rain on average during the past 5 years as recorded at the nearest weather station.	Overstory cover of *Juniperus, Quercus, Pinus* or other is between 50 and 80%.
Low (1)	One subpopulation of plants/population.	Number of individuals in each population is <150 individuals.	Populations contain fewer seedlings (<1.5 cm [0.6 in]) than dying individuals.	Water at or near the surface (riparian vegetation present indicating subsurface water) is within 20–30 m from individuals.	6 or fewer inches of winter rain on average during the past 5 years as recorded at the nearest weather station.	Overstory cover of *Juniperus, Quercus, Pinus* or other is between 20 and 50%.
Ø	No subpopulations	No individuals are found during surveys in appropriate microhabitat.	Population is made up primarily of dead and dying individuals that do not produce seed or no individuals found.	Streambed near plants is dry and invaded by non-riparian plant species indicating shift of vegetation community and complete loss of suitable habitat.	6 or fewer inches of winter rain on average during the past 5 years as recorded at the nearest weather station.	Overstory cover has been removed.

Maintaining representation in the form of genetic or ecological diversity is important to maintain the capacity of Bartram's stonecrop to adapt to future environmental changes. Representation describes the ability of a species to adapt to changing environmental conditions. Representation can be measured by the breadth of genetic or ecological diversity within and among populations. The more representation, or diversity, a species has, the more it is capable of adapting to changes (natural or human-caused) in its environment. In the absence of species-specific genetic and ecological diversity information, we evaluate representation based on the extent and variability of habitat characteristics across the geographical range.

Genetic analysis of Bartram's stonecrop has not been conducted within or among populations or mountain ranges. However, populations on different mountain ranges are widely separated (ranging from roughly 14 to 42 km (8.7 to 26 mi) apart), making cross-pollination highly unlikely, and most of the populations contain small numbers of individuals. Therefore, there is the potential for genetic diversity among mountain ranges. Because multiple populations have been extirpated, it is possible that there has been a loss of genetic diversity. There may be genetic diversity between populations within and among the sky island mountain ranges due to response to elevational and other environmental differences between locations. As such, maintaining representation in the form of genetic diversity across multiple populations and sky island mountain ranges may be important to the capacity of Bartram's stonecrop to adapt to future environmental change.

The species is found over a relatively wide range of elevations of 1,067 to 2,042 m (3,500 to 6,700 ft) and vegetation communities (oak woodlands at higher elevations, and grasslands and oak savannas at lower elevations), which could be important in terms of representation. Such variability in elevation could aid in survival of future environmental changes, such as warming temperatures or decreased precipitation from climate change. At a minimum, we likely need to retain populations throughout the geographic and elevational ranges of the species to maintain the overall potential genetic and environmental diversity that can maximize the species' response to environmental changes over time.

Bartram's stonecrop needs to have multiple resilient populations distributed throughout its range to provide for redundancy such that a catastrophic event will not result in the loss of all populations. Redundancy describes the ability of a species to withstand catastrophic events, measured by the number of populations, and their resiliency, distribution, and connectivity. The more populations, and the wider the distribution of those populations, the more redundancy the species will exhibit. Redundancy reduces the risk that a large portion of the species' range will be negatively affected by a catastrophic natural or anthropogenic event at a given point in time. Species that are well-distributed across their historical range are considered less susceptible to extinction and more likely to be viable than species confined to a small portion of their range (Carroll *et al.* 2010, entire). There is little connectivity potential between the sky island mountain ranges (separated from roughly 14 to 42 km (8.7 to 26 mi) apart); therefore, a localized stressor such as dewatering from a mine or a high-severity wildfire would impact only those populations near the activity. Regional drought and altered fire regime could impact many populations throughout the plant's range. There are 34 populations spread throughout the range of the species, many with multiple subpopulations. Conversely, such distance among populations reduces connectivity among populations and mountain ranges, which may be important for genetic exchange and recolonization. At a minimum, the species likely requires retaining population redundancy across multiple sky island mountain ranges throughout the species' range to minimize impacts from catastrophic events.

Summary of Biological Status and Stressors

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

We completed a comprehensive assessment of the biological status of beardless chinchweed and Bartram's stonecrop, and prepared an SSA report for each species (Service 2018a and 2018b, entire), which provides a thorough account of the species' overall viability. We define viability here as the ability of the species to persist over the long term and, conversely, to avoid extinction. In the following discussion, we summarize the conclusions of the SSA reports, which can be accessed at Docket FWS–R2–ES–2018–0104 on *http://www.regulations.gov* and at *https://www.fws.gov/southwest/es/arizona/Docs_Species.htm.*

Beardless Chinchweed

Several stressors influence whether beardless chinchweed populations will grow to maximize habitat occupancy, which increases the resiliency of a population to stochastic events. We evaluated the past, current, and future stressors (*i.e.,* negative changes in the resources needed by beardless chinchweed) that are affecting what beardless chinchweed needs for viability. These stressors are described in detail in chapter 4 of the SSA report (Service 2018a). Stressors that have the potential to affect beardless chinchweed population resiliency include:

- Loss of habitat due to invasion by nonnative species;
- Altered fire regime exacerbated by invasion by nonnative species;
- Altered precipitation, drought, and temperature;
- Erosion, sedimentation, and burial from road and trail maintenance, mining, livestock, wildlife, and post-wildfire runoff;
- Grazing from wildlife and livestock; and
- Small population size exacerbating all other stressors.

The stressors that pose the largest risk to future viability of the species are: (1) Loss of habitat caused by the invasion of nonnative grasses that compete for space, water, light, and nutrients and that alter wildfire regimes; and (2) small population size (fewer than 50 individuals), which potentially causes other stressors to seriously damage or extirpate populations. The size of fewer than 50 individuals as a small population was determined by assessing the range of known population sizes. Much of the historical range of beardless chinchweed in both the United States and Mexico has been altered by an invasion of nonnative grasses and herbaceous plants. Although there are many nonnative plant species growing in historical beardless chinchweed habitats in both the United States and Mexico, two species in particular are most problematic to beardless chinchweed at this time: Lehman's lovegrass (*Eragrostis lehmanniana*) and rose natal (*Melinis repens*). Both of these species are strong competitors on southern exposures where beardless chinchweed occurs.

Habitat Loss Caused by Nonnative Grasses

Lehman's lovegrass, a nonnative grass from South Africa, has numerous competative advantages over native grasses in southern Arizona. Lehman's lovegrass resprouts from roots and tiller nodes not killed by hot fire, is not hampered by the reduction in mycorrhizae associated with fire and erosion, is able to respond to winter precipitation when natives grasses are dormant, is able to produce copious seed earlier than native grasses, maintains larger seed banks than native grasses, and has higher seedling survival and establishment than native grasses during periods of drought (Anable 1990, p. 49; Anable *et al.* 1992, p. 182; Robinett 1992, p. 101; Fernandez and Reynolds 2000, pp. 94–95; Crimmins and Comrie 2004, p. 464; Geiger and McPherson 2005, p. 896; Schussman *et al.* 2006, p. 589; O'Dea 2007, p. 149; Archer and Predick 2008, p. 26; Mathias *et al.* 2013, entire). This species outcompetes native grasses for water, light, and nutrients, forming nonnative-dominated grasslands that reduce structural, species, and spatial diversity and that produce two to four times the biomass of native grasslands (D'Antonio and Vitousek 1992, p. 70; McPherson 1995, pp. 136–137; VanDevender *et al.* 1997, p. 4; Huang *et al.* 2009, pp. 903–904;). This change in vegetation structure results in a higher fuel load that is highly lignified (long-lasting through slow decomposition) and results in more frequent fires that have longer flames, faster rates of spread, and higher severity and frequency than historical low-intensity burns of native desert grasslands (Anable *et al.* 1992, p. 186; Dennet *et al.* 2000, pp. 22–23; Williams and Baruch 2000, p. 128; Crimmins and Comrie 2004, p. 464). In addition, Lehman's lovegrass-dominated grasslands recover quickly from fire, as fires scarify the ample seeds and remove canopy, allowing for high seedling emergence (Cable 1965, p. 328; Anable 1990, p. 15; Roundy *et al.* 1992, p. 81; McPherson 1995, p. 137; Biedenbender and Roundy 1996, p. 160).

Rose natal, a native of Africa and Madagascar, is invasive in many locations, including southern Arizona and northern New Mexico (Stevens and Fehmi 2009, p. 379; Romo *et al.* 2012, p. 34). Similar to Lehman's lovegrass, rose natal is capable of growing in low moisture situations and has many advantages to outcompete native grasses of southern Arizona, such as prolific seed production and culms that root from the nodes (Stokes *et al.* 2011, p. 527). This aggressive grass displaces native vegetation in shrublands and oak stands, and increases fire frequency (Romo *et al.* 2012, p. 35; Center for Agriculture and Biosciences International 2017, entire).

In addition, several other African grasses (*e.g., Eragrostis cilianensis* [stinkgrass], *Eragrostis curvula* [Boer lovegrass], *Eragrostis echinochloidea* [African lovegrass], and *Dichanthium annulatum* [Kleberg's bluestem]) have been documented in southern Arizona and northern Mexico (Van Devender and Reina 2005, p. 160; NatureServe, entire; Fire Effects Information System, entire; SEINet, entire), as has the Asian grass, *Bothriochloa ischaemum* (yellow bluestem). Studies of other nonnative grasses in Mexico show rapid expansion and degradation of native communities, with the potential to invade large areas of northern Mexico (Arriaga *et al.* 2004, p. 1504). There are no beardless chinchweed populations in the United States that are more than 1 km (0.6 mi), and no beardless chinchweed populations in Mexico that are more than 27 km (16.8 mi), from documented nonnative grasses (SEINet, entire; Heitholt 2017, pers. comm.). Because we have seen nonnative infestations in the field in locations not shown in SEINet, we believe only a small portion of nonnative plants are reported into the SEINet system in either country. Based on the above information, we believe that it is unlikely any beardless chinchweed population is free of nonnative plants. This encroachment of nonnatives has reduced beardless chinchweed population numbers and habitat, and as nonnatives continue to encroach on beardless chinchweed populations, the number of individuals and available habitat will continue to decrease.

Altered Fire Regime

The desert grasslands, oak savannas, and oak woodlands of southern Arizona historically had large-scale, low-severity fire roughly every 10 to 20 years and following periods of adequate moisture (McPherson and Weltzin 2000, p. 5; Brooks and Pyke 2002, p. 6; McDonald and McPherson 2011a, p. 385; Fryer and Leunsmann 2012, entire). Fires now are more frequent and intense due to the unnaturally dense and evenly spaced canopies of nonnative-dominated communities (as compared to more open and heterogeneous native-dominated grasslands), coupled with more frequent fire starts from recreationist and cross-border violators (Anable *et al.* 1992, p. 186; D'Antonio and Vitousek1992, p. 75; Dennet *et al.* 2000, pp. 22–23; Williams and Baruch 2000, p. 128; Crimmins and Comrie 2004, p. 464; Emerson 2010, pp. 15, 17; United States Government Accountability Office 2011, p. 1; Wildland Fire Lesson's Learned Center 2011, entire). Nonnative grasses have higher seed output and large seed banks, earlier green-up in the spring, and greater biomass production than native grasses; all of these characteristics help to perpetuate a grass-fire cycle (*e.g.,* D'Antonio and Vitousek 1992, p. 73; Zouhar *et al.* 2008, pp. 17, 21; Steidl *et al.* 2013, p. 529).

In many locations in southern Arizona in recent decades, repeat fires have occurred within short periods of time, aided by the dominance of nonnative grasses in the landscape. For example, in the Pajarito and Atascosa Mountains area, multiple fires burned the landscape between 2008 and 2016 (Figure 4.4 in Service 2018a). This landscape is now dominated by both nonnative Lehman's lovegrass and rose natal (Service 2014c, entire; Heitholt 2017, entire), and many historically documented locations that supported beardless chinchweed have not been found again (Service 2014c, entire; Fernandez 2017, pers. comm.; Haskins and Murray 2017, p. 4). High-severity wildfires burn hotter than fires that beardless chinchweed evolved with; consequently, we believe the plant is not capable of surviving high-severity fires.

Altered Precipitation, Drought, and Temperature

Altered precipitation timing and form (snow versus rain), as well as reduced winter and spring precipitation and prolonged drought, are currently occurring and projected to increase or be altered from normal in the Southwest (Garfin *et al.* 2014, entire). Recently there has been a decrease in the amount of snowpack, earlier snowmelt, and increased drought severity in the Southwest (Garfin *et al.* 2013, entire; Garfin 2013b p. 465). Further, more wintertime precipitation is falling as rain rather than snow in the western United States (IPCC 2013, p. 204; Garfin 2013b p. 465). This means that the amount of runoff in the spring when snow melts is reduced, as is soil moisture. Precipitation is bimodal with the mountain ranges where beardless chinchweed occurs, with dormant season snow and rain, and growing season monsoon rains (CLIMAS 2014, entire). We believe that precipitation during October through March is important for beardless chinchweed germination and growth. In addition, beardless chinchweed does not flower until it reaches a height of more than 0.5 m (1.6 ft) tall; without sufficient precipitation, beardless chinchweed may be unable to attain adequate size for reproduction (Phillips *et al.* 1982, p.

8). Further, reduced precipitation, change in the timing and type of precipitation, and prolonged drought impact soil and ambient moisture availability for beardless chinchweed germination, growth, and flowering. In addition, due to increased nonnative competition during times of reduced precipitation and drought, impacts from these stressors to beardless chinchweed would be exacerbated (Anable 1990, p. 49; Robinett 1992, p. 101; Fernandez and Reynolds 2000, pp. 94–95; Geiger and McPherson 2005, p. 896; Schussman *et al.* 2006, p. 589; Archer and Predick 2008, p. 26; Mathias *et al.* 2013, entire).

Under a continuation of A2-high emissions scenario, reduced winter and spring precipitation is consistently projected for the southern part of the Southwest by 2100, as part of the general global precipitation reduction in subtropical areas (Garfin *et al.* 2014, p. 465). Analyses of the southwestern United States indicate future drying, primarily due to a decrease in winter precipitation under both the RCP 4.5 and 8.5 scenarios (IPCC 2013, p. 1080). The annual projected changes in precipitation for 2025 to 2049 under the RCP 4.5 and 8.5 scenarios range from an increase of 1.3 cm/month (0.5 in/month) to a decrease of 1.5 cm/month (0.5 in/month), with a an annual average of no change compared to 1981 to 2010 (USGS 2019, entire). However, winter and spring precipitation under both emission scenarios is projected to decrease from −0.3 to −1 cm (−0.1 to −0.4 inches) (MACA 2019) or a decrease up to 10 percent for 2016–2035 relative to 1986–2005 under RCP 4.5 (IPCC 2013, p. 985). The decrease in winter and spring precipitation would likely be greater under the RCP 8.5 scenario. There is some evidence from comparing observations with simulations of the recent past that climate models might be underestimating the magnitude of changes in precipitation in many regions (IPCC 2013, p. 986). The climate-model-projected simulations indicate that a high degree of variability of annual precipitation will continue during the coming century, for both low and high emission scenarios (Garfin 2013, p. 110). This suggests that the Southwest will remain susceptible to unusually wet spells and, on the other hand, will remain prone to occasional drought episodes (Garfin 2013, p. 110). However, decrease in soil moisture across much of the Southwest is projected under both scenarios by mid-century, due to increased evaporation (IPCC 2013, p. 1259). Late winter-spring mountain snowpack in the Southwest is predicted to continue to decline over the 21st century under the high emission scenario (A2), mostly because of projected increased temperature (Garfin *et al.* 2013, p. 6). Reduced rain and snow, earlier snowmelt, and drying tendencies cause a reduction in late-spring and summer runoff. Together these effects, along with increases in evaporation, result in lower soil moisture by early summer (Gafrin 2013, p. 117).

Climatic events such as snowpack, earlier snowmelt, and increased drought are regional and will impact all populations of beardless chinchweed. Precipitation timing and amount impacts the germination, growth, and flowering of beardless chinchweed, resulting in the loss of individuals and recruitment, and overall reducing the population size.

In the Southwest, temperatures increased 2.7 degrees Celcius (°C) (1.6 degrees Fahrenheit (°F)) plus or minus 0.9 °C (0.5 °F), between 1901 and 2010, and more heat waves occurred over the Southwest during 2001–2010 compared to average occurrences in the 20th century. In the future, under RCP 4.5, the annual maximum temperature is projected to increase by 5 °C (2.7 °F) for 2025–2049 and 7.3 °C (4 °F) for 2050–2074, and 5 °C (2.7 °F) for 2025–2049 and 10.4 °C (5.7 °F) for 2050–2074 under RCP 8.5, all relative to 1981–2010 (USGS 2019, entire). When temperatures rise, as has been occurring in recent decades and as is projected to continue into the future, evapotranspiration rates also increase and soil moisture decreases. Along with projected warming and increased evapotranspiration, it is highly likely that droughts will become more severe (Garfin 2013, pp. 137–138). A decrease of up to 4 percent soil moisture is projected under RCP 4.5 scenario for 2016–2035, relative to 1986–2005. The decrease in soil moisture would likely be greater under the RCP 8.5 scenario. Further, the evaporation deficient increases under RCP 4.5 and increases more in RCP 8.5 in 2025 to 2049, relative to 1981 to 2010. Based on the high emissions scenario, the current 100-year drought will become commonplace in the second half of this century and future droughts will be much more severe than those previously recorded (Garfin 2013, p. 138). This projection of intensified drought conditions on the Colorado River is not due to changes in precipitation, but rather due directly to warming and its effect on reducing soil moisture (Garfin 2013, p. 138). Physiological effects of CO_2 may involve both the stomatal response, which acts to restrict transpiration, and an increase in plant growth and leaf area, which acts to increase evapotranspiration (IPCC 2013, p. 986). An increase in evapotranspiration results in water loss from the plant and increases stress on the plant. This increase in stress impacts photosynthesis, respiration, transpiration, water use efficiency, leaf conductance, growth rate, vigor, and gas exchange. These impacts result in reduced growth, flowering, and seed production and, therefore, in reduced overall recruitment and population numbers.

Although rare species in the southwestern United States evolved with drought, recent changes in temperature, and rainfall patterns present stressful conditions of increased magnitude greater than what the species faced historically and raise the question of whether the species, can persist. Some species may shift their distributions in response to warming of the climate (McLaughlin *et al.* 2002, p. 6070). However, it is highly unlikely that beardless chinchweed would be able to naturally shift its range to keep up with current and high projected rates of climate change, due to its overall population decline and inability to maintain current populations. Since plants are not mobile, expanding the distribution of this species is dependent on seed dispersal. Further, extant populations are small, which limit the amount of seed production for dispersal. It is highly unlikely that under elevated environmental stress associated with climate change, the species would be able to both maintain populations and also colonize new areas with more suitable climate conditions. Thus localized extirpations over portions of the beardless chinchweed range could result (lower elevations), and, in other portions of its distribution, the occupied range (higher elevation) may expand, depending upon habitat availability.

Erosion, Sedimentation, and Burial

General road maintenance and widening could disturb populations along road cuts and create erosion (Phillips *et al.* 1982, p. 8). Of the six extant U.S. populations, the Ruby Road and Scotia Canyon populations, and the State of Texas Mine subpopulation of Coronado National Memorial occur along roadcuts; similarly, the Visitor Center subpopulation of the Coronado National Memorial population contains some plants that occur along a maintained trail. These plants could be damaged or removed by road or trail maintenance. Impacts from such stressors could be profound for populations with fewer than 50 individuals. In addition, nonnative plant introduction and spread often occur in areas of disturbance, such as along roadways, along trails, in mining sites, and in areas of recreational use (Gelbard and Belnap 2003, p. 421; Brooks 2007, pp. 153–154; Anderson *et al.* 2015, p. 1).

The McCleary Canyon—Gunsight Pass population is in the path of a proposed alignment of a secondary access road for the proposed Rosemont Mine (Westland 2010, p. iv), and the McCleary Canyon—Wasp Canyon population is within the processing facility portion of the proposed Rosemont Mine (Westland 2017, entire). Collectively, these plants represent approximately 33 percent of the total beardless chinchweed populations known across the U.S. range and 16 percent of all known individuals. The proposed road alignment would eliminate these populations.

Dust from mining operations or recreational travel can impact beardless chinchweed populations along dirt roadways. Dust may negatively affect plant growth and vigor as a result of changes in physiological and biochemical processes (*e.g.,* photosynthesis, respiration, transpiration, water use efficiency, leaf conductance, growth rate, vigor, and gas exchange) and reduced pollination (Phillips *et al.* 1982, pp. 9–10; Chibuike and Obiora 2014, p. 1; Waser *et al.* 2017, p. 90). These impacts could affect those populations within 30 meters (98 feet) of roads and mine sites (Waser *et al.* 2017, p. 90). This stressor could impact four of the six populations in the United States.

Grazing

There are two different perspectives on the influence of grazing on beardless chinchweed:

(1) Wildfire historically maintained native open habitat where beardless chinchweed occurred, but with fire suppression, overgrazing may have alternatively provided native open habitats for this species to expand its range in the early 1900s, even without frequent fire (Schmalzel 2015, p. 2), due to open space being created and maintained by cattle; and

(2) Grazing pressure may have contributed to the species' rareness (Keil 1982, entire) due to reduced reproduction and alteration in habitat.

Regardless, grazing that occurs in small populations (fewer than 50 individuals) of beardless chinchweed would have a negative population-level impact through the reduction of flowers and seeds, and possibly individuals. Beardless chinchweed does not flower until it reaches a height of more than 0.5 m (1.6 ft) tall, suggesting that grazing in summer or fall when the plant is growing and flowering could reduce seed production and recruitment.

Small Populations

Small population size has the potential to affect beardless chinchweed' population resiliency, as all stressors are exacerbated in populations with only a small number of individuals (fewer than 50). Known population sizes of beardless chinchweed were used to quantify the size of a small population. Small populations are less able to recover from losses caused by random environmental changes (Shaffer and Stein 2000, pp. 308–310), such as fluctuations in reproduction (demographic stochasticity), variations in rainfall (environmental stochasticity), or changes in the frequency or severity of disturbances, such as wildfires. Five of the six extant beardless chinchweed populations in the United States contain fewer than 50 individuals. Based on populations in the United States, which are mostly small and occur in habitat dominated by nonnatives, we believe that the six populations in Mexico are of similar size but may be in worse condition, because of limited native habitat management, similar climate change impacts, equally frequent wildfires, and likely more impacts from grazing. Loss due to mining, erosion, road and trail maintenance, trampling, grazing, or other stressors mentioned above are exacerbated in small populations, and have the potential to seriously damage or completely remove these small populations. Synergistic interactions among wildfire, nonnative grasses, decreased precipitation, and increased temperatures cumulatively and cyclically impact beardless chinchweed, and all stressors are exacerbated in small populations.

Current Condition of Beardless Chinchweed

Since 1962, we are aware of nine populations and one subpopulation of beardless chinchweed in the United States that have become extirpated. Currently, six extant beardless chinchweed populations are spread across four mountain ranges in southern Arizona: The Atascosa-Pajarito, Huachuca, Santa Rita, and the Canelo Hills. These six populations consist of 387 individuals spread across less than 2 ha (5 ac). Additionally, six populations have been reported from northern Mexico, but this information is from 1940 or earlier.

Population Resiliency of Beardless Chinchweed

To help determine current condition, we assessed each population in terms of its resiliency. Our analysis of the past, current, and future stressors on the resources that beardless chinchweed needs for long-term viability revealed that there are a number of stressors impacting this species. All beardless chinchweed populations likely contain nonnative grasses. Further, altered fire regime has the potential to affect all populations. This altered fire regime enhances the spread of nonnatives, and all populations of beardless chinchweed contain nonnatives. Consequently, fire will aid in the spread of nonnatives, and is currently a risk to all populations of beardless chinchweed and will be further exacerbated by nonnative grasses in the near future (approximately 10 years). Altered precipitation, increased temperatures, increased evapotranspiration, decreased soil moisture, and decreased winter and spring precipitation are current and ongoing regional actions that are impacting all populations of beardless chinchweed. These environmental conditions exacerbate an altered fire regime, which in turn further drives the spread of nonnatives. In addition, nonnative grasses have competitive advantage over native grasses during periods of drought.

Road maintenance is likely resulting in the direct killing of individuals in three populations (Ruby Road, Scotia Canyon, and Coronado National Memorial). In addition, all individuals in these three populations are currently being impacted by dust from the road. These three populations are already of low resiliency. Two additional populations (McCleary Canyon—Gunsight Pass and McCleary Canyon—Wasp Canyon) will be impacted by Rosemont mining operations and dust in the near future (approximately 10 years; Westland 2010, p. iv). One of these populations is already of low resiliency, and the other is of moderate resiliency. Eleven of the 12 populations (92 percent) are small population (fewer than 50 individuals). Synergistic interactions among wildfire, nonnative grasses, decreased precipitation, and increased temperatures cumulatively and cyclically impact beardless chinchweed, and all stressors are exacerbated in small populations. Of the six extant populations, two are moderately resilient and four are in low resiliency (Table 5, below). Population resiliency categories are described in Table 2, above, and in the SSA report (Service 2018a).

TABLE 5—BEARDLESS CHINCHWEED CURRENT POPULATION CONDITION

Mountain range/country	Population	Number of individuals	Current condition
Atascosa-Pajarito Mountains, USA	Pena Blanca Lake	0	Extirpated.
	Ruby Road	10	Low.
	Summit Motorway	0	Extirpated.
Canelo Hills, USA	Audubon Research Ranch	37	Low.
	Copper Mountain	0	Extirpated.
	Harshaw Creek	0	Extirpated.
	Lampshire Well	0	Extirpated.
Huachuca Mountains, USA	Scotia Canyon	40	Low.
	Coronado National Memorial	241	Low.
	Joe's Canyon Trail	0	Extirpated.
Patagonia Mountains, USA	Flux Canyon	0	Extirpated.
	Washington Camp	0	Extirpated.
Santa Rita Mountains, USA	Box Canyon	0	Extirpated.
	McCleary Canyon—Gunsight Pass	32	Moderate.
	McCleary Canyon—Wasp Canyon	32	Low.
Chihuahua, Mexico	Batopililas, Rio Mayo	~10	Low.
	Guasaremos, Rio Mayo	~10	Low.
Sonora, Mexico	Canon de la Petaquilla	~10	Low.
	North of Horconcitos	~10	Low.
	Canyon Estrella, Sierra de los Cendros; southeast of Tesopaco.	~10	Low.
	Los Conejos, Rio Mayo	~10	Low.

Beardless Chinchweed Representation

No genetic studies have been conducted within or between the 21 historical populations of beardless chinchweed in southern Arizona and Mexico. Mountain ranges that have only one or two populations, or have only have one subpopulation per population, or low numbers of individuals per population with several miles between mountain ranges, may not be as genetically diverse because pollination or transport of seeds between populations may be very limited or nonexistent. Five of the six extant U.S. populations do not have multiple subpopulations. The Coronado National Memorial population has two subpopulations. The six extant U.S. populations are separated geographically into the Atascosa-Pajarito, Huachuca, and Santa Rita Mountains, and the Canelo Hills, which are separated by 16 to 61 km (9.9 to 37.9 mi). There is likely genetic diversity among mountain ranges, but reduced genetic diversity within populations. Further, overall genetic diversity is likely reduced given that some populations are extirpated.

The 15 historical beardless chinchweed populations in the United States range in elevation from 1,158 m (3,799 ft) to 1,737 m (5,699 ft). Of these, eight (about 53 percent) fall below 457 m (1,500 ft) elevation. Of these eight, six have become extirpated in recent decades. This essentially indicates a loss at this lower elevational range and possibly loss of some local adaptation to warmer or dryer environments and genetic differentiation among populations.

In the Ruby Road, Scotia Canyon, and Coronado National Memorial populations, plants have been reported over many decades, indicating that these populations may have the genetic and environmental diversity needed to adapt to changing conditions. Note, however, that both the Ruby Road and Scotia Canyon populations have been reduced in size in the past 30 years, and we have no previous count data at Coronado National Memorial for comparison.

Beardless Chinchweed Redundancy

The beardless chinchweed populations in the United States and Mexico are naturally fragmented between mountain ranges. Currently, six extant beardless chinchweed U.S. populations are spread across Atascosa-Pajarito, Huachuca, and Santa Rita Mountains and the Canelo Hills. The Atascosa-Pajarito Mountains and the Canelo Hills have only one extant population each, while the Santa Rita and Huachuca Mountains have two extant populations each. These mountain ranges are separated from each other by 16 to 61 km (9.9 to 37.9 mi), so natural gene exchange or re-establishment following extirpation is very unlikely. In addition, six historical populations of beardless chinchweed are distributed across two general areas in northern Chihuahua and Sonora, Mexico. Their status is unknown, but we believe they are small populations with poor habitat based on populations in the United States, which are small and dominated by nonnative species. Although this may imply some level of redundancy across the range of beardless chinchweed, note that five of the six extant populations in the United States contain fewer than 50 individual plants. Further, nine populations and one subpopulation have been extirpated in recent decades, largely from the lower elevations of the species' range, and several populations have been reduced in size in recent decades.

Future Condition of Beardless Chinchweed

We also assessed the future condition of beardless chinchweed under several plausible scenarios in our SSA report (Service 2018a, entire). We present a summary of the relevant information here; the detailed future condition analysis is available in the SSA report.

We developed four scenarios incorporating the stressors that are ongoing or will occur in the future to consider the range of possible future conditions. For each scenario, we describe the level of impact from the identified stressors that would occur in each population. All of the scenarios involve some degree of uncertainty; however, they present a range of realistic and plausible future conditions (Table 6). All scenarios consider impacts from nonnative invasion, altered wildfire regime, and drought because there is no likely future scenario where these stressors would not affect the species. In addition, effects on individual plants (small population size) from multiple stressors are assessed, including cross-border violator traffic, mining, trampling, erosion, road and trail maintenance, and grazing. We projected the likelihood of each scenario occurring at 40-years. We chose 40 years because this is within the range of available hydrological and climate change model forecasts, is within the time period of the Rosemont Mine effects, and it represents four generations of the plant.

Below is a summary of the four scenarios. For more detail, see Chapter 6 of the SSA (Service 2018a, entire).

TABLE 6—FUTURE SCENARIOS FOR BEARDLESS CHINCHWEED

Risks	Mining activity	Altered fire regime*	Climate	Individual effects	Conservation
Risk described	• Burial • Removal • Dust	• Lightning • Nonnative plants • Cross border violators. • Recreation	• Reduction in available water**. • Seedling desiccation. • Flowering halt	• Grazing • Trampling • Trail and road maintenance. • Erosion	Conservation actions implemented.
Scenario 1 Continuation continuing into the future.	Rosemont mine implemented with indirect and direct impacts.	Number of wildfires annually increases at the same rate as the last 10 years.	Available water and drought continue at the same level as in the past 10 years, emissions 4.5.	Applied to populations <50 individuals.	No new individuals, subpopulations or populations found. No augmentation of existing populations, little seed preservation, nonnatives not controlled, some woodland areas thinned.
Scenario 2 Conservation.	Rosemont mine implemented with indirect and direct impacts; with mitigation.	Number of wildfires does not increase from current rate.	Available water remains stable, emissions 4.5.	Applied to populations <50 individuals.	Sites revisited and additional plants are located, sites are augmented, or new sites are established, some nonnatives are controlled, and additional woodland areas are thinned.
Scenario 3 Moderate increase in negative effects.	Rosemont mine implemented with direct impacts and additional mines implemented with indirect impacts.	Number of wildfires increases.	Available water is reduced per 4.5 emissions scenario.	Applied to populations <50 individuals.	No new individuals, subpopulations or populations found. No augmentation of existing populations, little seed preservation, nonnatives not controlled, some woodland areas thinned.
Scenario 4 Major increase in negative effects.	Rosemont mine implemented and additional mines implemented with direct impacts.	Number of wildfires increases.	Available water is reduced per 8.5 emissions scenario.	Applied to populations <50 individuals.	No new individuals, subpopulations or populations found. No augmentation of existing populations, little seed preservation, nonnatives not controlled, some woodland areas thinned.

The ''continuation'' scenario evaluates the condition of beardless chinchweed if there is no increase in risk of stressors to the populations relative to what exists today. The other scenarios evaluate the response of the species to changes in those risks. The ''conservation'' scenario takes into account realistically possible additional protective measures, which may or may not happen. The ''moderate effects'' scenario is an increase in the risk of stressors to populations. The ''major effects'' scenario is a further increase in risk of stressors to populations.

We examined the resiliency, representation, and redundancy of beardless chinchweed under each of these plausible scenarios (see table 6.7 in the SSA report). The overall resiliency categories are the same as those used for current condition. We expect the six extant beardless chinchweed populations to experience changes to aspects of their habitat in different ways under the different scenarios. We projected the expected future resiliency, representation, and redundancy of beardless chinchweed based on the risk of stressors that would occur under each scenario (see Table 7). Under the ''continuation'' scenario, we would expect the viability of beardless chinchweed to be characterized by a loss of resiliency, representation, and redundancy at the level that is currently occurring. Under the ''conservation'' scenario, we would expect the viability of beardless chinchweed to be characterized by higher levels of resiliency, representation, and redundancy than it exhibits under the current condition. Under the ''moderate effects'' scenario, we would expect the viability of beardless chinchweed to be characterized by lower levels of resiliency, representation, and redundancy than it has in the ''continuation'' scenario. Under the ''major effects'' scenario, we would expect all populations of beardless chinchweed to be extirpated at the 40-year time step.

TABLE 7—BEARDLESS CHINCHWEED POPULATION CONDITIONS UNDER THE CURRENT CONDITION AND ALL FUTURE SCENARIOS

Mountain range	Population name	Current condition	Continuation scenario	Conservation scenario	Moderate effects scenario	Major effects scenario
Atascosa-Pajarito	Pena Blanca Lake	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
	Ruby Road	Low	Extirpated	Extirpated	Extirpated	Extirpated.
	Summit Motorway	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
Canelo Hills	Audubon Research Ranch	Low	Low	Low	Extirpated	Extirpated.
	Copper Mountain	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
	Harshaw Creek	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
	Lampshire Well	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
Huachuca	Scotia Canyon	Low	Low	Low	Extirpated	Extirpated.
	Coronado National Memorial	Low	Low	Low	Low	Extirpated.
	Joe's Canyon Trail	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
Patagonia	Flux Canyon	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
	Washington Camp	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
Santa Rita	Box Canyon Road	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
	McCleary Canyon—Gunsight Pass	Moderate	Low	Low	Extirpated	Extirpated.
	McCleary Canyon—Wasp Canyon	Low	Extirpated	Extirpated	Extirpated	Extirpated.
Chihuahua, MX	Batopililas	Low	Extirpated	Extirpated	Extirpated	Extirpated.
	Guasaremos	Low	Extirpated	Extirpated	Extirpated	Extirpated.

TABLE 7—BEARDLESS CHINCHWEED POPULATION CONDITIONS UNDER THE CURRENT CONDITION AND ALL FUTURE SCENARIOS—Continued

Mountain range	Population name	Current condition	Continuation scenario	Conservation scenario	Moderate effects scenario	Major effects scenario
Sonora, MX	Canon de la Petaquilla	Low	Extirpated	Extirpated	Extirpated	Extirpated.
	Canyon Estrella	Low	Extirpated	Extirpated	Extirpated	Extirpated.
	Horconcitos	Low	Extirpated	Extirpated	Extirpated	Extirpated.
	Los Conejos	Low	Extirpated	Extirpated	Extirpated	Extirpated.

Bartram's Stonecrop

Several factors influence whether Bartram's stonecrop populations will grow to increase habitat occupancy, which increases the resiliency of a population to stochastic events. We evaluated the past, current, and future stressors that are affecting what Bartram's stonecrop needs for viability. These stressors are described in detail in the chapter 4 of the SSA report (Service 2018b, entire). Stressors that have the potential to affect Bartram's stonecrop population resiliency include:

• Loss of water in nearby drainages from mining and drought;
• Erosion, sedimentation, and burial from mining, livestock, wildlife, recreation trails and roads, cross-border violators, and post-wildfire runoff;
• Trampling from humans, wildlife, and livestock, and predation;
• Altered fire regime resulting from fires ignited by recreationists, cross-border violators, and lightning;
• Illegal collection;
• Altered precipitation, drought, flooding, and freezing regime from current and future climate change, resulting in loss of seedling, immature, and adult plants, and in loss of reproduction; and
• Small population size exacerbating all other stressors.

The stressors that pose the largest risk to future viability of the species, which are related to habitat changes, include:

(1) Groundwater extraction and prolonged drought that may reduce nearby water levels and humidity within Bartram's stonecrop habitat; and

(2) Altered fire regimes leading to erosion of Bartram's stonecrop habitat, sedimentation that could cover individuals, and loss of overstory shade trees. These stressors play a large role in the future viability of Bartram's stonecrop, especially for smaller populations. These stressors may reduce nearby water levels, shade, and humidity within Bartram's stonecrop habitat and may directly impact individuals.

Loss of Water

Dewatering of streams from mining operations may lead to overstory canopy losses and resulting loss of shade, as well as reduction in spring and stream flow and humidity in nearby Bartram's stonecrop populations. The Rosemont Mine Final Environmental Impact Statement states that no Bartram's stonecrop were found in the project area or the footprint of the connected actions; however, individuals growing in the analysis area could experience indirect impacts from groundwater drawdown (USFS 2013a, p. 676). According to the Rosemont Mine Final Environmental Impact Statement (USFS 2013a, p. 339), the proposed mine pit would create a permanent drawdown of the water table, and groundwater would flow toward the pit and be lost to evaporation. The water would be perpetually replenished in part by groundwater from the regional aquifer, and the pit would act as a hydraulic sink. Given that Bartram's stonecrop is consistently found in locations with nearby springs or other water sources, the loss of groundwater at the nearby unmapped spring in Box Canyon/Sycamore Canyon confluence, between Ruelas Spring and the Singing Valley Road residences, could significantly impact these Bartram's stonecrop plants. In the range of Bartram's stonecrop, there are many mining claims, trenching and exploration drilling activities, and a few active and proposed mines. Many currently undeveloped areas of locatable mineral deposits may be explored and/or mined in the future. We do not know the extent of future mine activity within the range of Bartram's stonecrop; however, a number of proposed mines are identified for development within Bartram's stonecrop habitat. The range of current and projected mining activities varies from 1 to 10 per sky island mountain range containing Bartram's stonecrop (USFS 2012, entire). The loss of water in any Bartram's stonecrop population could lead to extirpation of that population.

Erosion, Sedimentation, and Burial

Bartram's stonecrop typically occurs on steep slopes with erodible soils and areas susceptible to rock fall, making the plant particularly vulnerable to physical damage to its environment (Phillips *et al.* 1982, p. 10; Shohet 1999, p. 50; Ferguson 2014, p. 42; Ferguson 2016a, pp. 15, 26). Soil erosion can result in burying plants, eroding the soil the plant is growing in, or dislodging plants. While displaced plants may re-root (Shohet 1999, pp. 50–51, 60), it is more likely that these plants will not survive (Ferguson 2015, p. 2). The potential of soil disturbance and erosion within or above Bartram's stonecrop habitat or the trampling of individual Bartram's stonecrop plants may occur from a variety of activities, including livestock and wildlife movement; the placement and maintenance of infrastructure, trails, and roads; and recreationists or cross-border violators traveling along established trails or cross country (Phillips *et al.* 1982, p. 10; Shohet 1999, p. 60; Ferguson 2014, p. 42; NPS 2015, p. 4; Ferguson 2016a, p. 26).

Direct removal of Bartram's stonecrop individuals and substrate due to erosion, or burial of individuals, may occur due to the placement of mineral extraction sites and debris piles. These impacts could severely impact small Bartram's stonecrop populations. Erosion from test pits (an excavation made to examine the subsurface conditions of a potential mine site) has been documented to remove portions of habitat occupied by Bartram's stonecrop in Flux Canyon (Phillips *et al.* 1982, pp. 9–10).

Trampling

The trampling of individual Bartram's stonecrop plants may occur from a variety of activities, including livestock and wildlife movement; the placement and maintenance of infrastructure, trails, and roads; and recreationists or cross-border violators traveling along established trails or cross country (Phillips *et al.* 1982, p. 10; Shohet 1999, p. 60; Ferguson 2014, p. 42; NPS 2015, p. 4; Ferguson 2016a, p. 26). Given the potential for these stressors, those populations with fewer than 50 individuals may be heavily impacted during periods of unusual recreational use. This stressor is considered in our analysis of future viability only when it may impact a population with fewer than 50 individuals.

Altered Fire Regime

Since the mid-1980s, wildfire frequency in western forests has nearly quadrupled compared to the average of the period 1970 to 1986 (Westerling *et* *al.* 2006, p. 941). The timing, frequency, extent, and destructiveness of wildfires are likely to continue to increase (Westerling *et al.* 2006, p. 943), especially given historical land management actions, an increase in fire starts from cross-border violators and recreationists (*e.g.,* from campfires, cigarettes, target shooting), nonnative plant invasion, and continuing drought conditions (Westerling *et al.* 2006, p. 940; FireScape 2016, entire; Fire Management Information System 2016, p. 2; Tersey 2017, pers. comm.). Altered fire regimes can have direct and indirect impacts to Bartram's stonecrop and its habitat. Direct impacts include burning of individual Bartram's stonecrop plants, resulting in injury, reduction in reproductive structures, or death. Indirect impacts of fire on Bartram's stonecrop may include increased runoff of floodwaters, post-fire flooding, deposition of debris and sediment originating in the burned area, erosion, changes in vegetation community composition and structure, increased presence of nonnative plants, alterations in the hydrologic and nutrient cycles, and loss of overstory canopy shade essential for maintaining Bartram's stonecrop microhabitat (Griffis *et al.* 2000, p. 243; Crawford *et al.* 2001, p. 265; Hart *et al.* 2005, p. 167; Smithwick *et al.* 2005, p. 165; Stephens *et al.* 2014, p. 42; Ferguson 2014, p. 43; Ferguson 2016a, p. 26).

We are aware of 11 wildfires (Alamo, Brown, Elkhorn, Hog, Horseshoe II, La Sierra, Lizard, Mule Ridge, Murphy, Soldier Basin, and Spring) that have occurred in known Bartram's stonecrop sites in the past decade that killed some Bartram's stonecrop individuals and removed shade in some instances. When looking at the number of acres burned per sky island mountain range in comparison to the number of adult individuals known from that range, the two largest populations occur in sky island mountain ranges that have had the fewest acres burned in the past 10 years. It is not known if this is coincidence or is of significance, as we do not have pre-fire population counts in any population to address this question. Wildfires have burned in all nine sky island mountain ranges of southern Arizona that support Bartram's stonecrop during this time period. Fires did not burn through Bartram's stonecrop populations in all cases, but fire could occur in any population within this 10-year timeframe. Wildfire could potentially cause extirpation of small Bartram's stonecrop populations throughout the range of the species and have negative impacts on larger populations. In addition, because it is thought that Bartram's stonecrop seeds reside at the soil surface and the seeds are very tiny (Shohet 1999, p.48), it is likely that the seeds would not survive a wildfire.

The nonnative plants in the uplands and within Bartram's stonecrop populations include nonnative grass species such as Lehman's lovegrass and rose natal, both of which have numerous advantages over native grasses. Lehman's lovegrass resprouts from roots and tiller nodes not killed by hot fire, is not hampered by the reduction in mycorrhizae associated with fire and erosion, responds to winter precipitation when natives grasses are dormant, produces copious seed earlier than native grasses, maintains larger seedbanks than native grasses, and has higher seedling survival and establishment than native grasses during periods of drought (Anable 1990, p. 49; Anable *et al.* 1992, p. 182; Robinett 1992, p. 101; Fernandez and Reynolds 2000, pp. 94–95; Crimmins and Comrie 2004, p. 464; Geiger and McPherson 2005, p. 896; Schussman *et al.* 2006, p. 589; O'Dea 2007, p. 149; Archer and Predick 2008, p. 26; Mathias *et al.* 2013, entire). Rose natal is capable of growing in low moisture situations, has prolific seed production, and culms that root from the nodes (Stokes *et al.* 2011, p. 527). Both species outcompete native plants, reduce structural and spacial diversity of habitats, and increased biomass and fuel loads, increasing the fire frequency. Nonnative grasses have been reported with Bartram's stonecrop individuals in two instances, at French Joe Canyon and Juniper Flat populations, increasing the likelihood of fire occurrence and subsequent impacts to these two populations (Heritage Database Management System, E.O. ID 55; Simpson 2017, pers. comm.). Nonnative plant species increase the frequency and severity of wildfires, such wildfires can directly and indirectly impact individuals and populations.

Illegal Collection

Bartram's stonecrop is an attractive small plant that can be easily collected by gardeners and succulent enthusiasts. Tagged individuals were uprooted and taken from two sites in the Santa Rita Mountains, one near a campsite (Shohet 1999, p. 60). In a 2016 on-line Google search for Bartram's stonecrop for sale, an advertisement from a collector in Texas offered to pay cash for Bartram's stonecrop seedlings or rooted cuttings. One website notes that the similar southern Arizona occurring species, *G. rusbyi,* is cultivated and legally available for sale from cactus nurseries; however, Bartram's stonecrop is not (because it is more difficult to propagate and maintain in captivity) and is therefore vulnerable to collection. Small populations may not be able to recover from collection, especially if the mature, reproductive plants are removed. The removal of mature plants reduces the overall reproductive effort of the population, thereby reducing the overall resilience of the population.

Altered Precipitation, Drought, Flooding, and Freezing Regimes

Precipitation within the sky island mountain ranges is bimodal, with winter snow and rain, and summer monsoon rain (CLIMAS 2014, entire). Fall and winter (October through March) precipitation is needed for Bartram's stonecrop germination, and both summer (July and August) and fall precipitation (October and November) is needed for Bartram's stonecrop flower production. Flowering is triggered by fall rains and does not occur during periods of water stress (Shohet 1999, pp. 22, 25, 36, 39). Altered precipitation timing and form (*i.e.,* snow versus rain), as well as reduced precipitation in the winter and spring and prolonged drought, are important considerations in the analysis of the future stressors to Bartram's stonecrop due to increased nonnative competition during times of reduced precipitation and drought, which exacerbate impacts from stressors (Anable 1990, p. 49; Robinett 1992, p. 101; Fernandez and Reynolds 2000, pp. 94–95; Geiger and McPherson 2005, p. 896; Schussman *et al.* 2006, p. 589; Archer and Predick 2008, p. 26; Mathias *et al.* 2013, entire). In addition, reduced precipitation in the winter and spring and drought will also impact moisture availability for Bartram's stonecrop's germination, growth, and flowering.

Altered precipitation timing and form (snow versus rain), as well as reduced winter and spring precipitation and prolonged drought, are currently occurring and projected to increase or be altered from normal in the Southwest (Garfin *et al.* 2014, entire). Recently there has been a decrease in the amount of snowpack, earlier snowmelt, and increased drought severity in the Southwest (Garfin *et al.* 2013, entire; Garfin 2013b, p. 465). Further, more wintertime precipitation is falling as rain rather than snow in the western United States (IPCC 2013, p. 204; Garfin 2013b p. 465). This means that the amount of runoff in the spring when snow melts is reduced, as is soil moisture.

Under a continuation A2-high emissions scenario, reduced winter and spring precipitation is consistently projected for the southern part of the Southwest by 2100, as part of the general global precipitation reduction in subtropical areas (Garfin *et al.* 2014, p. 465). Analyses of the southwestern United States indicate future drying, primarily due to a decrease in winter precipitation under both the RCP 4.5 and 8.5 scenarios (IPCC 2013, p. 1080). The annual projected changes in precipitation for 2025 to 2049 under RCP 4.5 and 8.5 scenarios ranges from an increase of 1.3 cm/mo (0.5 to a decrease of 0.5 in/mo), with an annual average of no change compared to 1981 to 2010 (USGS 2019, entire). However, winter and spring precipitation under both emission scenarios is projected to decrease from −0.3 to −1 cm (−0.1 to −0.4 in) (MACA 2019) or a decrease up to 10 percent for 2016–2035 relative to 1986–2005 under RCP 4.5 (IPCC 2013, p. 985). The decrease in winter and spring precipitation would likely be greater under the RCP 8.5 scenario. There is some evidence from comparing observations with simulations of the recent past that climate models might be underestimating the magnitude of changes in precipitation in many regions (IPCC 2013, p. 986). The climate-model-projected simulations indicate that a high degree of variability of annual precipitation will continue during the coming century, for both low and high emission scenarios (Garfin 2013, p. 110). This suggests that the Southwest will remain susceptible to unusually wet spells and, on the other hand, will remain prone to occasional drought episodes (Garfin 2013, p. 110). However, decrease in soil moisture across much of the Southwest is projected under both scenarios by mid-century, due to increased evaporation (IPCC 2013 p. 1259). Late winter-spring mountain snowpack in the Southwest is predicted to continue to decline over the 21st century under the high emission scenario (A2), mostly because of projected increased temperature (Garfin *et al.* 2013, p. 6). Reduced rain and snow, earlier snowmelt, and drying tendencies cause a reduction in late-spring and summer runoff. Together these effects, along with increases in evaporation, result in lower soil moisture by early summer (Gafrin 2013, p. 117).

Precipitation timing and amount impacts the germination, growth, and flowering of Bartram's stonecrop, resulting in the loss of individuals and recruitment, and overall reducing the population size.

In the Southwest, temperatures increased 2.7°C (1.6 °F) plus or minus 0.9 °C (0.5 °F), between 1901 and 2010, and more heat waves occurred over the Southwest during 2001–2010 compared to average occurrences in the 20th century. In the future, under RCP 4.5, the annual maximum temperature is projected to increase by 5°C (2.7°F) for 2025–2049 and 7.3 °C (4°F) for 2050–2074, and 5 °C (2.7°F) for 2025–2049 and 10.4 °C (5.7°F) for 2050–2074 under RCP 8.5, all relative to 1981–2010 (USGS 2019, entire). When temperatures rise, as has been occurring in recent decades and as is projected to continue into the future, evapotranspiration rates also increase and soil moisture decreases. Along with projected warming and increased evapotranspiration, it is highly likely that droughts will become more severe (Garfin 2013, pp. 137–138). A decrease of up to 4 percent soil moisture is projected under RCP 4.5 for 2016–2035, relative to 1986–2005. The decrease in soil moisture would likely be greater under RCP 8.5. Further, the evaporation deficient increases under RCP 4.5 and increases more in RCP 8.5 in 2025 to 2049, relative to 1981 to 2010. Based on the high emissions scenario, the current 100-year drought will become commonplace in the second half of this century and future droughts will be much more severe than those previously recorded (Garfin 2013, p. 138). This projection of intensified drought conditions on the Colorado River is not due to changes in precipitation, but rather due directly to warming and its effect on reducing soil moisture (Garfin 2013, p. 138). Physiological effects of CO_2 may involve both the stomatal response, which acts to restrict transpiration, and an increase in plant growth and leaf area, which acts to increase evapotranspiration (IPCC 2013 p. 986). An increase in evapotranspiration results in water loss from the plant and increases stress on the plant. This increase in stress impacts photosynthesis, respiration, transpiration, water use efficiency, leaf conductance, growth rate, vigor, and gas exchange. These impacts result in reduced growth, flowering, and seed production, and, therefore, reduces overall recruitment and population numbers.

Although rare species in the southwestern United States evolved with drought, recent changes in temperature and rainfall patterns present stressful conditions of increased magnitude above what the species faced historically and raise the question of whether the species in this rule can persist. Some species will shift their distributions in response to warming of the climate (McLaughlin *et al.* 2002, p. 6070). It is highly unlikely that Bartram's stonecrop would be able to naturally shift its range to keep up with current and high projected rates of climate change due to its general state of population decline, lack of suitable intervening habitat, and abundant nonnative competitors. Thus, localized extinctions over portions of Bartram's stonecrop's range could result.

Small Populations

Stressors are exacerbated in populations with only a small number (*e.g.,* fewer than 50) of individuals. Small populations are less able to recover from losses caused by random environmental changes (Shaffer and Stein 2000, pp. 308–310), such as fluctuations in reproduction (demographic stochasticity), variations in rainfall (environmental stochasticity), or changes in the frequency or severity of wildfires. Approximately half of the extant Bartram's stonecrop populations contain 50 or fewer individuals. Loss due to erosion, trampling, collection, predation, fire, severe frost, or other stressors have the potential to seriously damage or completely remove these small populations.

In summary, the stressors that pose the largest risk to future species viability are primarily related to habitat changes: Groundwater extraction from mining, long-term drought, and alteration in wildfire regime. These stressors may reduce nearby water levels, shade, and humidity within Bartram's stonecrop habitat and may directly impact individuals. Other important stressors include erosion or trampling from livestock, wildlife, or human activities; illegal collection; predation of Bartram's stonecrop or their shade trees by wildlife and insects; abnormal freezing or flooding events; or other stressors that have the potential to seriously damage or completely remove small populations. Synergistic interactions among wildfire, drought, altered precipitation, and increased temperatures cumulatively and cyclically impact Bartram's stonecrop, and all stressors are exacerbated in small populations.

Current Condition of Bartram's Stonecrop

Historically, we know of 33 populations spread across 13 mountain ranges. Four populations have been extirpated in the United States in recent years, and a fifth population has likely contracted in size. In addition, the southeastern Arizona landscape has experienced many changes since the 1890s, resulting from intensive cattle grazing, water development, and fire suppression (*e.g.,* Bahre 1991, entire). These impacts may have reduced the range or number of populations and individuals. Currently, 29 extant populations occur across 12 mountain ranges in the United States and Mexico: 9 in southern Arizona and 3 in northern Mexico. The U.S. populations total 3,726 individuals within occupied habitats that total about 2 ha (5 ac). Data are lacking for the Mexico populations; however, based on populations in the United States, which are mostly small, we believe that the three populations in Mexico are of similar size to U.S. populations but may be in worse condition, because of limited native habitat management, similar climate change impacts, equally frequent wildfires, and likely more livestock impacts (Romo *et al.* 2012, entire; Arriaga *et al.* 2004, entire; Fishbein and Warren 1994, p. 20).

Population Resiliency for Bartram's Stonecrop

To help determine current condition, we assessed each population in terms of its resiliency and assessed the species' representation and redundancy. Our analysis of the past, current, and future stressors on the resources that Bartram's stonecrop needs for long-term viability revealed a number of stressors to this species. All Bartram's stonecrop populations likely contain nonnative grasses. Further, altered fire regime has the potential to affect all populations. This altered fire regime enhances the spread of nonnatives. Consequently, all populations of Bartram's stonecrop will be further impacted by nonnative grasses in the near future. Altered precipitation, increased temperatures, and decreased annual precipitation are current and ongoing regional conditions that are impacting all populations of Bartram's stonecrop. These environmental conditions exacerbate an altered fire regime, which, in turn, further drives the spread of nonnatives. In addition, nonnative grasses have competitive advantage over native grasses during periods of drought. Many currently undeveloped areas of locatable mineral deposits may be explored or mined in the future. We do not know the extent of future mine activity within the range of Bartram's stonecrop; however, there are 12 mining projects currently ongoing or proposed within 8 km (5 mi) of Bartram's stonecrop populations in Arizona. The range of current and projected mining activities varies from 1 to 10 per sky island mountain range containing Bartram's stonecrop (USFS 2012, entire). One population, Sycamore Canyon (115 adult individuals), would be affected by groundwater drawdown due to the Rosemont Mine. Sycamore Canyon is currently in moderate condition. Further, this species is collected and sold. Synergistic interactions among wildfire, nonnative grasses, decreased precipitation, and increased temperatures cumulatively and cyclically impact Bartram's stonecrop, and all stressors are exacerbated in small populations. In addition, because approximately 41 percent (12 populations) of the extant Bartram's stonecrop populations contain 50 or fewer individuals, loss due to erosion, trampling, collection, predation, fire, severe frost, or other stressors have the potential to seriously damage or completely remove these small populations. Of the 29 extant populations, 1 population (3 percent) is in high condition, 21 populations (72 percent) are in moderate condition, and 7 populations (24 percent) are in low condition (Table 8, below). Population resiliency categories are described in Table 4, above, and in the SSA report (Service 2018b).

TABLE 8—BARTRAM'S STONECROP CURRENT POPULATION CONDITION

Sky Island	Population	Number of individuals	Current condition
Baboquivari	Brown Canyon	112	Moderate.
	Thomas Canyon	5	Low.
Chiricahua	Echo Canyon	186	Moderate.
	Indian Creek	0	Extirpated.
Dragoon	Carlink Canyon	0	Extirpated.
	Jordan Canyon	415	Moderate.
	Sheephead	45	Moderate.
	Slavin Gulch	9	Moderate.
	Stronghold Canyon East	188	Moderate.
	Stronghold Canyon West	533	High.
Empire	Empire Mountains	0	Extirpated.
Mule	Juniper Flat	798	Moderate.
Pajarito-Atascosa	Alamo Canyon	134	Moderate.
	Holden Canyon	7	Moderate.
	Sycamore Canyon	298	Moderate.
	Warsaw Canyon	13	Moderate.
Patagonia	Alum Gulch	123	Moderate.
Rincon	Chimenea-Madrona Canyon	9	Moderate.
	Happy Valley North	0	Extirpated.
	Happy Valley South	14	Moderate.
Santa Rita	Adobe Canyon	82	Moderate.
	Gardner Canyon	14	Moderate.
	Josephine Canyon	71	Moderate.
	Madera Canyon	76	Moderate.
	Squaw Gulch	5	Low.
	Sycamore Canyon	115	Moderate.
	Temporal Gulch	7	Moderate.
	Walker Canyon	3	Moderate.
Whetstone	Deathtrap Canyon	135	Low.
	French Joe Canyon	87	Low.
Sierra Las Avispas, Sonora	Sierra Las Avispas	10	Low.
Sierra La Escuadra, Chihuahua	Near Colonia Pacheco	10	Low.
Sierra La Estancia, Chihuahua	Cuarenta Casas	10	Low.

Bartram's Stonecrop Representation

No genetic studies have been conducted within or between the 33 historical populations of Bartram's stonecrop in southern Arizona and Mexico. However, we assessed representation for Bartram's stonecrop in the form of its geographic distribution across the range. Some genetic exchange likely occurs within populations containing many subpopulations or many plants per subpopulation. Sky island populations on different mountain ranges are widely separated (ranging from roughly 14 to 42 km (8.7 to 26 mi) apart), making cross-pollination across sky islands highly unlikely. Mountain ranges that have only one or two populations, have only one subpopulation per population, or have low numbers of individuals per population with several miles between mountain ranges may not be as genetically diverse because pollination or transport of seeds between populations may be very limited. However, there may be genetic diversity between populations within and between the sky island mountain ranges in response to elevational and other environmental differences between locations. Due to the loss of four populations, it is possible that there has been a loss of genetic diversity. However, because the species occurs across 29 populations in 12 mountain ranges, it is likely some genetic diversity exists among mountain ranges.

In addition, because the plant occurs on multiple substrate types and at a range of elevations (1,067 to 2,042 m (3,500 to 6,700 ft)), there is likely some local adaptation and genetic differentiation among populations. This range in elevation provides a variety of climatic conditions for the species to inhabit. Lastly, in at least three locations (Flux Canyon, Sycamore Canyon (Pajarito-Atascosa Mountains), and Gardner Canyon populations), Bartram's stonecrop have been reported over many decades, indicating that these populations may have the genetic and environmental diversity to adapt to changing conditions.

Bartram's Stonecrop Redundancy

The Bartram's stonecrop populations in the United States and Mexico are naturally fragmented between mountain ranges. Currently, 29 extant Bartram's stonecrop populations are spread across 12 different mountain ranges in southern Arizona and northern Mexico. Although these numbers may imply redundancy across its range, note that 24 of the 29 extant populations contain fewer than 150 total individual plants. Further, 14 of the 29 populations have 50 individuals or less, and 4 populations have been extirpated over recent (approximately 10) years. Five mountain ranges (Baboquivari, Chiricahua, Mule, Whetstone, and Patagonia Mountains) have only one or two populations each or have only have one subpopulation per population, and low numbers of individuals per population. These sky island mountain ranges are several miles away from the other sky island mountain ranges, so natural gene exchange or re-establishment following extirpation is unlikely. In addition, the Mule Mountains contain large number of Bartram's stonecrop individuals, but there is only one population and it is approximately 38 km (23.6 mi) away from the nearest population, making natural re-establishment of populations unlikely. In addition, this population is known to be contracting in size due to drying of habitat (The Nature Conservancy 1987, p. 2).

Future Condition of the Bartram's Stonecrop

We now consider the species' future condition of population resiliency and the species' representation and redundancy are likely to be. The future viability of Bartram's stonecrop depends on maintaining multiple resilient populations over time. The resiliency of Bartram's stonecrop populations depends on moisture in their microenvironment maintained by shade from overstory vegetation, spring and winter precipitation, proximity to water, and vegetation litter. We expect the 29 extant Bartram's stonecrop populations to experience changes to all of these aspects of their habitat, although it may be in different ways under the different conditions. In addition, direct impacts to Bartram's stonecrop through being dislodged, buried, or collected will continue to impact the species.

Given our uncertainty regarding the scope of the stressors manifesting and the species' response, we forecasted future conditions of Bartram's stonecrop under four plausible future scenarios (see chapter 6 of the SSA report; Service 2018b). We developed these scenarios to span a range of potential stressors that are ongoing or will occur in the future that we believe will influence the future status of the species. We chose 10 years to evaluate the current condition, as well as future projections out to 40 years because this is within the range of predictions of available hydrological and climate change model forecasts and is within the time period of the Rosemont Mine effects. This time frame represents eight generations of the Bartram's stonecrop, which allows us to assess reproductive effects on the species and allows the species opportunities to rebound after poor water years. The ten-year time step also represents a reasonable timeframe to judge the species' current vulnerability to threats as they are manifested now, without projecting changes to threats that longer timeframes would provide. Thus, the future scenarios forecast the viability of Bartram's stonecrop over the next 40 years. See table 9 below for a summary of the four scenarios. For more detail, see Chapter 6 of the SSA report (Service 2018b, entire).

TABLE 9—FUTURE SCENARIOS FOR BARTRAM'S STONECROP

Risks	Mining activity	Altered fire regime	Climate	Climate	Individual effects	Conservation
Risk described	Water extraction, Excavation, Burial, Shade reduction.	Lightning Recreation Cross border violators Nonnative plants.	Reduction in available water* and/or shade.	Dislodging from flooding events, Seedling desiccation, Flowering halt, Shade removal.	Livestock Recreation Trampling Predation Collection.	Conservation actions implemented.
Scenario 1. Continuation continuing into the future.	Ongoing or planned mining activities as of 2012 (~20).	Number of wildfires annually increases at the same rate as the last 10 years.	Available water and drought continue at the same level as in the past 10 years. Emissions 8.5.	Number and severity of flooding events continues at the past 10 years. Emissions <4.5.	Applied to populations <50 individuals.	No new individuals, subpopulations or populations found. No augmentation of existing populations, no seed preservation, nonnatives controlled, and forest thinned.
Scenario 2. Conservation.	Number of mining activities does not increase from current condition.	Number of wildfires does not increase from current rate.	Available water remains stable. Emissions 4.5.	Flooding events do not increase. Emissions <4.5.	Applied to populations <50 individuals.	Sites revisited and additional plants are located, sites are augmented, or new sites are established, nonnatives controlled, and forest thinned.

TABLE 9—FUTURE SCENARIOS FOR BARTRAM'S STONECROP—Continued

Risks	Mining activity	Altered fire regime	Climate	Climate	Individual effects	Conservation
Scenario 3. Moderate increase in negative effects.	1–3 new mining activities (above the 2012 number) are implemented and/or existing mines expand.	Number of wildfires increases in uplands.	Available water is reduced per 8.5 emissions scenario.	Increases in flash flooding per 4.5 emissions scenario.	Applied to populations <50 individuals.	No new individuals, subpopulations, or populations found, and no augmentation of existing populations, nonnatives controlled, and forest thinned.
Scenario 4. Major increase in negative effects.	>3 new mining activities are implemented and/or existing mines expand.	Number of wildfires increases in uplands.	Available water is reduced per 8.5 emissions scenario.	Increases in flash flooding per 8.5 emissions scenario.	Applied to populations <50 individuals.	No new individuals, subpopulations or populations found, and no augmentation of existing populations, nonnatives controlled, and forest thinned.

* Available water includes precipitation, soil moisture, humidity, surface water, aquifer recharge, reduction in riparian vegetation, and increased number of days without water.

All scenarios consider impacts from mining, wildfire, and climate. In addition, effects on individual plants from multiple stressors are assessed, including livestock, recreation, trampling, predation, and collection. The ''continuation'' scenario evaluates the condition of Bartram's stonecrop if there is no increase in risks to the populations relative to what exists today, while the other scenarios evaluate the response of the species to changes in those risks. The ''conservation'' scenario takes into account realistically possible additional protective measures which may or may not happen. The ''moderate effects'' scenario is an increase in the risks to populations with changes in climate as projected in a lower (8.5) emissions scenario along with increases in other stressors. The ''major effects'' scenario is a further increase in risks to populations, with changes in climate projected at a higher (8.5) emissions scenario, and with additional increases in other stressors. These are described in more detail in chapter 6 of the SSA report (Service 2018b).

The most likely scenario is the ''moderate effects'' scenario, with impacts to the species occurring around the 40-year time step. Under the ''moderate effects'' scenario, water flow reduction due to drought and groundwater extraction continues to reduce the humid microhabitat for this species. Cross-border violator traffic continues, and risk of catastrophic wildfire is high due to dry conditions; invasion of nonnatives in the uplands; and increased risk of fire starts from illegal activity, recreation, and natural causes. Mining impacts individuals in the Patagonia and Santa Rita Mountains. Collection, trampling, freezing, predation, and human impacts also continue at current or increased levels. The full analyses of all scenarios are available in the SSA report (Service 2018b, chapter 6); however, we are only presenting the full results of the ''moderate effects'' scenario here because it gives the most realistic projection of the future condition of the species.

Under the ''moderate effects'' scenario, within the 40-year timeframe, we expect Bartram's stonecrop's viability to be characterized by lower levels of resiliency, representation, and redundancy than it has currently, which is already reduced as described above. Under the ''moderate effects'' scenario, no populations would be in high condition, 4 populations (12 percent) would remain in moderate condition, 16 populations (52 percent) would be in low condition, and 13 populations (36 percent) would be extirpated, further reducing population redundancy and connectivity (see table 6.6 in the SSA report; Service 2018b). Under the ''moderate effects'' scenario, because of the intensity of stressors discussed above, 22 populations would be reduced from their current condition (see Table 10, and see figure 6.3 and table 6.6 in the SSA report (Service 2018b)). We further believed that in the ''moderate effects'' scenario, one of the three small populations in Mexico becomes extirpated due to the amount of nonnatives contributing to fire, reduction in precipitation, increase in drought, and low resiliency of a small population.

TABLE 10—BARTRAM'S STONECROP POPULATION CONDITIONS UNDER THE ''MODERATE EFFECTS'' SCENARIO

Sky Island	Population	Condition under the ''moderate effects'' scenario
Baboquivari	Brown Canyon	Low.
	Thomas Canyon	Low.
Chiricahua	Echo Canyon	Low.
	Indian Creek	Extirpated.
Dragoon	Carlink Canyon	Extirpated.
	Jordan Canyon	Moderate.
	Sheephead	Low.
	Slavin Gulch	Low.
	Stronghold Canyon East	Moderate.
	Stronghold Canyon West	Moderate.
Empire	Empire Mountains	Extirpated.
Mule	Juniper Flat	Low.
Pajarito-Atascosa	Alamo Canyon	Low.
	Holden Canyon	Extirpated.
	Sycamore Canyon	Moderate.
	Warsaw Canyon	Extirpated.
Patagonia	Alum Canyon	Extirpated.
Rincon	Chimenea-Madrona Canyon	Low.
	Happy Valley North	Extirpated.
	Happy Valley South	Low.
Santa Rita	Adobe Canyon	Low.
	Gardner Canyon	Low.
	Josephine Canyon	Low.

TABLE 10—BARTRAM'S STONECROP POPULATION CONDITIONS UNDER THE "MODERATE EFFECTS" SCENARIO—Continued

Sky Island	Population	Condition under the "moderate effects" scenario
	Madera Canyon	Extirpated.
	Squaw Gulch	Extirpated.
	Sycamore Canyon	Extirpated.
	Temporal Gulch	Low.
	Walker Canyon	Extirpated.
Whetstone	Deathtrap Canyon	Low.
	French Joe Canyon	Extirpated.
Sierra Las Avispas, Sonora	Sierra Las Avispas	Low.
Sierra La Escuadra, Chihuahua	Near Colonia Pacheco	Extirpated.
Sierra La Estancia, Chihuahua	Cuarenta Casas	Low.

Determination

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future stressors to beardless chinchweed and Bartram's stonecrop.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.''

Therefore, on the basis of the best available scientific and commercial information, we propose listing beardless chinchweed as endangered in accordance with sections 3(6) and 4(a)(1) of the Act and Bartram's stonecrop as threatened in accordance with sections 3(20) and 4(a)(1) of the Act.

Beardless Chinchweed

Historically there were 21 populations. Nine populations have been extirpated, leaving 12 extant populations (six in the United States and six in Mexico). The six populations in the United States consist of 387 individuals spread across less than 2 ha (5 ac). The six populations have been reported from northern Mexico, but this information is from 1940 or earlier.

The proliferation of invasive nonnative grasses throughout most of the beardless chinchweed's range has greatly affected this species through increased competition and altered fire regimes. Many of these historical locations no longer support beardless chinchweed due to this alteration of habitat (National Park Service 2014, pp. 3–4; Service 2014b, pp. 1–2; Service 2014c, entire; Service 2014d, pp. 1–2).

All beardless chinchweed populations likely contain nonnative grasses, resulting in habitat loss (Factor A). Further, altered fire regime (Factors A and E), which is currently or in the near future impacting all populations, drives the spread of nonnatives (Factor A), exacerbating the encroachment of nonnative grasses. Consequently, all remaining populations of beardless chinchweed are impacted by nonnative grasses now or will be in the near future. Altered precipitation (Factors A and E), increased temperatures (Factors A and E), and decreased annual precipitation (Factors A and E) are current and ongoing regional conditions that are impacting all populations of beardless chinchweed. These environmental conditions exacerbate an altered fire regime, which, in turn, drives the spread of nonnatives. In addition, nonnative grasses have competitive advantage over native grasses during periods of drought. Road and trail maintenance (Factors A and E) is altering habitat and likely resulting in the direct killing of individuals in three populations (Ruby Road, Scotia Canyon, and Coronado National Memorial). In addition, all individuals in these three populations are being impacted by dust (Factor E) from the road. These three populations are already of low resiliency. Two additional populations (McCleary Canyon—Gunsight Pass and McCleary Canyon—Wasp Canyon) will be impacted by roads (Factor A) related to mining operations in the near future (Westland 2010, p. iv). All individuals of these two populations will also be impacted by dust (Factor E). One of these populations is already of low resiliency and the other is of moderate resiliency. Of the 12 populations, 11 (92 percent) are small populations (fewer than 50 individuals). Synergistic interactions among wildfire, nonnative grasses, decreased precipitation, and increased temperatures cumulatively and cyclically impact beardless chinchweed, and all stressors are exacerbated in small populations (Factor E). No conservation efforts have been implemented for this species.

We consider beardless chinchweed to have poor representation in the form of potential genetic diversity (Factor E). All but one population has fewer than 50 individuals. Small populations are susceptible to the loss of genetic diversity, genetic drift, and inbreeding. There are currently six populations spread across four mountain ranges in the United States and six populations in northern Mexico that are presumed extant. Five of the six extant U.S. populations do not have multiple subpopulations (all but the Coronado National Memorial population, which has two subpopulations). Mountain ranges that have only one or two populations, have only have one subpopulation per population, or have low numbers of individuals per population with several miles (16 to 61 km (9.9 to 37.9 mi)) between mountain ranges, may not be genetically diverse because pollination or transport of seeds between populations may be very limited. This could mean that between-population genetic diversity may be greater than within-population diversity (Smith and Wayne 1996, p. 333; Lindenmayer and Peakall 2000, p. 200). Further, nine populations are extirpated, and it is possible that there has been a loss of genetic diversity.

Beardless chinchweed populations in the United States range in elevation from 1,158 m (3,799 ft) to 1,737 m (5,699 ft) in elevation. Of the 15 historical U.S. populations, 8 (approximately 53 percent) fall below 457 m (1,500 ft) elevation. Of these eight, six have become extirpated in recent decades. This essentially indicates a loss at this lower elevational range and possibly loss of some local adaptation to warmer or dryer environments and genetic differentiation among populations (Factor E).

Beardless chinchweed needs to have multiple resilient populations distributed throughout its range to provide for redundancy. Beardless chinchweed needs multiple resilient populations spread over their range that are distributed in such a way that a catastrophic event will not result in the loss of all populations. With the known extant populations being separated by as much as 35 km (21.8 mi) in southern Arizona and even farther in northern Mexico, there is little connection potential between known disjunct populations. Therefore, a localized stressor such as grazing during flowering would impact only those groups of plants nearby the activity. However, repeated, large-scale, moderate- and high-severity fires, nonnative plant invasion, and climatic changes occur across the region and could impact all populations now or in the near future. The distance among populations reduces connectivity among populations and mountain ranges, making it unlikely that a site that is extirpated can be naturally recolonized by another population (Factor E).

We find that beardless chinchweed is presently in danger of extinction throughout its entire range based on the severity and immediacy of stressors currently impacting the species. The overall range has been significantly reduced (nine populations extirpated), and the remaining habitat and populations are threatened by a variety of factors acting in combination to reduce the overall viability of the species. The risk of extinction is high because the remaining populations are small, isolated, and have limited potential for natural recolonization. Therefore, on the basis of the best available scientific and commercial information, we propose listing beardless chinchweed as endangered in accordance with sections 3(6) and 4(a)(1) of the Act. We find that a threatened species status is not appropriate for beardless chinchweed because of the species's current precarious condition due to its contracted range, because the stressors are severe and occurring rangewide, and because the stressors are ongoing and expected to continue into the future.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that beardless chinchweed is endangered throughout all of its range, we find it unnecessary to proceed to an evaluation of potentially significant portions of the range. Where the best available information allows the Service to determine a status for the species rangewide, that determination should be given conclusive weight because a rangewide determination of status more accurately reflects the species' degree of imperilment and better promotes the purposes of the statute. Under this reading, we should first consider whether listing is appropriate based on a rangewide analysis and proceed to conduct a ''significant portion of its range'' analysis if, and only if, a species does not qualify for listing as either endangered or threatened according to the ''all'' language. We note that the court in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), did not address this issue, and our conclusion is therefore consistent with the opinion in that case.

Therefore, on the basis of the best available scientific and commercial information, we propose to list beardless chinchweed as an endangered species across its entire range in accordance with sections 3(6) and 4(a)(1) of the Act.

Bartram's Stonecrop

Bartram's stonecrop has experienced population declines and four populations have been lost entirely. Currently, there are 29 extant populations. All Bartram's stonecrop populations contain or are near nonnative grasses resulting in habitat loss in the future (Factor A). Further, altered fire regime (Factors A and E), which is currently and in the future impacting all populations, drives the spread of nonnatives (Factor A), exacerbating the encroachment of nonnative grasses. Consequently, all populations of Bartram's stonecrop will be impacted by nonnative grasses in the future. Altered precipitation (Factors A and E), increased temperatures (Factors A and E), and decreased annual precipitation (Factors A and E) are current and ongoing regional conditions that are impacting all populations of Bartram's stonecrop. These environmental conditions exacerbate an altered fire regime, which, in turn, drives the spread of nonnatives. In addition, nonnative grasses have competitive advantage over native grasses during periods of drought. Many currently undeveloped areas of locatable mineral deposits may be explored or mined in the future (Factors A and E). The range of current and projected mining activities varies from 1 to 10 per sky island mountain range containing Bartram's stonecrop (USFS 2012, entire). One population, Sycamore Canyon (115 adult individuals), will be affected by groundwater drawdown due to the Rosemont Mine, which will impact the shade and moist microclimate this species needs (Factor A). This species is known to be collected and sold (Factor B), and plants in close proximity to trails or roads have higher discovery potential and are, therefore, more likely to be collected. In addition, because approximately 47 percent of the extant Bartram's stonecrop populations contain 50 or fewer individuals (Factor E), loss due to erosion (Factors A and E), trampling (Factor E), collection (Factor B), predation (Factor C), and fire (Factors A and E) has the potential to seriously damage or completely remove these small populations. Synergistic interactions among wildfire, nonnative grasses, decreased precipitation, and increased temperatures cumulatively and cyclically impact Bartram's stonecrop, and all stressors are exacerbated in small populations (Factor E). No conservation efforts have been implemented for this species.

We consider Bartram's stonecrop to have poor representation in the form of potential genetic diversity. Sky island populations on different mountain ranges are widely separated (ranging from roughly 14 to 42 km (8.7 to 26 mi) apart), making genetic exchange highly unlikely. There is likely genetic diversity among mountain ranges, but reduced genetic diversity within populations. Further, overall genetic diversity is likely reduced given that four populations are extirpated. However, it is likely that the species' genetic representation will be lost given the impacts to populations through the reduction in the number of individuals per population and the loss of populations (Factor E). In addition, it is likely that ecological representation will continue to decline as those populations at lower elevations are lost due to reduced precipitation and increased temperatures (Factor E).

The Bartram's stonecrop populations in the United States and Mexico are naturally fragmented between mountain ranges. Currently, 29 extant Bartram's stonecrop populations are spread across 12 different mountain ranges in southern Arizona and northern Mexico. Although this may imply redundancy across its range, note that 24 of the 29 extant populations contain fewer than 150 total individual plants. Further, 14 of the 29 populations have 50 individuals or less, and 4 populations have been extirpated. Five mountain ranges (Baboquivari, Chiricahua, Mule, Whetstone, and Patagonia Mountains) have only one or two populations each, have only one subpopulation per population, or have low numbers of individuals per population. These sky island mountain ranges are several miles away from the other sky island mountain ranges, so natural gene exchange or re-establishment following extirpation is unlikely. In addition, the Mule Mountains contain large number of Bartram's stonecrop individuals, but there is only one population, and it is approximately 38 km (23.6 mi) away from the nearest population, making natural re-establishment of populations unlikely. In addition, this population has contracted in size due to drying of habitat (The Nature Conservancy 1987, p. 2; Rawoot 2017, pers. comm.).

The overall range of the species has not been significantly reduced, although four populations are extirpated due to habitat drying. Currently, 29 extant populations are spread across 12 mountain ranges, providing protection from catastrophic events in the near future (approximately 10 years). While there are multiple stressors to the remaining populations, these stressors are not immediately impacting all populations such that Bartram's stonecrop is in danger of extinction. The stressors that pose the largest risk to future species viability are primarily related to habitat changes: Groundwater extraction from mining, long-term drought, and alteration in wildfire regime. These are stressors that we have high confidence in occurring and impacting Bartram's stonecrop within the next 40 years. We chose a foreseeable future of 40 years (approximately 2060) because this is within the range of predictions of available hydrological and climate change model forecasts, is within the time period of the Rosemont Mine effects, and represents eight generations of the Bartram's stonecrop, which allows us to assess reproductive effects on the species and allows the species opportunities to rebound after poor water years. The primary sources we examined in determining foreseeable future include the IPCC (2013 and 2014 entire) and Garfin *et al.* 2013 entire. The IPCC emission scenarios projections are for 2025 to 2049 and 2050—2074, or approximately mid-century, under RCP 4.5 and 8.5 scenarios. This is 6 to 30 and 31 to 55 years, respectively, in the future. The IPCC has high confidence for climate projections of increased temperature during this interval. In addition, we examined literature pertaining to wildfire frequency and severity, including Westerling *et al.* 2006, FireScape 2016, and Fire Management Information System 2016. An increase in temperature results in increased evapotranspiration rates and soil drying, resulting in the effects of future droughts becoming more severe (Garfin 2013, pp. 137–138) and wildfires becoming more frequent and of increased intensity. Given that climate change projections are for mid-century and that wildfire is influenced by a drying climate, we used 40 years as the foreseeable future for this species. We find that Bartram's stonecrop is likely to become an endangered species within the foreseeable future (approximately 40 years) throughout all of its range based on the severity and immediacy of stressors.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the Bartram's stonecrop is likely to become an endangered species within the foreseeable future throughout its range, we find it unnecessary to proceed to an evaluation of potentially significant portions of the range. Where the best available information allows the Service to determine a status for the species rangewide, that determination should be given conclusive weight because a rangewide determination of status more accurately reflects the species' degree of imperilment and better promotes the purposes of the statute. Under this reading, we should first consider whether listing is appropriate based on a rangewide analysis and proceed to conduct a ''significant portion of its range'' analysis if, and only if, a species does not qualify for listing as either endangered or threatened according to the ''all'' language. We note that the court in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), did not address this issue, and our conclusion is therefore consistent with the opinion in that case.

Therefore, on the basis of the best available scientific and commercial information, we propose to list Bartram's stonecrop as a threatened species across its entire range in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the stressors to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new stressors to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for downlisting (reclassification from endangered to threatened) or delisting (removal from listed status), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*), or from our Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands. If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Arizona would be eligible for Federal funds to implement management actions that promote the protection or recovery of beardless chinchweed and Bartram's stonecrop. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although beardless chinchweed and Bartram's stonecrop are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Beardless Chinchweed

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Forest Service (Coronado National Forest), Bureau of Land Management, U.S. Customs and Border Protection, and National Park Service (Coronado National Memorial).

With respect to endangered plants, prohibitions at section 9 of the Act and 50 CFR 17.61 make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or to remove and reduce to possession any such plant species from areas under Federal jurisdiction. In addition, for endangered plants, the Act prohibits malicious damage or destruction of any such species on any area under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of any such species on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law. Exceptions to these prohibitions are set forth at 50 CFR 17.62 and 17.63.

We may issue permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62 and 17.63. With regard to endangered plants, the Service may issue a permit authorizing any activity otherwise prohibited by 50 CFR 17.61 for scientific purposes, for enhancing the propagation or survival of endangered plants, or for economic hardship. At this time, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because beardless chinchweed occurs in a variety of habitat conditions across its range.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) Ground-disturbing activities within 30 m (98 ft) of individual beardless chinchweed plants;

(3) Dislodging and trampling by livestock;

(4) Livestock grazing during April through October where the species occurs; and

(5) Herbicide applications within 30 m (98 ft) of individual beardless chinchweed plants.

Bartram's Stonecrop

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Forest Service (Coronado National Forest), Bureau of Land Management, U.S. Customs and Border Protection, and National Park Service (Chiricahua National Monument and Saguaro National Park).

With respect to threatened plants, the Act allows the Secretary to promulgate regulations to prohibit activities to provide for the conservation of the species. Under II. Proposed Section 4(d) Rule for Bartram's stonecrop, below, we explain what activities we are proposing to prohibit.

We may issue permits to carry out otherwise prohibited activities involving threatened plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.72. With regard to threatened plants, a permit issued under this section must be for one of the following: Scientific purposes, the enhancement of the propagation or survival of threatened species, economic hardship, botanical or horticultural exhibition, educational purposes, or other activities consistent with the purposes and policy of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. At this time, we are unable to identify specific activities that would not be considered to result in a violation of the Act because the Bartram's stonecrop occurs in a variety of habitat conditions across its range.

Based on the best available information, the following activities may potentially result in a violation of the Act; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) Ground-disturbing activities within 30 m (98 ft) of individual Bartram's stonecrop plants;

(3) Herbicide applications within 30 m (98 ft) of individual Bartram's stonecrop plants; and

(4) Dislodging and trampling by livestock.

Questions regarding whether specific activities would constitute a violation of the Act should be directed to the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Proposed Section 4(d) Rule for Bartram's Stonecrop

Background

Section 4(d) of the Act states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. In *Webster* v. *Doe,* 486 U.S. 592 (1988), the U.S. Supreme Court noted that similar ''necessary or advisable'' language ''fairly exudes deference'' to the agency. Conservation is defined in section 3 of the Act as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited'' under section 9(a)(2) of the Act. Thus, regulations promulgated under section 4(d) of the Act provide the Secretary with wide latitude of discretion to select appropriate provisions tailored to the specific conservation needs of the threatened species. The statute grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may decide not to include a taking prohibition for threatened wildlife, or to include a limited taking prohibition. See *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* and 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988), the rule need not address all the stressors to the species. As noted by Congress when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species,'' or he may choose to forbid both taking and importation but allow the transportation of such species, as long as the prohibitions, and exceptions to those prohibitions, will ''serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

The Service has developed a species-specific 4(d) rule that is designed to address Bartram's stonecrop's specific stressors and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this regulation is necessary and advisable to provide for the conservation of Bartram's stonecrop. As discussed under Summary of Biological Status and Stressors, above, the Service has concluded that Bartram's stonecrop is at risk of extinction within the foreseeable future primarily due to groundwater extraction and prolonged drought that may reduce nearby water levels and humidity within Bartram's stonecrop's microenvironment, and altered fire regimes leading to erosion of Bartram's stonecrop that could dislodge plants, sedimentation that could cover individuals, and loss of overstory shade trees. In addition, collection, trampling, predation, flooding, and dislodging and burial from recreationists, cross-border violators, and domestic and wild animals contribute to the risk of extinction within the foreseeable future due to the majority of populations being small and isolated. The provisions of this proposed 4(d) rule would promote conservation of Bartram's stonecrop by encouraging management of the landscape in ways that meet land management needs while meeting the conservation needs of Bartram's stonecrop. The provisions of this rule are one of many tools that the Service would use to promote the conservation of Bartram's stonecrop. This proposed 4(d) rule would apply only if and when the Service makes final the listing of Bartram's stonecrop as a threatened species.

Provisions of the Proposed Protective Regulation

This proposed 4(d) rule would provide for the conservation of the Bartram's stonecrop by applying all of the prohibitions applicable to an endangered plant, except as otherwise authorized or permitted: Import or export; certain acts related to removing, damaging, and destroying; delivery, receipt, transport, or shipment in interstate or foreign commerce in the course of commercial activity; or sale or offering for sale in interstate or foreign commerce. Bartram's stonecrop is an attractive and small plant that can be easily collected by gardeners and succulent enthusiasts. We have confirmed collection from the wild and sale in interstate commerce. Because Bartram's stonecrop is difficult to propagate and maintain in captivity, it is more vulnerable to collection than other plants in this genus. Small populations may not be able to recover from collection, especially if the mature, reproductive plants are removed.

As discussed under Summary of Biological Status and Stressors, above, multiple factors are affecting the status of Bartram's stonecrop. A range of activities have the potential to impact Bartram's stonecrop, including:

(1) Unauthorized handling or collecting of the species;

(2) Ground-disturbing activities where the species occurs;

(3) Activities that would affect pollinators where the species occurs and in the surrounding area;

(4) Activities that would promote high-severity wildfires where the species occurs;

(5) Activities that would reduce shade, reduce proximity to water, and lower the water table such that the cooler, humid microenvironment is affected; and

(6) Herbicide applications where the species occurs.

Regulating these activities will help conserve the species' remaining populations; slow their rate of decline; and decrease synergistic, negative effects from other stressors.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened plants under certain circumstances. Regulations governing permits are codified at 50 CFR 17.72. With regard to threatened plants, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival (control of nonnatives and fuel load), for economic hardship, for botanical or horticultural exhibition, for educational purposes, or other activities consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, under this proposed 4(d) rule, any qualified employee or agent of a State conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve Bartram's stonecrop that may result in otherwise prohibited activities without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of Bartram's stonecrop. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

III. Proposed Critical Habitat Designation for Beardless Chinchweed and Prudency Determination for Bartram's Stonecrop

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary of the Interior (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific areas, we focus on the specific features that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts, if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

Beardless Chinchweed

We did not identify any of the factors above to apply to the beardless chinchweed. Therefore, we find designation of critical habitat is prudent for the species.

Bartram's Stonecrop

As described above, there is currently an imminent threat of take attributed to collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is expected to increase such threat because when we designate critical habitat, we publish detailed maps and descriptions of species' occurrences in the **Federal Register**, which in this case, could make this species more vulnerable to the threats identified under Factor B. Because we have determined that the designation of critical habitat will likely increase the degree of threat to the species, we find that designation of critical habitat is not prudent for Bartram's stonecrop.

Critical Habitat Determinability for Beardless Chinchweed

Having determined that designation is prudent for beardless chinchweed, under section 4(a)(3) of the Act, we must find whether critical habitat for the species is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for beardless chinchweed.

Physical or Biological Features for Beardless Chinchweed

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. For example, physical features might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of beardless chinchweed from studies of this species' habitat, ecology, and life history, as described below. We have determined that the following physical or biological features are essential to the conservation of beardless chinchweed:

(1) Native-dominated plant communities, consisting of:

(a) Plains, great basin, and semi-desert grasslands, oak savanna, or Madrean evergreen woodland;

(b) Communities dominated by bunchgrasses with open spacing (adjacent to and within 10 m (33 ft) of individual beardless chinchweed) and with little competition from other plants; and

(c) Communities with plants for pollinator foraging and nesting within 1 km (0.62 mi) of beardless chinchweed populations.

(2) 1,158 to 1,737 m (3,799 to 5,699 ft) elevation.

(3) Eroding limestone or granite bedrock substrate.

(4) Steep, south-facing, sunny to partially shaded hillslopes.

(5) The presence of pollinators (*i.e.,* flies, bees, and butterflies).

Space for individual and population growth is needed for beardless chinchweed, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed banks in the form of open, native-dominated desert grasslands, oak savannas, and oak woodlands at 1,158 to 1,737 m (3,799 to 5,699 ft) in elevation (SEINet, entire). In addition, plants need space on steep, south-facing, sunny to partially shaded hillslopes, with eroding bedrock and open areas with little competition from other plants. Native-dominated habitats have diverse assemblages of vegetation, each with different-shaped and -sized canopy and root system, which creates heterogeneity of form, height, and patchiness and provides openness. Beardless chinchweed is presumed to be a poor competitor due to its preference for this open habitat and inability to find the species under dense vegetation conditions. Pollination is necessary for effective fertilization, out-crossing, and seed production in beardless chinchweed. Beardless chinchweed, like other yellow-flowered composites, is most likely pollinated by bees, flies, and butterflies. Many bees and butterflies can travel a distance of 1 km (0.62 mi); consequently, adequate space for pollinators is needed around beardless chinchweed populations to support pollinators and, therefore, cross-pollination within and among populations and subpopulations. In addition, open space is needed in the form of seedbanks for population growth. Further, beardless chinchweed populations need space with soil moisture and nutrients for individual and population growth.

Beardless chinchweed needs multiple populations distributed across its range that are large enough to withstand stochastic events, and connectivity to reestablish extirpated populations. Species that are widely-distributed are considered less susceptible to extinction and more likely to be viable than species confined to small ranges (Carroll *et al.* 2010, entire). Historically, there were 21 populations across seven mountain ranges. Nine populations (and one subpopulation) have been extirpated in the United States, and all populations are extirpated from the Patagonia Mountains in the United States. This leaves six populations across four mountains ranges covering an occupied area of about 2 ha (5 ac) in the United States and six small populations in Mexico. Further, two mountain ranges only have one population each with fewer than 50 individuals. In addition, the other two mountain ranges have only two populations each, both with fewer than 50 individuals each. The current distribution of this species does not represent its historical geographical distribution. Additional populations are needed to increase the redundancy of the species to secure the species from catastrophic events like wildfire and nonnative grass encroachment. Increased representation in the form of ecological environments are needed to secure the species against environmental changes like increase temperatures, increase drought, and increased evapotranspiration. Specifically, populations at higher altitudes are likely needed to secure the species viability.

All populations need protection from wildfires of high severity and of greater frequency than was known historically and from nonnative grass encroachment. Further, all populations need protection from stressors related to one or more of the following activities: Recreation, road and trail maintenance, grazing, trampling, and mining. As discussed above, these stressors are currently, or will in the near future, impact all populations. Protection is needed from these stressors to ensure the conservation of the species.

The minimum viable population size for this species is unknown. General conservation biology indicates that at least 500 individual are needed for a minimum viable population. Currently, 11 of the 12 populations have fewer than 50 individuals. In Arizona, there are currently 387 individual beardless chinchweed spread across less than 2 ha (5 ac) within six extant populations spread across the four mountain ranges. Space, in the form of habitat described above, is needed for an increase in the number of populations and the number of individuals per population.

Specific details about the physical or biological features essential to this species are described above in the background section and in the SSA report (Service 2018a).

Special Management Considerations or Protection for Beardless Chinchweed

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following stressors: Altered fire regime, nonnative grass encroachment, grazing, erosion, and burial (see Table 11 below). Special management considerations or protection are required within critical habitat areas to address these stressors. Management activities that could ameliorate these stressors include (but are not limited to): Prescribed fire, fire breaks, reduction of nonnative grasses, promotion or introduction of native forbs and grasses, clean equipment, exclosure fences, and protection from erosion and burial. These management activities will protect the physical or biological features for the species by reducing or avoiding the encroachment or expansion of nonnative grass species, promoting native vegetation, and preventing the succession of vegetation such that open space and sun exposure are reduced or eliminated.

TABLE 11—FEATURES THAT MAY REQUIRE SPECIAL MANAGEMENT

Features that may require special management	Stressors to features	Special management or protection to address stressor	Features protected by
Native-dominated plant communities.	Altered fire regime; nonnative grasses; grazing; road and trail maintenance.	Fire breaks around populations; prescribed fires; reduction of nonnative grasses; clean equipment to limit the spread of non-natives; promotion or introduction of native forbs and grasses.	Avoidance of encroachment of nonnatives from wildfires and drought; promotion of native species through natural fire regime; avoidance of introducing nonnative species.
Plants for pollinators	Altered fire regime; nonnative grasses.	Fire breaks around populations; prescribed fires; reduction of nonnative grasses; promotion or introduction of native forbs and grasses.	Avoidance of encroachment of nonnatives from wildfires and drought; promotion of native species through natural fire regime; avoidance of introducing nonnative species.
Open, sunny sites	Altered fire regime; nonnative grasses.	Prescribed fires; reduction of nonnative grasses; promotion or introduction of native forbs and grasses.	Elimination or reduction of the loss of open space and sun exposure.

Criteria Used To Identify Critical Habitat for Beardless Chinchweed

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. Sources of data for this species include multiple databases maintained by the Arizona Natural Heritage Program, existing endangered species reports, and interviews with species experts. We have also reviewed available information that pertains to the habitat requirements of this species.

In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are proposing to designate critical habitat in areas within the geographical area currently occupied by the species (*i.e.,* at the time of proposed listing). We also are proposing to designate specific areas outside the geographical area currently occupied by the species that were historically occupied, but are presently unoccupied, because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species.

The current distribution of beardless chinchweed is reduced from its historical distribution to a level where it is in danger of extinction. We anticipate that recovery will require continued protection of existing populations and habitat, as well as reestablishment of populations at a subset of previously occupied habitats throughout the species' historical range in the United States. Reestablishment of additional populations will help to ensure that catastrophic events, such as wildfire, cannot simultaneously affect all known populations. We have determined that it is reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features that are essential to the conservation of the species.

Areas Occupied at the Time of Listing

The proposed critical habitat designation does not include all populations known to have been occupied by the species historically; instead, it includes all currently occupied areas within the historical range that have retained the necessary physical or biological features that will allow for the maintenance and expansion of these existing populations. The following populations meet the definition of areas occupied by the species at the time of listing: McCleary Canyon, Audubon Research Ranch, Scotia Canyon, Coronado National Memorial, and Ruby Road.

Areas Outside of the Geographic Range at the Time of Listing

Pena Blanca Lake, Summit Motorway, Copper Mountain, Lampshire Well, Harshaw Creek, Flux Canyon, Washington Camp, Box Canyon, and Joe's Canyon are within the historical range of beardless chinchweed, but are not within the geographic range currently occupied by the species. We consider these sites to be extirpated. For areas not occupied by the species at the time of listing, we must demonstrate that these areas are essential to the conservation of the species in order to include them in our critical habitat designation. To determine if these areas are essential for the conservation of beardless chinchweed, we considered the life history, status, and conservation needs of the species such as: (1) The importance of the site to the overall status of the species to prevent extinction and contribute to future recovery of beardless chinchweed; (2) whether the area could be restored to support beardless chinchweed; (3) whether the site provides connectivity between occupied sites for genetic exchange; and (4) whether a population of the species could be reestablished in the area.

Of the unoccupied areas, Lampshire Well, Harshaw Creek, and Washington Camp on U.S. Forest Service lands contain a mixture of native and nonnative grasses that could be restored to native conditions, thus making them suitable for reestablishment of the species, and they are important to the overall status of the species. The reestablishment of the Washington Camp population would reintroduce the species into the Patagonia Mountains, where currently it is extirpated. The reestablishment of beardless chinchweed into the Patagonia Mountains would restore the historical range of the species in terms of occupied mountain ranges. This area would provide key representation and redundancy needed for conservation of the species. Further, the addition of two reestablished populations in the Canelo Hills would increase the redundancy of the species in this area and reduce the chance that a catastrophic event would eliminate all populations in this area. Currently, there is only one population with 37 individuals in the Canelo Hills.

Of the remaining historical populations in the United States, Pena Blanca Lake, Summit Motorway, Copper Mountain, Box Canyon, Joe's Canyon, and Flux Canyon are heavily infested with nonnative grasses to an extent where restoration of native vegetation is not likely feasible. Reestablishment of the species to these historical sites is not likely to be successful and, therefore, not likely to contribute to the recovery of the species. Therefore, these remaining historical sites are not included in the proposed designation of critical habitat.

In summary, for areas within the geographic area occupied by the species at the time of listing (*i.e.,* currently occupied), we delineated critical habitat unit boundaries by evaluating the habitat suitability of areas within the geographic area occupied at the time of listing, and retaining those units that contain some or all of the physical or biological features to support life-history functions essential for conservation of the species.

For areas outside the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries by evaluating areas not known to have been occupied at listing (*i.e.,* that are not currently occupied) but that are within the historical range of the species to determine if they are essential to the survival and recovery of the species. Essential areas are those that: (1) Serve to extend an occupied unit; and (2) expand the geographic distribution within areas not occupied at the time of listing across the historical range of the species.

We conclude that the areas we are proposing for critical habitat provide for the conservation of beardless chinchweed because they include habitat for all extant populations and include habitat for connectivity and dispersal opportunities within units. Such opportunities for dispersal assist in maintaining the population structure and distribution of the species. In addition, the unoccupied units each contain one or more of the physical or biological features and are likely to provide for the conservation of the species. Each of the unoccupied areas are on lands managed by the Coronado National Forest. The Forest Plan for the Coronado contains several important guidelines that would contribute to the conservation of beardless chinchweed including control of nonnative vegetation, promotion of native grasses, and protections for species listed under the Endangered Species Act (USDA Forest Service 2018). Designation of critical habitat would facilitate the application of this guidance where it would do the most good for the beardless chinchweed.

As a final step, we evaluated occupied units and refined the area by evaluating the presence or absence of appropriate physical or biological features. We selected the boundary of a unit to include 1 km (0.62 mi) of foraging and reproductive habitat for pollinators that are necessary for beardless chinchweed. We then mapped critical habitat units using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a geographic information systems (GIS) program.

The areas we are proposing for designation as critical habitat provide sufficient habitat for recruitment, pollinators, seed bank, and seed dispersal. In general, the physical or biological features of critical habitat are contained within 1 km (0.62 mi) of beardless chinchweed plants within the population.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the physical or biological features necessary for beardless chinchweed. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is made final as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and are proposing for designation of critical habitat, unoccupied areas that are essential for the conservation of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support beardless chinchweed life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Some units contain only some of the physical or biological features necessary to support beardless chinchweed' particular use of that habitat.

The critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2018–0104, on our internet site at *https://www.fws.gov/southwest/es/arizona/Docs_Species.htm,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

Proposed Critical Habitat Designation for Beardless Chinchweed

We are proposing to designate approximately 10,604 ac (4,291 ha) in eight units as critical habitat for beardless chinchweed. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for beardless chinchweed. The eight units we propose as critical habitat are listed in Table 12.

TABLE 12—PROPOSED CRITICAL HABITAT UNITS AND OCCUPANCY OF BEARDLESS CHINCHWEED

Critical habitat unit	Occupied at the time of listing	Ownership	Size of unit in acres (hectares)
1—McCleary Canyon	Yes	Forest Service	1,686 ac (682 ha).

TABLE 12—PROPOSED CRITICAL HABITAT UNITS AND OCCUPANCY OF BEARDLESS CHINCHWEED—Continued

Critical habitat unit	Occupied at the time of listing	Ownership	Size of unit in acres (hectares)
2—Audubon Research Ranch	Yes	Bureau of Land Management (BLM), Forest Service, Private (Audubon Research Ranch).	1,170 ac (474 ha) BLM; 817 ac (331 ha) Forest Service; 300 ac (121 ha) private.
3—Scotia Canyon	Yes	Forest Service	855 ac (346 ha).
4—Coronado National Memorial	Yes	National Park Service	2,109 ac (853 ha).
5—Lampshire Well	No	Forest Service	939 ac (380 ha).
6—Harshaw Creek	No	Forest Service	1,013 ac (410 ha).
7—Washington Camp	No	Forest Service	939 ac (380 ha).
8—Ruby Road	Yes	Forest Service	776 ac (314 ha).
Total			10,604 ac (4,291 ha).

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for beardless chinchweed, below.

Unit 1: McCleary Canyon

The McCleary Canyon unit occurs in the northeastern portion of the Santa Rita Mountains in Pima County, Arizona, and is managed by the U.S. Forest Service. This unit is 1,686 ac (682 ha) in size and is currently occupied. The unit contains two extant populations: Gunsight Pass and Wasp Canyon. Each population within the McCleary Canyon unit supports 32 individual beardless chinchweed plants. The proposed Rosemont Copper Mine occurs in this unit, and there is ongoing and historical mining activity throughout the Santa Rita Mountains. This unit also receives significant recreational pressure and livestock grazing. The Gunsight Pass population is one of the few populations within the range of beardless chinchweed where native grass species dominate the site. The Wasp Canyon population has a mixture of native and nonnative grass species. The McCleary Canyon unit provides at least one of the following essential physical and biological features needed for this species: Appropriate native plant communities (despite the presence of some nonnative species), elevation, substrates, and slope aspect. The physical and biological features in this unit may require special management considerations including reduction in nonnative grass presence, promotion of native forbs and grasses, removal of livestock between April and October, and the creation of exclosures. This unit includes habitat for species already listed under the Act, including the jaguar (*Panthera onca*); ocelot (*Leopardus (=Felis) pardalis*); Mexican spotted owl (*Strix occidentalis lucida*); yellow-billed cuckoo (*Coccyzus americanus*); and Chiricahua leopard frog (*Lithobates chiricahuensis*). This proposed unit would overlap with designated critical habitat for jaguar.

Unit 2: Audubon Research Ranch

The Audubon Research Ranch unit occurs in the northern portion of the Canelo Hills in Santa Cruz County, Arizona, and is managed by the Audubon Society and some plants occur on the Coronado National Forest. This unit is 2,287 ac (926 ha) in size and is currently occupied. The O'Donnell Canyon population is currently extant but there was one additional population, Post Canyon that occurred here historically. The Audubon Research Ranch unit supports 37 individual beardless chinchweed plants and is dominated by native grass species. The Audubon Research Ranch unit provides the physical and biological features in this unit may require special management considerations, including reduction in nonnative grass presence, promotion of native forbs and grasses. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, Gila chub (*Gila intermedia*), northern Mexican gartersnake (*Thamnophis eques megalops*), and Huachuca water-umbel (*Lilaeopsis schaffneriana* var. *recurva*). In addition, this unit includes designated critical habitat for Chiricahua leopard frog, Gila chub, and Huachuca water-umbel, and proposed critical habitat for northern Mexican gartersnake.

Unit 3: Scotia Canyon

The Scotia Canyon unit occurs on the western slopes of the Huachuca Mountains in Cochise County, Arizona, and is managed by the U.S. Forest Service. This unit is 855 ac (346 ha) in size and is currently occupied by beardless chinchweed. There is one extant population that is estimated to contain 100 individual beardless chinchweed plants. This unit has been impacted by historical mining, grazing, and wildfire. High recreational use also occurs in this unit. The Scotia Canyon unit is one of the few sites within the range of beardless chinchweed where native grass species dominate the site. The Scotia Canyon unit provides at least one of the following essential physical and biological features needed for this species: Appropriate native plant communities, elevation, substrates, and slope aspect. The physical and biological features in this unit may require special management considerations, including reduction in nonnative grass presence, promotion of native forbs and grasses, reduction in road maintenance activity, removal of livestock between April and October, and the creation of exclosures. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, northern Mexican gartersnake, and Huachuca water-umbel. In addition, this unit includes designated critical habitat for jaguar and Huachuca water-umbel, and proposed critical habitat for northern Mexican gartersnake.

Unit 4: Coronado National Memorial

The Coronado National Memorial unit occurs in the southern portion of the Huachuca Mountains in Cochise County, Arizona, and is managed by the National Park Service. This unit is 2,109 ac (853 ha) in size and is occupied. The unit contains two extant subpopulations: The visitor's center and the State of Texas mine. The area around the visitor's center supports approximately 180 individual beardless chinchweed plants. Another 61 plants have been documented in the vicinity of the State of Texas mine. Additionally, the historical subpopulation, Joe's Canyon Trail, occurs within this unit and is not currently occupied. This unit supports a high level of recreational use, historical mining use, and ongoing impacts from wildfire. Portions of the Coronado National Memorial unit are dominated by native grass species, while other areas are a mixture of native and nonnative grasses. The Coronado National Memorial unit provides at least one of the following essential physical and biological features needed for this species: Appropriate native plant communities (although there is a nonnative presence), elevation, substrates, and slope aspect. The physical and biological features in this unit may require special management considerations, including reduction in nonnative grass presence and promotion of native forbs and grasses. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, northern Mexican gartersnake, and Huachuca water-umbel. In addition, this unit includes designated critical habitat for jaguar and Mexican spotted owl.

Unit 5: Lampshire Well

The Lampshire Well unit occurs in the Canelo Hills in Santa Cruz County, Arizona, and is managed by the U.S. Forest Service. This unit is 939 ac (380 ha) in size and is currently unoccupied. Historically, beardless chinchweed populations occurred on this unit. This unit is characterized by communities of mixed native and nonnative grasses, and is subject to border activities (foot traffic and increased fire ignition) and wildfire. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, northern Mexican gartersnake, Huachuca water-umbel, and Canelo Hills ladies'-tresses (*Spiranthes delitescens*). In addition, this unit includes designated critical habitat for jaguar and proposed critical habitat northern Mexican gartersnake.

Although it is considered unoccupied, this unit contains all of the physical or biological features essential for the conservation of the species. This unit consists of a mix of native and nonnative grasses, with scattered *Quercus* and *Juniperus,* at an elevation of 1,646 m (5,400 ft), on granitic substrate with steep slopes facing the southwest. There are areas in this unit with more native grasses than nonnative grasses. This unit is in Federal ownership managed by the U.S. Forest Service. The U.S. Forest Service is committed to managing for the recovery of listed species, reducing nonnative invasive species, and managing fuel loads to reduce potential for high intensity wildfire (USDA Forest Service 2018). The Lampshire Well unit is essential to the conservation of the species because it provides for habitat and population restoration opportunities, as well as provides habitat connectivity for beardless chinchweed and its pollinators. Recovery of this species will require new and expanded populations, and this unit provides for this needed recovery habitat that will contribute to the species' resiliency (larger and more populations), redundancy (more populations across the range), and representation (opportunities for increased genetic and environmental variation). We have determined that this unoccupied unit contains one or more of the physical or biological features that are essential to the conservation of the species and that it is reasonably certain that it will contribute to the conservation of the species.

Unit 6: Harshaw Creek

The Harshaw Creek unit occurs in the Canelo Hills in Santa Cruz County, Arizona, and is managed by the U.S. Forest Service. This unit is 1,013 ac (410 ha) in size and is currently unoccupied. Historically, beardless chinchweed populations occurred on this unit. This unit is characterized by communities of mixed native and nonnative grasses, and is subject to border activities and wildfire. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, northern Mexican gartersnake, Huachuca water-umbel, and Canelo Hills ladies'-tresses. In addition, this unit includes designated critical habitat for jaguar and proposed critical habitat for northern Mexican gartersnake.

Although it is considered unoccupied, portions of this unit contain all of the physical or biological features essential for the conservation of the species. This unit consists of a mix of native and nonnative grasses, with scattered *Quercus* and *Juniperus,* at an elevation of 1,494 m (4,900 ft), on granitic, rocky substrate with steep slopes facing the southwest. There are areas in this unit with more native grasses than nonnative grasses. This unit is in Federal ownership managed by the U.S. Forest Service. The U.S. Forest Service is committed to managing for the recovery of listed species, reducing nonnative invasive species, and managing fuel loads to reduce potential for high intensity wildfire (USDA Forest Service 2018). The Harshaw Creek unit is essential to the conservation of the species because it provides for habitat and population restoration opportunities, as well as provides habitat connectivity for beardless chinchweed and its pollinators. Recovery of this species will require new and expanded populations, and this unit provides for this needed recovery habitat that will contribute to the species' resiliency (larger and more populations), redundancy (more populations across the range), and representation (opportunities for increased genetic and environmental variation). We have determined that this unoccupied unit contains one or more of the physical or biological features that are essential to the conservation of the species and that it is reasonably certain that it will contribute to the conservation of the species.

Unit 7: Washington Camp

The Washington Camp unit occurs in the northeastern portion of the Patagonia Mountains in Santa Cruz County, Arizona, and is managed by the U.S. Forest Service. This unit is 939 ac (380 ha) in size and is currently unoccupied. This unit is the location of a number of proposed mining activities and is also subject to border activities, recreation, and wildfire. This unit is characterized by a mixture of native and nonnative grass species. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, and northern Mexican gartersnake. In addition, this unit includes designated critical habitat for jaguar and Mexican spotted owl, and proposed critical habitat for northern Mexican gartersnake.

Although it is considered unoccupied, portions of this unit contain all of the physical or biological features essential for the conservation of the species. This unit consists of a mix of native and nonnative grasses, with scattered *Quercus* and *Juniperus,* at an elevation of 1,646 m (5,400 ft), on granitic substrate with steep slopes facing the southwest. There are areas in this unit with more native grasses than nonnative grasses. This unit is in Federal ownership managed by the U.S. Forest Service. The U.S. Forest Service is committed to managing for the recovery of listed species, reducing nonnative invasive species, and managing fuel loads to reduce potential for high intensity wildfire (USDA Forest Service 2018). The Washington Camp unit is essential to the conservation of the species because it provides for habitat and population restoration opportunities, as well as provides habitat connectivity for beardless chinchweed and its pollinators.

Recovery of this species will require new and expanded populations, and this unit provides for this needed recovery habitat that will contribute to the species' resiliency (larger and more populations), redundancy (more populations across the range), and representation (opportunities for increased genetic and environmental variation). We have determined that this unoccupied unit contains one or more of the physical or biological features that are essential to the conservation of the species and that it is reasonably certain that it will contribute to the conservation of the species.

Unit 8: Ruby Road

The Ruby Road unit occurs in the Atascosa-Pajarito Mountains in Santa Cruz County, Arizona, and is managed by the U.S. Forest Service. This unit is 776 ac (314 ha) in size and is currently occupied. There is one extant population, Ruby Road, within this unit that supports approximately 10 individual beardless chinchweed plants. Despite the fact that nonnative grasses dominate this unit, beardless chinchweed is able to overcome this competition by occurring in areas along a roadside that is regularly maintained, which removes much of the nonnative grass cover. This unit is subject to past mining activities, border activities, recreation, grazing, and wildfire. The Ruby Road unit currently provides at least one of the following essential physical and biological features needed for this species: Appropriate native plant communities (although there is a nonnative presence), elevation, substrates, and slope aspect. The physical and biological features in this unit may require special management considerations, including reduction in nonnative grass presence, promotion of native forbs and grasses, reduction in road maintenance activity, removal of livestock between April and October, and creation of exclosures. This unit includes habitat for species already listed under the Act: Jaguar, ocelot, Mexican spotted owl, yellow-billed cuckoo, Chiricahua leopard frog, and northern Mexican gartersnake. In addition, this unit includes designated critical habitat for critical habitat for jaguar, Mexican spotted owl, and Chiricahua leopard frog.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final regulation with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency, do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would remove native bunchgrass communities. Such activities could include, but are not limited to, livestock grazing; fire management; trails construction and maintenance; infrastructure and road construction and maintenance; recreation management; minerals extraction and restoration; visitor use and management; and construction and maintenance of border roads, fences, barriers, and towers. These activities could eliminate or reduce open habitat necessary for growth, seed production, seedbank, and pollinators of beardless chinchweed.

(2) Actions that would result in the introduction, spread, or augmentation of nonnative grass species. Such activities could include, but are not limited to, livestock grazing; fire management; trails construction and maintenance; infrastructure and road construction and maintenance; recreation management; minerals extraction and restoration; visitor use and management; and construction and maintenance of border roads, fences, barriers, and towers. These activities could increase the amount of nonnative grasses or introduce nonnative grasses, which eliminate or reduce open habitat necessary for growth, seed production, seedbank, and pollinators of beardless chinchweed.

(3) Actions that would promote high-severity wildfires. Such activities could include, but are not limited to, recreation and encouraging the encroachment of nonnative grasses. These activities could eliminate or reduce open habitat necessary for growth, seed production, seedbank, and pollinators of beardless chinchweed.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense lands within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. At this time, we are not proposing any exclusions from critical habitat.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for beardless chinchweed (IEc 2018, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation for the species that may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our draft economic analysis of the proposed critical habitat designation for beardless chinchweed and is summarized in the narrative below.

Executive Orders (E.O.) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for beardless chinchweed, first we identified, in the IEM dated August 28, 2018 (Service 2018, entire), probable incremental economic impacts associated with the following categories of activities: (1) Federal lands management (National Park Service, U.S. Forest Service, Bureau of Land Management); (2) grazing (U.S. Forest Service and Bureau of Land Management); (3) wild and prescribed fire (National Park Service, U.S. Forest Service, Bureau of Land Management); (4) groundwater pumping (U.S. Forest Service); (5) mining (U.S. Forest Service); (6) fuels management (National Park Service, U.S. Forest Service, Bureau of Land Management); (7) transportation (road construction and maintenance; National Park Service, U.S. Forest Service); and (8) trampling and dust creation from recreation and border protection activities (U.S. Customs and Border Protection, U.S. Forest Service, National Park Service). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, the designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where beardless chinchweed is present, Federal agencies already are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we clarified the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for beardless chinchweed critical habitat. For species where the designation of critical habitat is proposed concurrently with the listing, like beardless chinchweed, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which would result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to beardless chinchweed would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for beardless chinchweed totals approximately 7,713 ac (3,121 ha, or 73 percent of the total proposed critical habitat designation) of currently occupied habitat and 2,891 ac (1,170 ha, or 27 percent of the total proposed critical habitat designation) of unoccupied habitat (see Table 12, above). Every unit of proposed critical habitat for beardless chinchweed overlaps with the ranges of a number of currently listed species and designated critical habitats. Therefore, the actual number of section 7 consultations is not expected to increase; however, the analysis within these consultations would expand to consider effects to critical habitat for the bearded chinchweed. Consequently, there would likely be a small increase in the time needed to complete the consultation to include the assessment of beardless chinchweed critical habitat units (IEc 2018, entire). Section 7 consultations involving third parties (State, Tribal, or private lands) are limited.

Based on the locations of the proposed critical habitat units and the types of projects we typically evaluate for the Coronado National Forest and the Coronado National Memorial, we estimate that there would likely be 4 to 6 consultations annually that would include beardless chinchweed. The entities that would incur incremental costs are Federal agencies, because 97 percent of critical habitat is on Federal land.

In the 7,713 ac (3,121 ha) of occupied proposed critical habitat (Units 1, 2, 3, 4, and 8), any actions that may affect the species or its habitat would also affect proposed designated critical habitat. Consequently, it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of beardless chinchweed. Therefore, only administrative costs are expected in these occupied units. While this additional analysis will require time and resources by the Federal action agency, the Service, and third parties, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant (IEc 2018, entire). In these unoccupied areas, any conservation efforts or associated probable impacts would be considered incremental effects attributed to the critical habitat designation. In units occupied by the chinchweed, we assume the additional administrative cost to address chinchweed critical habitat in the consultation is minor, costing approximately $5,100 per consultation (2017 dollars). For the proposed critical habitat units that are currently occupied by beardless chinchweed (Units 1, 2, 3, 4, and 8), we have not identified any ongoing or future projects or actions that would warrant additional recommendations or modifications to avoid adversely modifying critical habitat above those that we would recommend for avoiding jeopardy. Therefore, project modifications resulting from section 7 consultations in occupied units are unlikely to be affected by the designation of critical habitat.

In unoccupied units, (units 5, 6, and 7) we assume the incremental administrative effort will be greater on a per consultation basis. Thus, we assume an incremental per consultation administrative cost of $15,000 in unoccupied units (2017 dollars).

In unoccupied units, incremental project modifications are possible. No known projects are currently scheduled to occur within the areas proposed for designation; however, U.S. Forest Service staff suggests there is always a possibility of future projects related to grazing, transportation, mining, and recreation activities in this region. We discuss potential costs resulting from these activities below.

There are grazing allotments that overlap with unoccupied critical habitat. However, only one allotment overlaps with unoccupied critical habitat by more than 5 percent of the allotment's land area and two allotments with less than 5 percent of unoccupied critical habitat. In unoccupied units, the Service suggests alterations in amount or timing of grazing activities are not required because the species is not present. However, U.S. Forest Service may undertake range improvements to reduce the loss of native plant communities (*e.g.,* bunchgrass) in the unoccupied critical habitat overlapping with grazing allotment units. It estimates that range improvement projects in a given year may cost the agency from $1,000 to $250,000.

During the improvement project, electric fencing (included in the U.S. Forest Service cost estimate) would be installed temporarily to exclude cattle. During this period, there could be a loss of forage, depending on the extent of overlap with existing grazing allotments, resulting in a temporary reduction in the number of animal unit months (AUMs; a measure of the amount of forage consumed by one cow and calf during one month) associated with the relevant allotment. The value of grazing permits associated with allotments on Federal land can be used to estimate the potential loss to ranchers during exclusion period. We estimated a range of potential costs related to grazing, based on two scenarios. In the low-end scenario, we assumed that AUM reductions would only occur in allotments where proposed critical habitat accounts for greater than 5 percent of the total allotment area. Otherwise, ranchers are likely to be able to implement changes in practices that avoid the need to reduce the amount of cattle grazed on the allotment, and thus they avoid costs associated with lost AUMs. In the high-end scenario, we assume that ranchers are unable to change practices, and the loss in AUMs is proportional to the amount of overlap between proposed critical habitat and the relevant allotment.

To identify the allotments overlapping proposed unoccupied units and the number of AUMs permitted in each allotment, data was obtained from U.S. Forest Service. That data was then used to calculate potential AUM reduction for each allotment unit overlapping with unoccupied critical habitat. Only one allotment (San Rafael) overlaps with unoccupied critical habitat by more than 5 percent of the allotment's land area. In this allotment, a temporary reduction of 402 AUMs is possible. For the remaining allotments, we assume no impact on permitted AUMs in the low-end scenario. In the high-end scenario, a temporary reduction of 747 AUMs is possible if all of the unoccupied units are fenced to exclude cattle during range improvement efforts.

The cost of reducing AUMs from occupied critical habitat during range improvement activities is unlikely to exceed $41,000 in the low-end scenario or $76,000 in the high-end scenario (2017 dollars). Impacts associated with reduced AUMs could be greatest in Unit 7 ($27,000), followed by Unit 6 ($25,000) and Unit 5 ($24,000). These estimates represent perpetuity values, thus the single year loss would be a fraction of this amount.

Other activities that could overlap with unoccupied critical habitat include mining, and road and trail construction. To avoid adverse effects to critical habitat, U.S. Forest Service might recommend moving these projects, if feasible, to avoid the proposed units. This could result in the need to construct additional linear miles of road. If projects can easily be moved to other areas, U.S. Forest Service estimates total, on-time costs to the agency, as well as the project proponents, in the range of $0 to $500,000. Where avoidance of critical habitat is prohibitively expensive, U.S. Forest Service states that it would instead recommend monitoring and subsequent treatment for the introduction or spread of invasive plants due to project activities. The costs to U.S. Forest Service and project proponents of these activities might range from $1,000 to $500,000. For projects that result in a significant amount of vegetation that would not regrow in a timely manner (*e.g.,* 2 years), U.S. Forest Service might require more all-inclusive restoration, reclamation, and revegetation of the disturbed project footprints. In these cases, costs to U.S. Forest Service and project proponents might range from $10,000 to $1,000,000.

The Service estimates a total of four to six consultations are likely to occur in a given year in areas proposed for designation. As a conservative estimate (*i.e.,* more likely to overestimate than underestimate costs), we assume that six consultations will occur and all of the consultations will be formal. The total administrative cost of these consultations is estimated to be $48,000 (IEc 2018, p. 16), including costs to the Service, the Federal action agency, and third parties. Incremental project modifications resulting solely from the designation of critical habitat are unlikely in occupied critical habitat. In unoccupied units, which are all managed by the U.S. Forest Service, projects associated with grazing, mining, road or trail construction and maintenance, and range improvements are possible. The costs per project, including costs to the U.S. Forest Service and State, local, or private project proponents, might range from $0 (simply moving a project to avoid critical habitat where the overlap between the project and critical habitat is minor) to $1,000,000 (projects that result in a significant amount of surface disturbance, such as a new mining proposal in an unoccupied unit); however, it is very difficult to accurately predict these potential costs as often they are significantly reduced through the section 7 consultation process. Assuming that no more than six consultations, and therefore projects, are likely in a given year, the section 7 impacts of the proposed regulation are unlikely to exceed $10 million in a given year (IEc 2018, p. 16). However, as stated above, no known projects are currently scheduled to occur within the unoccupied areas proposed for designation, thus these estimated impacts are meant to capture a conservative high-end estimate of potential impacts. Therefore, our economic screening analysis indicates the incremental costs associated with critical habitat are unlikely to exceed $100 million in any single year, and, therefore, would not be significant.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis, as well as all aspects of the proposed rule. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Exclusions

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared an analysis of the probable economic impacts of the proposed critical habitat designation and related factors. The following land use sectors potentially occur in one or more of the proposed critical habitat units for beardless chinchweed: Border protection, conservation/restoration, fire management, forest management, grazing, mining, recreation, and transportation (road and trail construction and maintenance). The majority of proposed critical habitat units are on federally owned or managed lands.

During the development of a final designation, we will consider any additional economic impact information we receive through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for beardless chinchweed are not owned or managed by the Department of Defense or Department of Homeland Security. In addition, we did not find any potential national security impacts resulting from this proposed designation; therefore, we anticipate no impact on national security. However, during the development of a final designation, we will consider any additional information on any potential national security impacts we receive through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation. In preparing this proposal, we have determined that there are currently no HCPs or other management plans for beardless chinchweed, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation. During the development of a final designation, we will consider any additional information on any impacts to tribal resources, partnerships, or conservation plans that we receive through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

IV. Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 *et seq.*)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). Because neither species occurs within the jurisdiction of the Tenth Circuit, we are not preparing any additional NEPA analysis.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We are not aware of any tribally owned lands that are currently occupied by beardless chinchweed or Bartram's stonecrop or that are unoccupied lands that are essential to the conservation of beardless chinchweed. Therefore, we are not proposing to designate critical habitat for beardless chinchweed on tribal lands. While there are no tribally owned lands within the proposed designation of critical habitat, certain lands proposed for designation may include areas that are culturally significant to the Tohono O'odam Tribe. We have sought government-to-government consultation (government-to-government consultation, not section 7 consultation) with the tribe during the development of the SSA report and this proposed rule. This may result in the modification of some actions to conserve and protect areas of cultural significance. On October 23, 2017, we sent a letter to the Tohono O'odam Tribe requesting information, explaining the SSA process, describing the upcoming rulemaking, and inviting the Tribe to participate in the SSA process. To date, we have not received a response from the Tohono O'odam Tribe. Upon publication of the proposed rule, we will notify the Tohono O'odam Tribe of its availability.

Executive Order 13771

We do not believe this proposed rule is an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because we believe this rule is not significant under E.O. 12866; however, the Office of Information and Regulatory Affairs has waived their review regarding their E.O. 12866 significance determination of this proposed rule.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has waived their review regarding their significance determination of this proposed rule.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) that would be imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if adopted, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if adopted, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. In our draft economic analysis, we did not find that the designation of this proposed critical habitat would significantly affect energy supplies, distribution, or use due to the absence of any energy supply or distribution lines in the proposed critical habitat designation. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation,

statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because the lands proposed for critical habitat designation are primarily Federal lands, with a small amount of private land; small governments would be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions would not adversely affect the designated critical habitat. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for beardless chinchweed in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures of, or restrictions on use of or access to, the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify designated critical habitat. A takings implications assessment has been completed and concludes that this proposed designation of critical habitat for beardless chinchweed would not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Arizona. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on a map, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Arizona Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

V. Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h), the List of Endangered and Threatened Plants, by adding entries for ''*Graptopetalum bartramii*'' and ''*Pectis imberbis*'' in alphabetical order under FLOWERING PLANTS to read as set forth below:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
Flowering Plants				
* *	*	* *		* *
Graptopetalum bartramii	Bartram's stonecrop	Wherever found	T	[**Federal Register** citation when published as a final rule]
* *	*	* *		* *
Pectis imberbis	Beardless chinchweed	Wherever found	E	[**Federal Register** citation when published as a final rule]
* *	*	* *		* *

■ 3. Add § 17.73 to read as follows:

§ 17.73 Special rules—flowering plants.

(a) *Graptopetalum bartramii* (Bartram's stonecrop).

(1) *Prohibitions.* The following prohibitions apply to *Graptopetalum bartramii,* except as provided under paragraph (a)(2) of this section:

(i) *Import or export.* It is unlawful to import or to export any *Graptopetalum bartramii.* Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(ii) *Remove and reduce to possession.* It is unlawful to remove and reduce to possession the species from areas under Federal jurisdiction; maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.

(iii) *Interstate or foreign commerce.* It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any *Graptopetalum bartramii.*

(iv) *Sale or offer for sale.* (A) It is unlawful to sell or to offer for sale in interstate or foreign commerce any *Graptopetalum bartramii.*

(B) An advertisement for the sale of any *Graptopetalum bartramii* which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the Service, shall not be considered an offer for sale within the meaning of this paragraph.

(v) It is unlawful to attempt to commit, solicit another to commit, or cause to be committed, any of the acts described in paragraph (a)(1) of this section.

(2) *Exceptions from prohibitions.* The following exceptions from prohibitions apply to *Graptopetalum bartramii:*

(i) A person may apply for a permit in accordance with 50 CFR 17.72 that authorizes an activity otherwise prohibited by this paragraph for *Graptopetalum bartramii.*

(ii)(A) Any employee or agent of the Service, any other Federal land management agency, or a State conservation agency, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession *Graptopetalum bartramii* from areas under Federal jurisdiction without a permit if such action is necessary to:

(*1*) Care for a damaged or diseased specimen;

(*2*) Dispose of a dead specimen; or

(*3*) Salvage a dead specimen which may be useful for scientific study.

(B) Any removal and reduction to possession pursuant to this paragraph must be reported in writing to the U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 28006, Washington, DC 20005, within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with written directions from the Service.

(iii) Any qualified employee or agent of the Service or of a State conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove, cut, dig up, damage, or destroy *Graptopetalum bartramii* on areas under Federal jurisdiction.

(b) [Reserved].

■ 4. In § 17.96, amend paragraph (a) by adding an entry for ''*Pectis imberbis* (beardless chinchweed),'' in alphabetical order under Family Asteraceae, to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

Family Asteraceae: *Pectis imberbis* (beardless chinchweed)

(1) Critical habitat units are depicted for Cochise, Pima, and Santa Cruz Counties, Arizona, on the map below.

(2) Within these areas, the physical or biological features essential to the conservation of *Pectis imberbis* consist of the following components:

(i) Native-dominated plant communities, consisting of:

(A) Plains, great basin, and semi-desert grasslands, oak savanna, or Madrean evergreen woodland;

(B) Communities dominated by bunchgrasses with open spacing (adjacent to and within 10 meters (33 feet) of individual *Pectis imberbis* plants) and with little competition from other plants; and

(C) Communities with plants for pollinator foraging and nesting within 1 kilometer (0.62 miles) of *Pectis imberbis* populations.

(ii) 1,158 to 1,737 meters (3,799 to 5,699 feet) elevation.

(iii) Eroding limestone or granite bedrock substrate.

(iv) Steep, south-facing, sunny to partially shaded hillslopes.

(v) The presence of pollinators (*i.e.,* flies, bees, and butterflies).

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a Geographic Information Systems program on a base of USA Topo Maps. Critical habitat units were then mapped using NAD 1983, Universal Transverse Mercator (UTM) Zone 12N coordinates. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site at *https://www.fws.gov/southwest/es/arizona/Docs_Species.htm,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2018–0104, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Unit 1:* McCleary Canyon, Pima County, Arizona. Unit 1 consists of 682 hectares (1,686 acres) of U.S. Forest Service lands.

(6) *Unit 2:* Audubon Research Ranch, Santa Cruz County, Arizona. Unit 2 consists of 926 hectares (2,287 acres) of land, of which 331 hectares (817 acres) are owned by the U.S. Forest Service, 474 hectares (1,686 acres) by the Bureau of Land Management, and 121 hectares (300 acres) by the Audubon Research Ranch.

(7) *Unit 3:* Scotia Canyon, Cochise County, Arizona. Unit 3 consists of 346 hectares (855 acres) of U.S. Forest Service lands.

(8) *Unit 4:* Coronado National Memorial, Cochise County, Arizona. Unit 4 consists of 853 hectares (2,109 acres) of National Park Service lands.

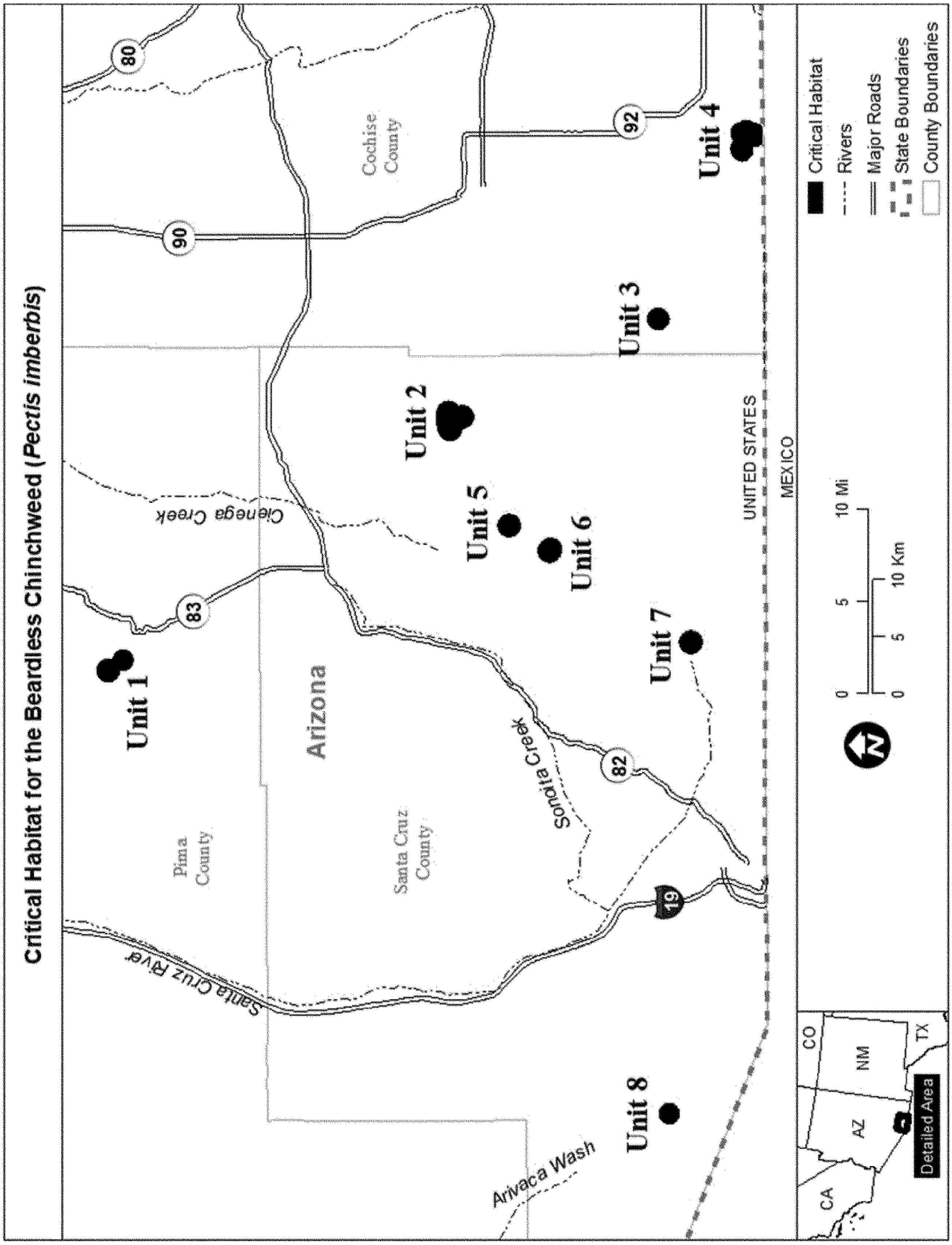
(9) *Unit 5:* Lampshire Well, Santa Cruz County, Arizona. Unit 5 consists of 380 hectares (939 acres) of U.S. Forest Service lands.

(10) *Unit 6:* Harshaw Creek, Santa Cruz County, Arizona. Unit 6 consists of 410 hectares (1,013 acres) of U.S. Forest Service lands.

(11) *Unit 7:* Washington Camp, Santa Cruz County, Arizona. Unit 7 consists of 380 hectares (939 acres) of U.S. Forest Service lands.

(12) *Unit 8:* Ruby Road, Santa Cruz County, Arizona. Unit 8 consists of 314 hectares (776 acres) of U.S. Forest Service lands.

(13) Map of Units 1 through 8 follows:


Critical Habitat for the Beardless Chinchweed (*Pectis imberbis*)
Unit 1
Unit 2
Unit 3
Unit 4
Unit 5
Unit 6
Unit 7
Unit 8
Arizona
Pima County
Santa Cruz County
Cochise County
Cienega Creek
Sonoita Creek
Santa Cruz River
Arivaca Wash
80
90
92
83
82
19
UNITED STATES
MEXICO
0 5 10 Mi
0 5 10 Km
Critical Habitat
Rivers
Major Roads
State Boundaries
County Boundaries
CO
NM
AZ
CA
TX
Detailed Area

* * * * *

Dated: November 26, 2019

Margaret E. Everson

Principal Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2019–26210 Filed 12–5–19; 8:45 am]

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Part IV

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedure for External Power Supplies; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2019–BT–TP–0012]

RIN 1904–AD86

Energy Conservation Program: Test Procedure for External Power Supplies

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (''DOE'') is proposing to revise its test procedure for external power supplies (''EPS'' or ''EPSs''). DOE is proposing to add a definition for ''commercial and industrial power supply'' in its regulations to differentiate between EPSs and other non-consumer power supplies that are not subject to the test procedure. DOE also proposes to add a definition to address an adaptive EPS that conforms to the Universal Serial Bus Power Delivery (''USB–PD EPS'') specifications and revise its procedure to address their testing in a manner more representative of their actual use. Further, the proposed revisions would provide more specific instructions for testing single-voltage EPSs that have multiple output busses. Lastly, DOE proposes to reorganize the test procedure to centralize definitions, consolidate generally applicable requirements, and better delineate requirements for single-voltage, multiple-voltage, and adaptive EPSs. DOE is seeking comment from interested parties on the proposal.

DATES:

Comments: Written comments, data, and information are requested and will be accepted no later than February 4, 2020. See section V, ''Public Participation,'' for details.

Meeting: DOE will hold a webinar on Wednesday, December 11, 2019, from 1:00 a.m. to 4:00 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. DOE will hold a public meeting on this proposed test procedure if one is requested by December 20, 2019. If a public meeting is requested, DOE will announce its date and location on the DOE website and via email. If held, the meeting will also be broadcast as a webinar. Information regarding webinar registration, participant instructions, and information about the capabilities available to webinar participants will be provided with the announcement should a public meeting be held.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov*. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2019–BT–TP–2012, by any of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

(2) *Email: EPS2019TP0012@ee.doe.gov*. Include the docket number EERE–2019–BT–TP–2012 or regulatory information number (RIN) 1904–AD86 in the subject line of the message.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, Suite 600, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting written comments and additional information on the rulemaking process, see section V of this document.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov*. All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *http://www.regulations.gov/docket?D=EERE-2019-BT-TP-0012*. The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email *ApplianceStandardsQuestions@ee.doe.gov*.

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov*.

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SUPPLEMENTARY INFORMATION:

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I. Authority and Background

An EPS is a ''covered product'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6295(u)(1)(A)) DOE's energy conservation standards and test procedures for EPSs are currently prescribed at Title 10 of the Code of Federal Regulations (''CFR'') sections 430.32(w) and 430.23(bb), respectively. The following sections discuss DOE's authority to establish test procedures for EPSs and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

The Energy Policy and Conservation Act, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of certain consumer products and types of industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth provisions designed to improve energy efficiency for a variety of products and equipment. These products include EPSs, the subject of this document. (42 U.S.C. 6291(36)(A); 42 U.S.C. 6295(u))

EPCA's energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), energy conservation standards (42 U.S.C. 6295), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) Certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of those consumer products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off-mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off-mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already account for and incorporate standby mode and off-mode energy consumption or such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)(i)) If an integrated test procedure is technically infeasible, DOE must prescribe separate standby mode and off-mode energy use test procedures for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii)) Any such amendment must consider the most current versions of International Electrotechnical Commission (''IEC'') Standard 62301 [3] and IEC Standard 62087 [4] as applicable. (42 U.S.C. 6295(gg)(2)(A))

The Energy Policy Act of 2005 (''EPACT 2005''), Public Law 109–58 (August 8, 2005), amended EPCA by adding provisions related to EPSs. Among these provisions were a definition of EPS and a requirement that DOE prescribe ''definitions and test procedures for the power use of battery chargers and external power supplies.'' (42 U.S.C. 6295(u)(1)(A)) DOE complied with this requirement by publishing a test procedure final rule to address the testing of EPSs to measure their energy efficiency and power consumption. 71 FR 71340 (December 8, 2006) (codified at 10 CFR part 430, subpart B, Appendix Z, ''Uniform Test Method for Measuring the Energy Consumption of External Power Supplies'').

The Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140 (December 19, 2007) later amended EPCA by modifying the EPS-related definitions found in 42 U.S.C. 6291. While section 135(a)(3) of EPACT 2005 defined an EPS as ''an external power supply circuit that is used to convert household electric current into DC current or lower-voltage AC current to operate a consumer product,'' section 301 of EISA 2007 further amended this definition by creating a subset of EPSs called Class A EPSs. EISA 2007 defined this subset of products as those EPSs that, in addition to meeting several other requirements common to all EPSs, are ''able to convert [line voltage AC] to only 1 AC or DC output voltage at a time'' and have ''nameplate output power that is less than or equal to 250 watts.'' (42 U.S.C. 6291(36)(C)(i)) As part of these amendments, EISA 2007 prescribed minimum standards for these products (hereafter referred to as ''Level IV'' standards based on the marking provisions detailed under 10 CFR 430.32(w)(4)) and directed DOE to publish a final rule to determine whether to amend these standards.[5] (42 U.S.C. 6295(u)(3)(A) and (D)) EISA 2007 also required DOE to publish a second rule to determine whether the standards then in effect should be amended. (42 U.S.C. 6295(u)(3)(D)(ii))

EISA 2007 also amended EPCA by defining the terms ''active mode,'' ''standby mode,'' and ''off-mode.'' Each of these modes corresponds to the operational status of a given product—*i.e.,* whether it is (1) plugged into AC mains and switched ''on'' and performing its intended function, (2) plugged in but not performing its

[1] All references to EPCA in this document refer to the statute as amended through the America's Water Infrastructure Act of 2018, Public Law 115–270 (October 23, 2018).

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[4] IEC 62087, *Methods of measurement for the power consumption of audio, video, and related equipment* (Edition 3.0, 2011–04).

[5] The international efficiency markings on which DOE's marking requirements are based consist of a series of Roman numerals (I–VI) and provide a global uniform system for power supply manufacturers to use that indicates compliance with a specified minimum energy performance standard. *https://www.regulations.gov/document?D=EERE-2008-BT-STD-0005-0218.*

intended function (*i.e.,* simply standing by to be operated), or (3) plugged in, but switched ''off,'' if a manual on-off switch is present. Additionally, EISA 2007 required DOE to amend its test procedure to ensure that standby and off-mode energy consumption are measured. It also authorized DOE to amend, by rule, the definitions for active, standby, and off-mode, as long as DOE considers the most current versions of IEC Standards 62301 and 62087. 42 U.S.C. 6295(gg)(2)(A) (incorporating EISA 2007 amendments related to standby and off-mode energy).

Following the amendments to EPCA under EISA 2007, Congress further amended EPCA to exclude EPSs used for certain security and life safety alarms and surveillance systems manufactured prior to July 1, 2017, from no-load standards. Public Law 111–360 (January 4, 2011). EPCA's EPS provisions were again amended by the Power and Security Systems (''PASS'') Act, which extended the rulemaking deadline and effective date established under the EISA 2007 amendments from July 1, 2015, and July 1, 2017, to July 1, 2021, and July 1, 2023, respectively. Public Law 115–78 (November 2, 2017); 131 Stat. 1256, 1256; 42 U.S.C. 6295(u)(3)(D)(ii)). The PASS Act also extended the exclusion of certain security and life safety alarms and surveillance systems from no-load standards until the effective date of the final rule issued under 42 U.S.C. 6295(u)(3)(D)(ii) and allows the Secretary to treat some or all external power supplies designed to be connected to a security or life safety alarm or surveillance system as a separate product class or to further extend the exclusion. (42 U.S.C. 6295(u)(3)(E)(ii) and (iv)).

Most recently, on January 12, 2018, the EPS Improvement Act of 2017, Public Law 115–115, amended EPCA to exclude the following devices from the EPS definition: Power supply circuits, drivers, or devices that are designed exclusively to be connected to and power (1) light-emitting diodes providing illumination, (2) organic light-emitting diodes providing illumination, or (3) ceiling fans using direct current motors.[6] (42 U.S.C. 6291(36)(A)(ii))

If DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) EPCA also requires that, at least once every 7 years, DOE evaluate test procedures for each type of covered product, including EPSs, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures to not be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A)) If the Secretary determines, on his own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)). If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedures. DOE is publishing this NOPR in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A))

B. Background

DOE's existing test procedures for EPSs appear at 10 CFR part 430, subpart B, Appendix Z, ''Uniform Test Method for Measuring the Energy Consumption of External Power Supplies'' (''Appendix Z''). These procedures were first established on December 8, 2006. 71 FR 71340. On March 27, 2009, pursuant to the provisions in EISA 2007, DOE published a final rule that added the terms and definitions related to EPSs to Appendix Z. 74 FR 13318. On June 1, 2011, DOE further amended Appendix Z by adding a test method for multiple-voltage EPSs. 76 FR 31750. The amendments also revised the definition of ''active power'' and clarified how to test an EPS that (1) has a current-limiting function, (2) can communicate with its load, or (3) combines a current-limiting function with the ability to communicate with a load. A current-limited EPS is one that can significantly lower its output voltage once an internal output current limit has been exceeded. An EPS that communicates with its load refers to an EPS's ability to identify or otherwise exchange information with its load (*i.e.,* the end-use product to which it is connected). These revisions provided manufacturers with additional detail on how to conduct the test and determine the measured energy use for these types of EPSs.

On February 10, 2014, DOE published a final rule (''February 2014 final rule'') prescribing new standards for some non-Class A EPSs and amended standards for some Class A EPSs. 79 FR 7846. The February 2014 final rule also established new definitions for direct operation EPSs and indirect operation EPSs in 10 CFR 430.2, which distinguish between these devices based on whether the EPS is used to power a battery charger.[7] Direct operation EPSs, regardless of whether they are Class A EPSs, are subject to more stringent standards than the statutory Level IV standard requirements. Direct operation EPSs must meet prescribed efficiency levels, based on their power output, that correspond to what are identified as Level VI standards. An EPS meeting this level of efficiency must be identified with a Level VI marking per 10 CFR 430.32(w)(4). With respect to indirect operation EPSs, the February 2014 final rule did not prescribe a specific efficiency level for these devices. Nonetheless, indirect operation EPSs imported or domestically manufactured on or after July 8, 2008, that meet the definition of a Class A EPS must meet the prescribed Level IV standards established by EISA 2007. (42 U.S.C. 6295(u)(3)(A)) Direct operation EPSs domestically manufactured or imported into the U.S. on or after February 10, 2016, must meet the Level VI standards.[8]

Following the publication of the February 2014 final rule, DOE received follow-up questions and requests for clarification regarding how to test certain EPSs. To address these issues, DOE published a test procedure final rule on August 25, 2015 (''August 2015 final rule''), which added further detail to Appendix Z. 80 FR 51424. These

[6] DOE amended its regulations to reflect the changes introduced by the PASS Act and EPS Improvement Act. 84 FR 437 (January 29, 2018).

[7] Specifically, the regulation defines a ''direct operation external power supply'' as ''an external power supply that can operate a consumer product that is not a battery charger without the assistance of a battery.'' In contrast, an ''indirect operation external power supply'' is one that ''cannot operate a consumer product that is not a battery charger without the assistance of a battery.'' 10 CFR 430.2.

[8] Generally, a covered product must comply with the relevant standard in effect as of the date the product is manufactured. For products imported into the U.S., this is the date of importation. 42 U.S.C. 6291(10) (''The term 'manufacture' means to manufacture, produce, assemble or import.'')

changes also updated references to the latest version of IEC 62301, ''Household electrical appliances—Measurement of standby power,'' Edition 2.0, 2011–01, and clarified DOE's test procedure to better reflect evolving technologies.

On June 8, 2017 and June 22, 2017, the Information Technology Industry Council (''ITI''), on behalf of four petitioners—Apple, Inc. (''Apple''), Microsoft Corporation (''Microsoft''), Poin2 Lab (''Poin2''), and Hefei Bitland Information Technology Co., Ltd. (''Bitland''), filed petitions for waivers from the current DOE test procedure for EPSs under 10 CFR 430.27 for several basic models of adaptive EPSs (''USB–PD EPSs''—short for ''Universal Serial Bus—Power and Data'') that meet the voltage and current provisions of the IEC's ''Universal serial bus interfaces for data and power—Part 1–2: Common components—USB Power Delivery'' (''IEC 62680–1–2'') specification—which specifies the relevant performance and compatibility-related specifications for USBs but does not, like some other IEC documents, prescribe any specific testing requirements. An adaptive EPS is one with an output bus [9] that can alter its output voltage based on an established digital communication protocol with the end-use application without any user-generated action. In a notice published on July 24, 2017, DOE granted the petitions for interim waiver and specified an alternate test procedure the manufacturers were required to follow when testing and certifying the specific basic models for which the petitioners requested a waiver. 82 FR 34294. On March 16, 2018, DOE published a notice of decision and order announcing that it had granted the petitioners a waiver from the EPS test procedure for certain adaptive EPSs. The decision and order required the petitioners to test and certify these models according to the alternate test procedure presented in the decision and order. 83 FR 11738. DOE published a series of decision and order notices granting the same waiver to Huawei Technologies (83 FR 25448 (June 1, 2018)) and extending Apple's to two more basic models. (83 FR 50905 (October 10, 2018) and 83 FR 60830 (November 27, 2018)).

II. Synopsis of the Notice of Proposed Rulemaking

In this notice of proposed rulemaking (''NOPR'') DOE proposes to update Appendix Z as follows:

(1) Adopt a definition of ''commercial and industrial power supply,'' that would apply specific characteristics to help distinguish these power supplies from EPSs, as defined in EPCA, which are consumer products under the statute.

(2) Amend the definition of ''external power supply'' to expressly exclude any ''commercial and industrial power supply.'' Power supplies that meet the definition of ''commercial and industrial power supply'' would, therefore, not be subject to the EPS test procedure.

(3) Create a definition for USB–PD EPSs and amend their testing requirements, consistent with recently issued waivers.

(4) Provide additional direction for testing single-voltage EPSs with multiple output busses.

(5) Provide instructions to allow any functionality that is unrelated to the external power supply circuit to be disconnected during testing as long as the disconnection does not impact the functionality of the external power supply itself.

(6) Reorganize the test procedure to remove redundant definitions, modify the definition of ''average active-mode efficiency'', centralize definitions, consolidate generally applicable requirements, and better delineate requirements for single-voltage, multiple-voltage, and adaptive EPSs.

DOE has tentatively determined that the proposed amendments would not alter the measured efficiency of EPSs, and that the proposal, if adopted, would not be unduly burdensome to conduct. DOE's proposed actions are summarized in Table II.1 of this NOPR and addressed in detail in section III of this document. A redline markup of the current test procedure with the proposed changes is available in the rulemaking docket.

TABLE II.1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE

Current DOE test procedure	Proposed test procedure	Attribution, reason
Defines EPSs as a power supply circuit used to convert household electric current into DC current or lower-voltage AC current to operate a consumer product. 10 CFR 430.2	Would define a ''commercial and industrial power supply'' to delineate those power supplies that do not fall within the scope of the ''external power supply'' definition set out by Congress. 10 CFR 430.2	Stakeholder inquiries.
Requires adaptive EPSs that meet the IEC 62680–1–2 specification to test at 3 amps for the 100% loading condition at the lowest operating output voltage of 5 volts. 10 CFR part 430, Subpart B, Appendix Z, Sec. 4.	Would define an adaptive EPS that meets the voltage/current specifications of IEC 62680–1–2 as a ''USB–PD EPS'' and require that it be tested at 2 amps for the 100% loading condition at the lowest operating output voltage of 5 volts. Would also define a USB Type-C connector. 10 CFR part 430, Subpart B, Appendix Z, Sec. 3, 6(a)(1)(iii)B, 6(b)(1)(iii)B.	Adaptive EPS waivers.
Adaptive EPS instructions are currently a subsection within the single-voltage EPS testing instructions in section 4(a)(i)(E) of Appendix Z. 10 CFR part 430, Subpart B, Appendix Z, Sec. 4(a)(i)(E).	Would move instructions for non-adaptive EPSs to section 5 and add a new section 6 in Appendix Z for testing all adaptive EPSs, with two sub-sections for single-voltage and multiple-voltage adaptive EPSs. 10 CFR part 430, Subpart B, Appendix Z, Sec. 6.	Adaptive EPS waivers, stakeholder inquiries, improve readability of TP (with added waiver provisions, better delineates requirements for single-voltage, multiple-voltage, and adaptive EPSs).
Does not explicitly provide instructions for testing single-voltage EPSs with multiple output busses. 10 CFR part 430, Subpart B, Appendix Z (Generally).	Would provide explicit instructions for testing single-voltage EPSs with multiple output busses. 10 CFR part 430, Subpart B, Appendix Z, Sec. 5(a)(1)(iv).	Innovation in the marketplace and Stakeholder inquiries.

[9] An ''output bus'' is defined as ''any of the outputs of the power supply to which loads can be connected and from which power can be drawn, as opposed to signal connections used for communication.'' Section 2 of Appendix Z.

TABLE II.1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE—Continued

Current DOE test procedure	Proposed test procedure	Attribution, reason
Does not provide instructions for allowing functions unrelated to the external power supply circuit to be disconnected during testing. 10 CFR part 430, Subpart B, Appendix Z, Sec. 4(h).	Would provide explicit instructions for disconnecting non-EPS functions during testing 10 CFR part 430, Subpart B, Appendix Z, Sec. 4(i).	Stakeholder inquiries.
Defines ''nameplate output power'' as the value on the Product's nameplate or manufacturer's documentation. 10 CFR part 430, Subpart B, Appendix Z, Sec. 2o.	Would redefine ''nameplate output power'' to provide an exception for USB–PD EPSs, which tests these devices at 10W. The exception would permit adaptive EPSs meeting this specification to be tested using the same 10W level. 10 CFR part 430, Subpart B, Appendix Z, Sec. 3.	Adaptive EPS waivers.
Contains redundant definitions that had been carried over from previous revisions of the test procedure but are no longer referenced. 10 CFR part 430, Subpart B, Sec. 2e., h., l., m., y.	Would remove redundant definitions that are no longer referenced.	Improve ease of reference and readability.
Numerous EPS related definitions are spread across multiple locations in 10 CFR 430.2 and Appendix Z. 10 CFR 430.2 and Subpart B, Appendix Z (Generally).	Would consolidate all EPS related definitions to Appendix Z. 10 CFR part 430, Subpart B, Appendix Z, Sec. 3.	Improve ease of reference and readability.
Defines ''average active-mode efficiency'' as the average of the loading conditions for which a unit can sustain output current. 10 CFR part 430, Subpart B, Appendix Z, Sec. 2f.	Would redefine ''average active-mode efficiency'' to explicitly state that the definition references the average of the active mode efficiencies measured at the loading conditions for which a unit can sustain output current. 10 CFR part 430, Subpart B, Appendix Z, Sec. 3.	Improve readability of TP.
Contains repetitive instructions across multiple sections on uncertainty and resolution requirements for power measurements, room air speed and temperature conditions, input voltage source, product configuration, and wire gauge requirements for leads. 10 CFR part 430, Subpart B, Appendix Z, Sec. 3(a), 3(b).	Would consolidate these requirements that are applicable to all EPSs into a single section within Appendix Z. 10 CFR part 430, Subpart B, Appendix Z, Sec. 4.	Improve readability of TP (with added waiver provisions, better delineates requirements for single-voltage, multiple-voltage, and adaptive EPSs).
Incorporates by reference the entire IEC 62301 Ed. 2.0 industry standard. 10 CFR part 430, Subpart B, Appendix Z (Generally).	Would incorporate by reference IEC 62301, add into Appendix Z particular sections from that IEC standard to use during testing, and update the shorthand notation to ''IEC 62301–Z'' in Appendix Z. 10 CFR part 430, Subpart B, Appendix Z, Sec. 1.	Adherence to **Federal Register** requirements.

III. Discussion

A. Scope of Applicability

EPCA defines an ''external power supply'' as an external power supply circuit that is used to convert household electric current into DC current or lower-voltage AC current to operate a consumer product. (42 U.S.C. 6291(36)(A)(i))

EPCA also defines a ''consumer product'' in relevant part as ''any article . . . of a type which in operation consumes or is designed to consume energy . . . and which, to any significant extent, is distributed in commerce for personal use or consumption by individuals; without regard to whether such article of such type is in fact distributed in commerce for personal use or consumption by an individual . . . .'' 42 U.S.C. 6291(1).

DOE issued guidance on December 20, 2017, that laid out the specific types of situations in which the agency would view a given power supply as falling outside of the scope of the definition of EPS in EPCA. The guidance document is available in the rulemaking docket[10] and sets out the following characteristics that DOE would consider as placing a given power supply outside of the ''external power supply'' definition:

(1) A power supply requiring 3-phase input power, which is incapable of operating on household current;

(2) A DC–DC only power supply, which is incapable of operating on household current;

(3) A power supply with a fixed, non-removable connection to an end-use device that is not a consumer product under EPCA;

(4) A power supply whose output connector is uniquely shaped to fit only an end-use device that is not a consumer product;

(5) A power supply that cannot be readily connected to an end-use device that is a consumer product without significant modification or customization of the power supply itself or the end-use device;

(6) A power supply packaged with an end-use device that is not a consumer product, as evidenced by either:

(a) Such device being certified as, or declared to be in conformance with, a specific standard[11] applicable only to non-consumer products; or

[10] *https://www.regulations.gov/contentStreamer?documentId=EERE-2019-BT-TP-0012-0001&attachmentNumber=1&contentType=pdf.*

[11] Examples include a power supply model intended for use with an end-use device that is

(b) Such device being excluded or exempted from inclusion within, or conformance with, a law, regulation, or broadly-accepted industry standard where such exclusion or exemption applies only to non-consumer products;

(7) A power supply distributed in commerce for use with an end-use device where:

(a) The end-use device is not a consumer product, as evidenced by either the circumstances in (6)(a) or (6)(b) of this section; and

(b) The end-use device for which the power supply is distributed in commerce is reasonably disclosed to the public, such as by identification of the end-use device on the packaging for the power supply, documentation physically present with the power supply, or on the manufacturer's or private labeler's public website; or

(8) A power supply that is not marketed for residential or consumer use, and that is clearly marked (or, alternatively, the packaging of the individual power supply, the shipping container of multiple such power supplies, or associated documentation physically present with the power supply when distributed in commerce is clearly marked) ''FOR USE WITH COMMERCIAL OR INDUSTRIAL EQUIPMENT ONLY'' or ''NOT FOR RESIDENTIAL OR CONSUMER USE,'' [12] with the marking designed and applied so that the marking will be visible and legible during customary conditions for the item on which the marking is placed.

Consistent with the specific screening criteria laid out in the December 2017 guidance, the incorporation of these criteria into DOE's regulations would not be the sole method for determining whether a power supply would be excluded from the definition of ''external power supply.'' Rather, these criteria merely identify specific and likely examples of circumstances in which DOE would not consider a power supply as meeting the definition of ''external power supply'' under EPCA. DOE does not intend for these criteria to preclude a person from asserting that a specific power supply falls outside of EPCA's reach in spite of its inability to meet one or more of these eight criteria.

In order to provide manufacturers and other stakeholders additional certainty as to which power supplies would be considered to fall outside of the EPS definition, DOE proposes to use these criteria to create a new definition for a ''commercial and industrial power supply'' at 10 CFR part 430, and expressly exclude such products from the EPS definition. Specifically, DOE proposes to define ''commercial and industrial power supply'' as:

A power supply that is used to convert electric current into DC or lower-voltage AC current, is not distributed in commerce for use with a consumer product, and includes any of the following characteristics:

(1) A power supply that requires 3-phase input power and that is incapable of operating on household current;

(2) A DC–DC only power supply that is incapable of operating on household current;

(3) A power supply with a fixed, non-removable connection to an end-use device that is not a consumer product as defined under the Energy Policy and Conservation Act of 1975 (as amended);

(4) A power supply whose output connector is uniquely shaped to fit only an end-use device that is not a consumer product;

(5) A power supply that cannot be readily connected to an end-use device that is a consumer product without significant modification or customization of the power supply itself or the end-use device;

(6) A power supply packaged with an end-use device that is not a consumer product, as evidenced by either:

(a) Such device being certified as, or declared to be in conformance with, a specific standard applicable only to non-consumer products. For example, a power supply model intended for use with an end-use device that is certified to the following standards would not meet the EPCA definition of an EPS: (1) CISPR 11 (Class A Equipment), ''Industrial, scientific and medical equipment—Radio-frequency disturbance—Limits and methods of measurement''; (2) UL 1480A, ''Standard for Speakers for Commercial and Professional Use''; (3) UL 813, ''Standard for Commercial Audio Equipment''; and (4) UL 1727, ''Standard for Commercial Electric Personal Grooming Appliances''; or

(b) Such device being excluded or exempted from inclusion within, or conformance with, a law, regulation, or broadly-accepted industry standard where such exclusion or exemption applies only to non-consumer products;

(7) A power supply distributed in commerce for use with an end-use device where:

(a) The end-use device is not a consumer product, as evidenced by either the circumstances in (6)(a) or (6)(b) of this section; and

(b) The end-use device for which the power supply is distributed in commerce is reasonably disclosed to the public, such as by identification of the end-use device on the packaging for the power supply, documentation physically present with the power supply, or on the manufacturer's or private labeler's public website; or

(8) A power supply that is not marketed for residential or consumer use, and that is clearly marked (or, alternatively, the packaging of the individual power supply, the shipping container of multiple such power supplies, or associated documentation physically present with the power supply when distributed in commerce is clearly marked) ''FOR USE WITH COMMERCIAL OR INDUSTRIAL EQUIPMENT ONLY'' or ''NOT FOR RESIDENTIAL OR CONSUMER USE,'' with the marking designed and applied so that the marking will be visible and legible during customary conditions for the item on which the marking is placed.

As provided in the current guidance, non-material deviations from such marking cited in (8) would not preclude satisfaction of the circumstances set forth in that paragraph. In addition, DOE may in its discretion determine that a power supply satisfies the circumstances set forth in (8) (provided all other conditions are satisfied) where such marking consists of language other than that specified in (8) but that nonetheless clearly conveys that the power supply is not marketed or intended for use with consumer products.

DOE requests comment on the criteria specifying the scope of applicability of the EPS definition.

B. Adaptive EPSs

As discussed, DOE has issued test procedure waivers for several basic models of adaptive EPSs that meet the provisions of industry standard IEC 62680–1–2. (Case Nos. EPS–001, EPS–002, EPS–003, EPS–004, 2017–014, 2018–005, and 2018–010.) The IEC

certified to the following standards would not meet the EPCA definition of an EPS: (1) CISPR 11 (Class A Equipment), ''Industrial, scientific and medical equipment—Radio-frequency disturbance—Limits and methods of measurement''; (2) UL 1480A, ''Standard for Speakers for Commercial and Professional Use''; (3) UL 813, ''Standard for Commercial Audio Equipment''; and (4) UL 1727, ''Standard for Commercial Electric Personal Grooming Appliances''.

[12] DOE's guidance also stated that ''[n]on-material deviations from such marking . . . will not preclude satisfaction of the circumstances set forth in this paragraph'' and added that ''DOE may in its discretion determine that a power supply satisfies the circumstances set forth in [this paragraph] (provided all other conditions are satisfied) where such marking consists of language other than that specified in [this paragraph] but that nonetheless clearly conveys that the power supply is not marketed or intended for use with consumer products.'' DOE Guidance (December 30, 2017), at 2, note 7.

62680–1–2 specification contains the voltage, current, and digital communication requirements for the adaptive Universal Serial Bus Power Delivery (''USB–PD'') system. Specifically, the USB–PD specification allows for the output voltage of a compatible EPS to adaptively change between 5 volts, 9 volts, 15 volts and 20 volts while allowing for currents up to 3 amps for the first three voltage levels and up to 5 amps at the 20 volt level upon request from a load using an established digital communication protocol. As a result, USB–PD allows seamless interoperability across multiple consumer products with different input voltage requirements such as a mobile phone, tablet, or laptop.

As described in the notice of decision and order granting waivers to Apple, Microsoft, Poin2, and Bitland, DOE determined that applying the DOE test procedure to USB–PD EPSs would yield results that would be unrepresentative of the active-mode efficiency of those products. 83 FR 11738, 11739. Section 4(a)(i)(C) of Appendix Z requires that active-mode efficiency be measured at four loading conditions (100%, 75%, 50%, and 25%) relative to the nameplate output current of the EPS. Section 4(a)(i)(E) of Appendix Z further requires that for adaptive EPSs, the average active-mode efficiency must be measured by testing the unit twice—once at the highest achievable output voltage and once at the lowest. Thus, for an adaptive EPS with a nameplate output current of 3 amps the four active mode loading conditions are 3 amps, 2.25 amps, 1.5 amps, and 0.75 amps. The adaptive EPS would be tested using these four loading conditions at its highest achievable output voltage and its lowest achievable output voltage, which is 5 volts for USB–PD EPSs. For those USB–PD EPSs specified in the waiver orders, DOE determined that operating the EPS at the 3 amps and 5 volts test condition (resulting in a 15W output power) would not reflect the actual use in the field of USB–PD EPSs at the lowest achievable output voltage. Although the USB–PD specification requires the lowest operating point for these EPSs to be 15W at 5 volts, USB–PD EPSs operating at 5 volts generally do not exceed 10W for almost all usage conditions. When charging a product, such as a laptop, that is sold or intended to be used with a USB–PD EPS, the EPS typically charges at 5 volts only if the product has a fully discharged or fully charged battery, and in such cases, the charging current would typically be 0.5 amps or less. At all other times when more power is needed, the EPS will typically switch to a higher voltage. If these adaptive EPSs are used to power other products such as mobile phones or tablets, the EPS will typically revert back to the lowest output voltage of 5 volts, but would generally have a charging current of no more than 2 amps (corresponding to an output power of 10W). According to data presented by manufacturers in their requests for a waiver, the bulk of consumer products that are capable of being powered by such an adaptive EPS are represented by these mobile phones, tablets and laptops. For these reasons, petitioners asserted, USB–PD EPSs are highly likely to only output power at less than 10W at an output voltage of 5 volts.

After reviewing the data provided by the petitioners, DOE concluded that when using a USB–PD EPS to charge an end-use product at the lowest voltage level of 5 volts, the product would rarely draw more than 2 amps of current at 5 volts (*i.e.,* a power draw of more than 10W). Nonetheless, for a USB–PD EPS with a nameplate output current of 3 amps, the current DOE test procedure would require that the EPS's efficiency be measured at a current of 3 amps at the lowest voltage condition of 5 volts (*i.e.,* a power draw of 15W). As a result, the efficiency of that EPS, when evaluated at that higher power draw (15W v. 10W), would result in a measurement that is unrepresentative of the actual energy consumption characteristics of the USB–PD EPS being tested. 83 FR 11738, 11739.

For USB–PD EPSs, DOE prescribed an alternate test procedure to measure their energy efficiency. Specifically, USB–PD EPSs covered by the referenced waivers must be tested such that when testing at the lowest achievable output voltage (*i.e.,* 5 volts), the output current shall be 2 amps (corresponding to an output power of 10W) at the 100% loading condition. The 75%, 50%, and 25% loading conditions are scaled accordingly under this alternate procedure (*i.e.,* 1.5 amps, 1 amp, and 0.5 amps, respectively). When tested in this manner, the resulting power draws are 10W, 7.5W, 5W, and 2.5W; this is in contrast to the existing test procedure at Appendix Z, which would require power draws of 15W, 11.25W, 7.5W, and 3.75W, respectively. 83 FR 11738, 11739–11740. The average active mode efficiency equals the average of the efficiencies when tested at each of the four loading conditions. In addition, for such EPSs, the alternate procedure prescribes that the nameplate output power at the lowest output voltage shall be considered to be 10W at each USB–PD port, such that the appropriate energy conservation standards would apply. *Id.*

DOE notes that with any waiver it grants, it must also, as soon as practicable, publish a NOPR in the **Federal Register** to amend its regulations to eliminate any need for the continuation of such waiver followed by the publication of a final rule. 10 CFR 430.27(l) Accordingly, DOE is reviewing the issues presented in the waivers granted to Apple, Microsoft, Poin2, Bitland, and Huawei and proposing to adopt the alternate test procedure specified in those waivers when testing USB–PD EPSs. If DOE publishes a final rule that amends the test procedure to address the issues presented in these waivers, the waivers will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 430.27(h)(2)

When DOE finalized the current testing requirements for adaptive EPSs in the August 2015 final rule, the IEC 62680–1–2 standard had not yet been published.[13] As DOE explained in the August 2015 final rule, adaptive EPSs are unique among EPSs because of their ability to operate at one power level when communicating with certain consumer products but an inability to reach a similar operating point when used with other consumer products lacking the ability to communicate. 80 FR 51424, 51432. The EPS test procedure was designed to capture the efficiencies at the various output conditions in which an adaptive EPS would operate. This is achieved by conducting the test twice at each loading condition—once at the highest achievable output voltage that is utilized while communicating with a load, and once at the lowest achievable output voltage utilized during load communication. Due to the nature of EPS design, the points in between the highest and lowest output voltage would be no less efficient than either extreme. *Id.*

Since publishing the August 2015 final rule, DOE has reviewed existing and legacy USB specifications as well as existing products with USB output ports. While the legacy USB specifications (USB 2.0, USBBC 1.2) published prior to March 2016 limit the current output to 1.5 amps, several consumer devices on the market today operate with USB EPSs with nameplate output currents of 2.0 amps or 2.4 amps at nameplate output voltages of 5 volts. These EPSs, operating at power ratings higher than those specified in legacy

[13] The first version of IEC 62680–1–2 was published in November 2016.

USB specifications, were the industry's response to consumer demand for faster charging in mobile devices and greater utility of USB chargers at a rate that outpaced the original USB specifications.

Based on this review of USB products on the market and the recent waiver requests from industry for USB–PD EPSs, limiting the current draw at the 100% loading condition to 2 amps when testing at the lowest nameplate output voltage would ensure that testing is performed in a manner that is representative of typical use. 42 U.S.C. 6293(b)(3)

Accordingly, DOE is proposing to add definitions for USB–PD EPSs and the physical USB Type-C connector that supports it in section 3 of Appendix Z to reflect the voltage and current requirements specified in IEC 62680–1–2. In particular, DOE proposes to define the term USB Power Delivery (''USB–PD'') EPS to mean ''an adaptive EPS that utilizes a USB Type-C output port and uses a digital protocol to communicate between the EPS and the end-user product to automatically switch between an output voltage of 5 volts and one or more of the following voltages: 9 volts, 15 volts, or 20 volts. The USB–PD output bus must be capable of delivering 3 amps at an output voltage of 5 volts, and the voltages and currents must not exceed any of the following values for the supported voltages: 3 amps at 9 volts; 3 amps at 15 volts, and; 5 amps at 20 volts''. DOE additionally proposes to define the term USB Type-C as ''the reversible 24-pin physical USB connector system that supports USB–PD and allows for the transmission of data and power between compatible USB products.''

Alternatively, DOE is also considering referencing IEC 62680–1–2 in the proposed USB–PD EPS and USB Type-C definitions. With this approach, the definitions would either reference the entire standard, or individual pertinent sections.

DOE requests comment on its proposed definitions for USB–PD EPSs, and whether it accurately captures the specifications required to distinguish a USB–PD device from other adaptive EPSs. Similarly, DOE requests comments on its proposed definition for the USB Type-C connector and whether it accurately captures the specifications required to distinguish it from other physical port designs that can support adaptive external power supplies. DOE also requests comment on its alternate suggestion for defining a USB–PD EPS by referencing the IEC 62680–1–2 standard, either in its entirety or individual pertinent sections. For the latter, DOE seeks feedback on which individual sections of IEC 62680–1–2 would be pertinent in distinguishing a USB–PD device from other adaptive EPSs. If neither DOE's proposed definition nor the alternate suggestion is appropriate, DOE requests comment on the appropriate specification to reference as well as the reasons for it.

Additionally, DOE is proposing to require that USB–PD EPSs be tested at the lowest nameplate output voltage (*i.e.,* 5 volts as prescribed for these EPSs) at 2 amps for the 100% loading condition. The remaining loading points of 75%, 50% and 25% would be scaled down from this 2-amp maximum current value to 1.5 amps, 1 amp, and 0.5 amps, respectively. These requirements would be specified in new paragraphs 6(a)(1)(iii)(B) and 6(b)(1)(iii)(B) of Appendix Z for single-voltage and multiple-voltage adaptive EPSs, respectively. The average active-mode efficiency of any unit under test (''UUT'') would still be represented as the arithmetic average of the active-mode efficiencies at the four loading conditions. The loading conditions at the highest nameplate output voltage would be unaffected by this proposal.

While the existing testing requirements for adaptive EPSs are specified in paragraph 4(a)(i)(E) in Appendix Z, DOE is proposing to remove this paragraph and add a new section 6 in Appendix Z that would specify the testing requirements for all adaptive EPSs. The proposed requirement for single-voltage adaptive EPSs that meet the IEC 62680–1–2 specification would be specified in a new paragraph 6(a)(1)(iii)(B) of Appendix Z, and those for multiple-voltage adaptive EPSs would be specified in a new paragraph 6(b)(1)(iii)(B).

DOE requests comment on its proposed amendments for USB–PD EPS and is particularly interested in whether the 2-amp limit is appropriate to use for the maximum current at the lowest nameplate output voltage for these products.

In addition to proposing testing requirements for USB–PD EPSs, DOE is also proposing to amend the related certification requirements for these products. The current certification requirements for adaptive EPSs at 10 CFR 429.37(b)(2)(iii) require reporting the nameplate output power in W at the highest and lowest nameplate output voltages, among other reported values. Section 2 of Appendix Z defines nameplate output power as the power output as specified on the manufacturer's label on the power supply housing or, if absent from the housing, as specified in documentation provided by the manufacturer. Under the current test procedure, for a USB–PD EPS, the nameplate output power at the lowest nameplate voltage of 5 volts would be 15W. However, since DOE is proposing that these EPSs be tested at a maximum output current of 2 amps, corresponding to an output power of 10W, DOE is proposing that such EPSs would be certified at 10W as well. Accordingly, DOE is proposing to amend the definition of nameplate output power in Appendix Z to explicitly state that for USB–PD ports, nameplate output power is 10W at the 5 volt level and as specified on the manufacturer's label or documentation at the highest voltage.

For example, a USB–PD EPS that is rated at 5 volts, 3 amps at the lowest nameplate output voltage and 9 volts, 1.5 amps at the highest nameplate output voltage, would be tested at 5 volts, 2 amps (*i.e.,* 10W) at the lowest nameplate output voltage and 9 volts, 1.5 amps (*i.e.,* 13.5W) at the highest nameplate output voltage, based on the proposed amendments. Under the proposed approach, the tested device would be certified at 10W and 13.5W at the lowest and highest nameplate output powers, respectively.

DOE is also proposing corresponding amendments to the certification requirements for single-voltage adaptive EPSs in 10 CFR 429.37(b)(2)(iii). Specifically, DOE is proposing that for all USB–PD EPSs, all of the required reported values must be provided, but with the loading conditions at the lowest operating voltage scaled such that the output current at the 100%, 75%, 50% and 25% loading conditions would be set at 2 amps, 1.5 amps, 1 amp and 0.5 amps, respectively.

C. EPS Configurations

DOE's test procedure for EPSs account for the different configurations that these devices can have. Because a given EPS's configuration is tied to its capabilities, DOE's procedure attempts to address these design aspects when evaluating the energy efficiency of a given EPS. The various issues encountered by DOE regarding the testing of EPSs with different design configurations follow.

1. Single-Voltage EPSs With Multiple Output Busses

Stakeholders raised questions regarding how to load an EPS that is able to convert to only one output voltage at a time and has multiple output busses (*i.e.,* a single-voltage EPS with multiple output busses). A single-voltage EPS with multiple output busses is a single-voltage EPS and must be tested according to section 3.a of Appendix Z with measurements taken as specified in section 4.a of Appendix Z. DOE previously explained during a November 21, 2014, public meeting to discuss the EPS test procedure (''November 2014 public meeting'') that these single-voltage EPSs are to be tested at the same loading conditions as conventional single-voltage EPSs, using multiple loads across the busses to draw the complete nameplate output current from the EPS itself. (Docket No. EERE–2014–BT–TP–0043, DOE Public Meeting Transcript, No. 9, p. 43) At the time of the November 2014 public meeting, single-voltage EPSs with multiple output busses had limited availability in the marketplace, and the more explicit direction discussed during the November 2014 public meeting was not included in the regulatory text.

DOE recognizes, however, that since the publication of the August 2015 final rule, rapid innovation has led to single-voltage EPSs with multiple output busses becoming much more prevalent on the market, making it appropriate now to include more explicit directions for these EPSs. Therefore, DOE proposes to add regulatory text providing that any EPS that outputs the same voltage across multiple output busses must be tested in a configuration such that all busses are simultaneously loaded to their maximum output at the 100% loading condition, utilizing the proportional allocation method where necessary. This proposed amendment, which would be made at paragraph 5(a)(1)(iv) of Appendix Z, would require that each output be appropriately scaled for testing the 75%, 50%, and 25% loading conditions. DOE is also proposing to apply the same approach to adaptive EPSs that have multiple output busses that are capable of outputting the same voltage simultaneously. Accordingly, DOE is proposing to include this requirement in paragraph 6(a)(1)(iv) of Appendix Z.

This approach addresses two possible scenarios when testing single-voltage EPSs with multiple output busses. First, an EPS may list one nameplate output current that corresponds to the sum of the maximum current that can be drawn from all ports. As one example, consider an EPS with three ports, each of which can support the same maximum output current of 0.5 amps, with a total nameplate output current of 1.5 amps. Each port would be loaded to 0.5 amps at 100% load (for a total current load of 1.5 amps). Each load would then be scaled down as necessary to test at all the remaining loading conditions (*i.e.,* each port would be loaded to 0.375 amps at 75% load; 0.25 amps at 50% load; and 0.125 amps at 25% load). As another example, consider an EPS with three ports, in which one port can support a maximum current of 1 amp and the two remaining ports each supporting a maximum current of 0.5 amps—yielding a total nameplate output current of 2.0 amps for the EPS. In such a scenario, all three ports would be loaded simultaneously to 1.0/0.5/0.5 amps, respectively, at the 100% loading condition (for a total current load of 2.0 amps). Each load would then be scaled down as necessary to test all remaining loading conditions (*i.e.,* the ports would be loaded at 0.75/0.375/0.375 amps at 75% load; 0.5/0.25/0.25 amps at 50% load; and 0.25/0.125/0.125 amps at 25% load).

The second possible scenario involves a single-voltage EPS with multiple output busses for which the total nameplate output current is less than the sum of the maximum current that can be drawn from each of the individual ports. In this scenario, the load at each port would be appropriately scaled down using the proportional allocation method. For example, consider an EPS with three ports, each of which can support the same maximum output current of 0.5 amps, with a total nameplate output current of 1.2 amps. At the 100% loading condition, each port could not be loaded to 0.5 amps, because the total current (1.5 amps) would exceed the EPS's total nameplate output current of 1.2 amps. In this scenario, the load would be appropriately scaled down using the proportional allocation method, such that each port would be loaded to 0.4 amps at 100% load (for a total current load of 1.2 amps). Each load would then be further scaled down as necessary to test at all the remaining loading conditions (*i.e.,* each port would be loaded to 0.3 amps at 75% load; 0.2 amps at 50% load; and 0.1 amps at 25% load).

The additional detail described in this section for testing single-voltage EPSs with multiple output busses is being proposed to reflect current industry practice. DOE requests comment on these proposed provisions.

2. Multiple-Voltage Adaptive EPSs

Stakeholders have also inquired about how to test adaptive EPSs that operate as multiple-voltage EPSs. The definition of multiple-voltage EPS, as well as the new proposed definition of adaptive EPS, both apply to a multiple-voltage EPS with multiple output busses in which one or more of the busses are adaptive. Currently, section 4(a)(i)(E) of Appendix Z requires testing adaptive EPSs twice—once at the highest nameplate output voltage and once at the lowest nameplate output voltage. At each output voltage, adaptive EPSs are tested at the four loading conditions specified in Table 1 of Appendix Z (100%, 75%, 50%, and 25%). Separately, section 4(b)(i)(B) of Appendix Z requires testing multiple-voltage EPSs at four loading conditions (100%, 75%, 50%, and 25%) derated according to the proportional allocation method, with all busses loaded and tested simultaneously. Taking these two testing requirements into account, adaptive EPSs that operate as multiple-voltage EPSs are required to be tested once at the highest nameplate output voltage and once at the lowest nameplate output voltage, and for each test, all available busses must be loaded and derated according to the proportional allocation method. DOE also notes that such EPSs are subject to the multiple-voltage EPS standards.

To more explicitly address testing and certifying adaptive EPSs that operate as multiple-voltage EPSs, DOE is proposing to add new sections 6(a) and 6(b) to Appendix Z, to explicitly address single-voltage adaptive EPSs and multiple-voltage adaptive EPSs, respectively. The proposed requirements for testing both single-voltage and multiple-voltage adaptive EPSs are similar to the requirements for testing all other single-voltage and multiple-voltage EPSs, and would include the exception regarding USB–PD EPSs when testing at the lowest nameplate output voltage, as discussed previously in section III.B. DOE is also proposing to amend the certification requirements for switch-selectable and adaptive EPSs at 10 CFR 429.37(b)(2)(ii) and (b)(2)(iii) to clarify that the requirements apply to both single-voltage as well as multiple-voltage switch-selectable and adaptive EPSs, respectively.

DOE has also identified EPSs with multiple USB output ports at 5 volts and one or more adaptive outputs with a default voltage of 5 volts, but whose output voltage varies according to the demand of the product connected to that port. Under the default operating condition, the EPS operates as a single-voltage EPS because it outputs only one voltage to all available ports. However, in a different operating condition, the adaptive output may provide a higher voltage while the other outputs remain at 5 volts. In this condition, the EPS operates as a multiple-voltage EPS because it is providing more than one output voltage simultaneously. For such a product, the definition of single-voltage EPS would not apply because the product is able to convert to different output voltages at a time, whereas a single-voltage EPS is able to convert to *only* one AC or DC output voltage at a time (emphasis added). See Section 2 of Appendix Z. Instead, the definition of multiple-voltage EPS would apply to such a product. *Id.* DOE's proposed addition of a new definition of adaptive EPS would also apply.

With these proposed amendments, an EPS that has both adaptive and non-adaptive output busses would be considered a multiple-voltage adaptive EPS and would be tested under the newly proposed section 6(b) of Appendix Z. Both the adaptive and non-adaptive ports would be tested twice—first with the adaptive port at the highest nameplate output voltage and the non-adaptive ports at their fixed voltage; and again with the adaptive port at the lowest nameplate output voltage and the non-adaptive ports remaining at their fixed voltage. At each of the two test voltages, the proportional allocation method can continue to be used to derate the loading conditions where necessary. As proposed, this testing approach for EPSs with both adaptive and non-adaptive ports would be made explicit in the newly proposed section 6(b)(1)(iii)(F) of Appendix Z. DOE does not intend for this proposal to change the existing testing requirements for this type of EPS, but rather intends for these amendments to provide additional detail and more specific instruction for this type of EPS, consistent with how such EPSs are currently tested and rated. Consequently, this amendment would not require re-testing or re-rating of any existing EPSs with both adaptive and non-adaptive ports.

DOE requests comment on all proposed updates related to adaptive EPSs that operate as multiple-voltage EPSs.

3. EPSs With Other Major Functions

DOE received questions about whether non-EPS-related functions are permitted to be disconnected during testing for products with USB ports. The existing test procedure at Appendix Z in 10 CFR 430, Subpart B specifies that EPSs must be tested in their final completed configuration. For example, the efficiency of a bare circuit board power supply (*i.e.,* a power supply without its housing or DC output cord) may not be used to characterize the efficiency of the final product. DOE recognizes that the requirement to test an EPS in its final completed configuration may result in measuring the energy use of more than just an EPS (the covered product) where the EPS is a component of a product that serves one or more other major functions in addition to serving as an EPS. Accordingly, DOE proposes to amend the current requirement by specifying that components and circuits unrelated to the EPS functionality may be disconnected during testing as long as that disconnection does not impact the functionality of the EPS itself. For example, a surge protector with USB output ports may be tested with the surge protector circuit disconnected if it is distinct from the USB circuit and does not impact the EPS's functionality (*i.e.,* the circuit from household AC input to the USB output). This proposed change, if adopted, would appear in section 4(i) of Appendix Z and apply to single-voltage, multiple-voltage, and adaptive EPSs.

DOE requests comment on the proposed update to the test procedure regarding the disconnecting of functions unrelated to the EPS.

D. Industry Standards Incorporated by Reference

The current test procedure for EPSs incorporates by reference the entire IEC 62301 Ed. 2.0 industry standard. However, only a few specific sections of the standard are referenced in the test procedure. Therefore, DOE proposes to add a new section 1—''Incorporation by Reference''—in Appendix Z to reference only those sections that are used in the EPS test procedure. Further, in incorporating IEC 62301 Ed. 2.0 by reference in section 1 of Appendix Z, DOE also proposes to identify this industry standard as ''IEC 62301–Z'' to indicate that the reference applies exclusively to Appendix Z. This is consistent with the nomenclatures used with other DOE test procedures that also incorporate by reference sections of IEC 62301 Ed. 2.0. Finally, in places where a current reference to IEC 62301 Ed. 2.0 restates the requirement from that standard, DOE proposes removing those redundant references to the standard.

DOE requests comment on its proposal to add in Appendix Z a new section 1 titled, ''Incorporation by Reference,'' in Appendix Z that would incorporate only those sections of IEC 62301 Ed. 2.0 that are referenced in the EPS test procedure at Appendix Z.

E. Other Proposed Amendments

DOE is proposing additional revisions throughout Appendix Z to remove no longer relevant definitions, centralize the remaining definitions, consolidate generally applicable requirements, and improve the delineation of requirements for single-voltage, multiple-voltage, and adaptive EPSs. This proposal is intended solely to improve the readability of the test procedure by presenting the procedure in an easy-to-understand format without resulting in substantive changes.

1. Removing Redundant Definitions

DOE proposes to remove certain definitions in Appendix Z that had been carried over from previous revisions of the test procedure but are no longer referenced in either the current or the proposed test procedure. This proposal would ensure that only definitions relevant to the test procedure remain in Appendix Z. Specifically, DOE proposes to remove the definitions of ''apparent power'', ''instantaneous power'', ''nameplate input frequency'', ''nameplate input voltage'', and ''true power factor''.

DOE requests comment on its proposal to remove these definitions, and whether the removal of these definitions would negatively impact manufacturers' ability to make representations about the efficiency of their products to other agencies.

2. Location of EPS Definitions

DOE proposes to move all EPS-related terms that are currently defined in 10 CFR 430.2 to the EPS test procedure at Appendix Z. This proposal would ensure that all EPS-specific definitions are in one place and allow users of the test procedure to review these definitions at once without having to navigate between multiple areas of the CFR. Specifically, DOE proposes to move from 10 CFR 430.2 to Appendix Z the definitions of ''adaptive external power supply'', ''basic-voltage external power supply'', ''direct operation external power supply'', ''indirect operation external power supply'', and ''low-voltage external power supply''. DOE is not proposing to amend the substance of these definitions.

The definition of ''external power supply'' will remain in 10 CFR 430.2, but DOE proposes to add a sentence to the definition directing the reader to Appendix Z for other EPS-related definitions. This will ensure that even though the EPS-related definitions are specified in the test procedure, they would apply throughout 10 CFR part 430, including 10 CFR 430.32. For the definition of ''Class A external power supply'', which is statutorily defined in EPCA, DOE proposes to add it to the EPS test procedure at Appendix Z but also retain it at 10 CFR 430.2, where it currently exists.

Additionally, DOE proposes to modify the definition of ''average active-mode efficiency'' in Appendix Z to explicitly state that the average active-mode efficiency is the average of the active mode efficiencies at the loading conditions for which an EPS can sustain the output current—not the average of the loading conditions. This term would be defined as ''the average *of the active mode efficiencies* at the loading conditions (100%, 75%, 50%, and 25% of the unit under test's nameplate output current) for which that unit can sustain the output current.'' This proposal would not change the meaning of the definition; rather it would improve the readability of the test procedure.

3. Consolidating Duplicative Test Requirements

Section 3 of Appendix Z currently includes two subsections that specify the test apparatus and general instructions—one subsection specifies the requirements for single-voltage EPSs, and the other specifies the requirements for multiple-voltage EPSs. The requirements in these two subsections are largely the same. DOE proposes to combine these requirements and remove the separate subsections for single-voltage and multiple-voltage EPSs in order to provide a single, unified section for the test apparatus provisions and general instructions. Under this proposed change, the requirements would largely remain the same, but would appear in a single subsection that would apply to both single-voltage and multiple-voltage EPSs.

DOE also proposes consolidating the requirements regarding the required test load from sections 4(a)(i)(F) and 4(b)(i)(D) into a new subsection 4(f) of Appendix Z, since this requirement would remain the same across all EPSs. Similarly, DOE proposes to consolidate the requirements regarding how to attach power metering equipment from sections 4(a)(i)(A) and 4(b) into a new subsection 4(g) of Appendix Z.

4. Harmonizing Instructions for Single-Voltage and Multiple-Voltage EPSs

DOE proposes amending sections 4(a) and 4(b) of Appendix Z. These sections provide testing requirements for single-voltage and multiple-voltage EPSs, respectively, and DOE's proposal would harmonize these requirements. Applying both a similar structure and common set of instructions to these sections would improve the procedure's readability and reduce the likelihood of procedural errors during testing. These proposed updates would retain the current testing requirements.

5. Unsustainable Loading Provisions

Section 4(a)(i)(C)2 of Appendix Z currently specifies for single-voltage EPSs that if the EPS cannot sustain output at one or more of the loading conditions prescribed by the procedure (*i.e.,* 25%, 50%, 75%, and 100%), then it must be tested only at the loading conditions for which it can sustain output, and the average active-mode efficiency is calculated as the average of the loading conditions for which it can sustain the output. DOE proposes to clarify this existing requirement to state that of the outputs that are sustainable, the EPS must be tested at the loading conditions that allow for the maximum output power on that bus (that is, the highest output current possible at the highest output voltage).

Further, DOE proposes to reorganize this provision of the test procedure pertaining to unsustainable loading conditions by moving the part of this instruction related to the efficiency calculation to a newly designated section 5(a)(1)(vi), which would specify the requirements for calculating the tested EPS's efficiency. DOE also proposes to replicate the same requirements in the newly designated sections 5(b)(1)(vi), 6(a)(1)(vi), and 6(b)(1)(vi) for multiple-voltage, single-voltage adaptive, and multiple-voltage adaptive EPSs, respectively.

6. Correcting Table References

DOE proposes revising the current section 4(b)(i) of Appendix Z to correct a reference error. This section would be revised to refer to ''Table 2'' rather than ''Table 1,'' as currently referenced.

In light of the proposed restructuring of the test procedure, the proposed regulatory text presented in this document includes the entire EPS test procedure appendix language, including language that is not being changed from the existing requirements. Presenting the regulatory text in its entirety will assist stakeholders when reviewing the extent of the changes that DOE is proposing to make. DOE requests comment on all of the proposed changes related to the EPS test procedure raised in the preceding discussion in Section III.E.

F. Test Procedure Costs, Harmonization, and Other Topics

1. Test Procedure Costs and Impact

EPCA requires that test procedures proposed by DOE not be unduly burdensome to conduct. As discussed in the previous sections, DOE proposes to amend the existing test procedure for EPSs by: (1) Providing additional detail reflective of its current application; (2) adding revisions to address adaptive EPSs to reflect current industry testing standards and provide more representative results; and (3) adding detail to address the distinction between different types of EPSs with multiple ports. This document also proposes minor amendments to consolidate duplicative testing requirements, harmonized testing requirements for single-voltage and multiple-voltage EPSs, and improved organization of the test provisions regarding unsustainable loading conditions. DOE has tentatively determined that these proposed amendments would not be unduly burdensome for manufacturers to conduct.

DOE's analysis of this proposal indicates that, if finalized, it would not result in any additional costs or cost savings to manufacturers.

Further discussion of the cost impacts of the proposed test procedure amendments are presented in the following paragraphs.

If adopted, the proposed amendments would provide updates and supplemental details for how to conduct the test procedure and would neither increase complexity to test conditions/setup nor add new test steps. For example, the proposal would add references to specific sections of industry standards to provide precise direction to test technicians when conducting the test procedure. Consistent with industry inquiries and requests, DOE is proposing to revise or add definitions and test conditions to provide more specific direction. Further, DOE reorganized content and aligned terminology among relevant sections of the CFR to improve readability and provide clarity in the specifications referred to throughout the sampling requirements, test procedure, and applicable energy conservation standards. DOE does not anticipate that the amendments proposed in this NOPR would impact test costs.

DOE is also proposing to codify characteristics that can be used to differentiate between EPSs used to operate consumer products and power supplies that are used to operate non-consumer products (*i.e.,* industrial/commercial equipment), the latter of which are not subject to the test procedure. These proposed updates clarify which power supplies are excluded as non-consumer EPSs and would not fall within the scope of the test procedure. As such, these amendments, if made final, would not affect the testing burden faced by manufacturers when evaluating the efficiency of those products covered by the procedure.

With respect to USB–PD EPSs, DOE is proposing amendments based on the previously-mentioned petition for waiver filed by ITI on behalf of petitioners Apple, Microsoft, Poin2, and Bitland. In conjunction with this proposed change, because EPSs are required to be tested at their nameplate output power, DOE is proposing to amend the definition of ''nameplate output power'' to provide an exception for USB–PD EPSs, which would be tested at 10W at the lowest voltage instead of at their maximum capability at that voltage. The proposal would change the operating point at which testing is performed, but would not require any additional tests than are already required under the current test procedure. Hence, manufacturers would not incur any additional costs compared to the existing test procedure. Further, DOE is proposing to add further specification to the testing requirements for adaptive EPSs that also operate as multiple-voltage EPSs. The testing requirements for such EPSs would not change under this proposal. Accordingly, DOE does not anticipate that its proposal will result in any additional costs compared to the current test procedure.

DOE is also proposing to provide more explicit instructions for testing single-voltage EPSs that have multiple output busses. For such EPSs, DOE's proposal would not change the existing testing requirements. Instead, the proposal would improve the readability of the existing requirements. If finalized, these proposed amendments would provide supplemental detail but would not require manufacturers to test EPSs any differently and would result in no change in the associated testing cost compared to the current test procedure.

DOE also proposes to reorganize the test procedure to centralize the EPS-related definitions and relevant, general requirements, and better delineate the specific requirements for single-voltage, multiple-voltage, and adaptive EPSs. This proposed reorganization, like the amendments described earlier, are intended to improve the readability of the test procedure while avoiding any substantive changes; therefore, there would be no change in the associated testing cost compared to the current test procedure.

DOE has preliminarily concluded that the proposed amendments, if made final, would not impact the scope of the test procedure (*i.e.,* the proposal would not require manufacturers to test EPSs that are not already required to be tested) and would not alter the measured energy efficiency of EPSs under either the current test procedure or alternate test procedure required under currently active test procedure waivers. For adaptive EPSs that meet the IEC 62680–1–2 specification, the proposed approach is the same one required under the granted waivers. See 83 FR 11738 (initial Decision & Order on joint waiver request from Apple, et al.), 83 FR 25448 (Decision & Order on waiver request Huawei), 83 FR 50905 (first waiver extension for Apple), and 83 FR 60830 (second waiver extension for Apple). DOE has received no other petitions for waiver regarding adaptive EPSs that meet the IEC 62680–1–2 specification. Accordingly, on the basis of currently available data, DOE has preliminarily concluded that the proposed amendments would not alter the measured energy efficiency for such adaptive EPSs. Manufacturers would be able to continue to rely on data generated under the current test procedure, including any alternate test procedure permitted by DOE under a manufacturer-specific decision and order, should any of the proposed amendments be finalized.

DOE requests comment on its understanding of the impact of the proposals presented in this document in relation to the test burden and costs of the current test procedure.

2. Harmonization With Industry Standards

Appendix Z of 10 CFR part 430, subpart B incorporates by reference certain provisions of IEC 62301 Ed. 2.0. These provisions contain specifications for testing equipment and methods for measuring power consumption. DOE proposes to specify in section 1 of Appendix Z the relevant sections of IEC 62301 Ed. 2.0 that are referenced in Appendix Z. DOE requests comments on the benefits and burdens of the proposed updates to the industry standard referenced in the test procedure for EPSs.

DOE seeks comment on the degree to which the DOE test procedure should consider, and be harmonized further with, the most recent relevant industry standards for EPSs and whether there are any changes to the Federal test method that would provide additional benefits to the public. DOE also requests comment on the benefits and burdens of adopting any industry/voluntary consensus-based or other appropriate test procedure, without modification.

3. Other Test Procedure Topics

In addition to the issues identified earlier, DOE welcomes comment on any other aspect of the existing test procedure for EPSs not already addressed by the specific areas identified in this document. DOE particularly seeks information that would improve the ability of the test procedure to measure the energy efficiency/use of an EPS during a representative average use cycle or period of use. Comments regarding repeatability and reproducibility are also welcome.

DOE also requests information that would help DOE create procedures that would limit manufacturer test burden through streamlining or simplifying testing requirements. In particular, DOE notes that under Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' Executive Branch agencies such as DOE must manage the costs associated with the imposition of expenditures required to comply with Federal regulations. 82 FR 9339 (February 3, 2017). Consistent with that Executive Order, DOE encourages the public to provide input on measures DOE could take to lower the cost of its regulations applicable to EPSs consistent with the requirements of EPCA.

G. Compliance Date and Waivers

EPCA prescribes that all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with an amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) If DOE were to publish an amended test procedure EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

Should DOE amend the test procedure to address the issues presented in a waiver, the waiver would automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 430.27(h)(2). Recipients of any such waivers would be required to test those products that were subject to the waiver according to the amended test procedure as of the effective date of the amended test procedure. Some of the amendments proposed in this document would pertain to issues addressed by the waivers granted to Apple, Microsoft, Poin2, Bitland, and Huawei for testing

USB–PD EPSs (Case Nos. EPS–001, EPS–002, EPS–003, and EPS–004).

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (''OMB'') has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (''OIRA'') in OMB.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (''E.O.'') 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

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

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of the Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this rulemaking is consistent with the directives set forth in these executive orders. As described above, DOE has preliminarily determined that the proposed rule would not yield any costs or cost savings. Therefore, if finalized as proposed, this rule is expected to be an E.O. 13771 other 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 (''IRFA'') 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. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. 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 DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *http://energy.gov/gc/office-general-counsel.*

DOE reviewed this test procedure NOPR pursuant to the Regulatory Flexibility Act and the procedures and policies previously discussed. DOE has concluded that this rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below. DOE will consider any comments on the certification in determining whether to adopt the proposed amendments to the test procedure contained in this document.

For manufacturers of EPSs, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 13 CFR part 121. The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *https://www.sba.gov/document/support-table-size-standards.* EPS manufacturing is classified under NAICS 335999, ''All Other Miscellaneous Electrical Equipment and Component Manufacturing.'' The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business in this category.

DOE consulted its CCMS database to determine the total number of original device manufacturers (''ODMs'') with manufacturing facilities located in the United States that meet the SBA's definition of a ''small business.'' Due to the wide variety of applications that use EPSs, there were numerous EPS manufacturers listed in the CCMS database. However, the vast majority of EPS manufacturers are foreign companies. Of the few domestic companies listed, all of these companies exceed the size threshold defined by SBA and manufactured their EPSs abroad. Therefore, as in the 2015 test procedure final rule, DOE has determined that there are no small businesses that manufacture EPSs in the United States.

Therefore, DOE concludes that the impacts of the proposed test procedure amendments proposed in this NOPR would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of an IRFA is not warranted. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

DOE requests comment on its determination that there are no small EPS ODMs with manufacturing facilities located in the U.S.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of EPSs must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including EPSs. (10 CFR part 429, subpart B.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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 National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for external power supplies. DOE has determined that this proposed rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, Appendix A to Subpart D, A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. 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. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

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 rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Executive Order 12988

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

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

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

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed 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) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

The proposed regulatory action to amend the test procedure for measuring the energy efficiency of EPSs is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

M. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedure for EPSs do not incorporate any new industry standards.

N. Description of Materials Incorporated by Reference

In this NOPR, DOE proposes to maintain the current incorporation by reference of IEC 62301 Ed. 2.0 in 10 CFR 430.3, and create a new section 1 in Appendix Z, titled ''incorporation by reference'', to enumerate the specific provisions of the standard that are applicable to the EPS test procedure in Appendix Z. While incorporating IEC 62301 Ed. 2.0 by reference in section 1 of Appendix Z, DOE proposes to identify it as ''IEC 62301–Z'' to indicate the provisions of IEC 62301 that are applicable to Appendix Z. This is consistent with the nomenclature used with other DOE test procedures that also incorporate by reference sections of IEC 62301 Ed. 2.0. Specifically, section 1 of Appendix Z would limit use of the material incorporated by reference to the following sections of the IEC 62301:

(1) IEC 62301, ''Household electrical appliances—Measurement of standby power,'' Edition 2.0, 2011–01:

- Section 4.4.1, ''Power measurement uncertainty'';
- Section 5.3.3, ''Average reading method'';
- Annex B, ''Notes on the measurement of low power modes''; and
- Annex D, ''Determination of uncertainty of measurement''.

IEC 62301 is an industry-accepted standard for measuring the standby power of household electrical appliances. This standard is reasonably available and can be obtained from the American National Standards Institute at the following addresses:

American National Standards Institute, 25 W 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4936, or by visiting *http://webstore.ansi.org.*

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar then it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *https://www.energy.gov/eere/buildings/public-meetings-and-comment-deadlines.* Participants are responsible for ensuring their systems are compatible with the webinar software.

Additionally, you may request an in-person meeting to be held prior to the close of the request period provided in the **DATES** section of this document. Requests for an in-person meeting may be made by contacting Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *Appliance_Standards_Public_Meetings@ee.doe.gov.*

B. Submission of Comments

DOE will accept comments, data and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this NOPR.

Submitting comments via *http://www.regulations.gov.* The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or postal mail. Comments and documents submitted via email, hand delivery, or postal mail also will be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via 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.

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).

C. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. DOE requests comment on its proposed definition for ''commercial and industrial power supply'' to clarify the scope of applicability of the EPS test procedure. See section III.A for further detail.

2. DOE requests comment on its proposed definition for USB–PD EPSs, and whether it accurately captures the specifications required to distinguish a USB–PD device from other adaptive EPSs. Similarly, DOE requests comments on its proposed definition for the USB Type-C connector and whether it accurately captures the specifications required to distinguish it from other physical port designs that can support adaptive external power supplies. DOE also requests comment on its alternate suggestion for defining a USB–PD EPS by referencing the IEC 62680–1–2 standard, either in its entirety or individual pertinent sections. For the latter, DOE seeks feedback on which individual sections of IEC 62680–1–2 would be pertinent in distinguishing a USB–PD device from other adaptive EPSs. If neither DOE's proposed definition nor the alternate suggestion is appropriate, DOE requests comment on the appropriate specification to reference as well as the reasons for it. See section III.B for further detail.

3. DOE requests comment on its proposed amendments for USB–PD EPSs; and specifically, whether the 2-amp limit is appropriate for the maximum current at the lowest nameplate output voltage. If this proposed limit is appropriate, please state your reasons why—and if it is not appropriate, why not?

4. DOE seeks comment on its proposal to make more explicit the requirements for testing single-voltage EPSs with multiple output busses. DOE is specifically interested in feedback on whether there are any potential complications with this clarified testing methodology—and if so, the nature of those complications and possible solutions that DOE should consider adopting to address them. See section III.C.1 for further detail.

5. DOE requests comment on whether to treat adaptive EPSs that have both adaptive and non-adaptive output busses as multiple-voltage adaptive EPSs. DOE also requests comment on the proposed testing methods for multiple-voltage adaptive EPSs outlined in the proposed version of paragraph 6(b)(i)(C)(6) of Appendix Z. See section III.C.2 for further detail.

6. DOE requests comment on the proposed update to the test procedure in section 4(i) regarding the disconnecting of functions unrelated to the EPS.

7. DOE requests comment on its proposal to add a new section ''Incorporation by Reference'' in section 1 of Appendix Z to list the specific sections of IEC 62301 that are referenced in the EPS test procedure at Appendix Z. See section III.C.3 for further detail.

8. DOE requests comment on its proposal to remove redundant definitions that are no longer referenced in either the current or proposed test procedure at Appendix Z. See section III.E.1 for further detail.

9. DOE requests comment on its proposal to move all EPS-related definitions that are currently specified in 10 CFR 430.2 to the EPS test procedure at Appendix Z. See section III.E.2 for further detail.

10. DOE requests comment on its proposal to consolidate the general test requirements for single-voltage and multiple-voltage adaptive and non-adaptive EPSs into section 4 of Appendix Z. See section III.E.3 for further detail.

11. DOE requests comment on its proposal to further clarify that if an EPS can only sustain one output current at any of the output busses it must be tested at the loading condition that allows for the maximum output power on that bus. See section III.E.5 for further detail.

12. DOE requests comment on the accuracy of its understanding of the likely impact of its proposal in relation to the test burden and costs of the current test procedure. See section III.F.1 for further detail.

13. DOE seeks comment on the degree to which the DOE test procedure should consider and be harmonized further

with the most recent relevant industry standards for EPSs and whether there are any additional changes to the Federal test method (not already considered as part of this proposal) that DOE should consider making that would provide additional benefits to the public. DOE also requests comment on the benefits and burdens of adopting any industry/voluntary consensus-based or other appropriate test procedure, without modification. See section III.F.2 for further detail.

14. DOE requests comment on its current determination that there are no small EPS ODMs with manufacturing facilities located in the U.S. See section IV.C for further details.

15. In addition to the issues identified earlier, DOE welcomes comment on any other aspect of the existing test procedure for EPSs not already addressed by the specific areas identified in this document. DOE particularly seeks information that would improve the representativeness of the test procedure, as well as information that would help DOE create a procedure that would limit manufacturer test burden. Comments regarding repeatability and reproducibility are also welcome.

VI. Approval of the Office of the Secretary

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

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signed in Washington, DC, on November 7, 2019.

Alexander N. Fitzsimmons,

Acting Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 429.37 is amended by revising paragraphs (b)(2)(ii) and (iii) to read as follows:

§ 429.37 External power supplies.

* * * * *

(b) * * *

(2) * * *

(ii) Switch-selectable external power supplies: The average active mode efficiency as a percentage (%) value, no-load mode power consumption in watts (W) using the lowest and highest selectable output voltages, nameplate output power in watts (W), and, if missing from the nameplate, the output current in amperes (A).

(iii) Adaptive external power supplies: The average active-mode efficiency as a percentage (%) at the highest and lowest nameplate output voltages, no-load mode power consumption in watts (W), nameplate output power in watts (W) at the highest and lowest nameplate output voltages, and, if missing from the nameplate, the output current in amperes (A) at the highest and lowest nameplate output voltages. For USB–PD EPSs, as defined in appendix Z of part 430, subpart B of this chapter, all of the above values must be provided but with the loading conditions at the lowest operating voltage scaled such that the output current at the 100%, 75%, 50% and 25% loading conditions are 2A, 1.5A, 1A and 0.5A, respectively. Accordingly, for USB–PD EPSs, certify each adaptive port at 10W at the lowest nameplate output voltage.

* * * * *

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 3. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 4. Section 430.2 is amended by:

■ a. Adding a definition of ''Commercial and industrial power supply'' in alphabetical order;

■ b. Removing the definitions of ''Adaptive external power supply (EPS)'', ''Basic-voltage external power supply'', ''Direct operation external power supply'', ''External power supply design family'', ''Indirect operation external power supply'', and ''Low-voltage external power supply''; and

■ c. Revising the definition of ''External power supply''.

The addition and revision reads as follows:

§ 430.2 Definitions.

* * * * *

Commercial and industrial power supply means a power supply that is used to convert electric current into DC or lower-voltage AC current, is not distributed in commerce for use with a consumer product, and includes any of the following characteristics:

(1) A power supply that require a 3-phase input power and that is incapable of operating on household current;

(2) A DC–DC only power supply that is incapable of operating on household current;

(3) A power supply with a fixed, non-removable connection to an end-use device that is not a consumer product as defined under the Energy Policy and Conservation Act of 1975 (as amended);

(4) A power supply whose output connector is uniquely shaped to fit only an end-use device that is not a consumer product;

(5) A power supply that cannot be readily connected to an end-use device that is a consumer product without significant modification or customization of the power supply itself or the end-use device;

(6) A power supply packaged with an end-use device that is not a consumer product, as evidenced by either:

(i) Such device being certified as, or declared to be in conformance with, a specific standard applicable only to non-consumer products. For example, a power supply model intended for use with an end-use device that is certified to the following standards would not meet the EPCA definition of an EPS:

(A) CISPR 11 (Class A Equipment), ''Industrial, scientific and medical equipment—Radio-frequency disturbance—Limits and methods of measurement'';

(B) UL 1480A, ''Standard for Speakers for Commercial and Professional Use'';

(C) UL 813, ''Standard for Commercial Audio Equipment''; and

(D) UL 1727, ''Standard for Commercial Electric Personal Grooming Appliances''; or

(ii) Such device being excluded or exempted from inclusion within, or conformance with, a law, regulation, or broadly-accepted industry standard where such exclusion or exemption applies only to non-consumer products;

(7) A power supply distributed in commerce for use with an end-use device where:

(i) The end-use device is not a consumer product, as evidenced by either the circumstances in paragraph (6)(i) or (ii) of this definition; and

(ii) The end-use device for which the power supply is distributed in commerce is reasonably disclosed to the public, such as by identification of the end-use device on the packaging for the power supply, documentation physically present with the power supply, or on the manufacturer's or private labeler's public website; or

(8) A power supply that is not marketed for residential or consumer use, and that is clearly marked (or, alternatively, the packaging of the individual power supply, the shipping container of multiple such power supplies, or associated documentation physically present with the power supply when distributed in commerce is clearly marked) ''FOR USE WITH COMMERCIAL OR INDUSTRIAL EQUIPMENT ONLY'' or ''NOT FOR RESIDENTIAL OR CONSUMER USE,'' with the marking designed and applied so that the marking will be visible and legible during customary conditions for the item on which the marking is placed.

* * * * *

External power supply means an external power supply circuit that is used to convert household electric current into DC current or lower-voltage AC current to operate a consumer product. However, the term does not include any ''commercial and industrial power supply'' as defined in this section, or a power supply circuit, driver, or device that is designed exclusively to be connected to, and power—

(1) Light-emitting diodes providing illumination;

(2) Organic light-emitting diodes providing illumination; or

(3) Ceiling fans using direct current motors.

* * * * *

■ 5. Section 430.23 is amended by revising paragraph (bb) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(bb) *External Power Supplies.* The energy consumption of an external power supply, including active-mode efficiency expressed as a percentage and the no-load, off, and standby mode energy consumption levels expressed in watts, shall be measured in accordance with appendix Z of this subpart.

* * * * *

■ 6. Appendix Z is revised to read as follows:

Appendix Z to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of External Power Supplies

Note: Starting on [DATE 180 days after publication of the final rule in the **Federal Register**], manufacturers must make any representations regarding the energy efficiency or power consumption of external power supplies based upon results generated under this appendix. Prior to that date manufacturers must make any representations regarding the energy efficiency or power consumption of external power supplies based upon results generated under Appendix Z as it appeared at 10 CFR part 430, subpart B revised as of January 1, 2018.

1. *Incorporation by reference*

DOE incorporated by reference the entire standard for IEC 62301 in § 430.3; however, only enumerated provisions of this document is applicable to this appendix, as follows:

(a) IEC 62301, (''IEC 62301–Z''), Household electrical appliances—Measurement of standby power, (Edition 2.0, 2011–01), as follows:

(i) Section 4.3.2 ''Supply voltage waveform'';

(ii) Section 4.4.1 ''Power measurement uncertainty'';

(iii) Section 5.3.3 ''Average reading method'';

(iv) Annex B ''Notes on the measurement of low power modes''; and

(v) Annex D ''Determination of uncertainty of measurement.''

(b) Reserved.

2. *Scope.*

This appendix covers the test requirements used to measure the energy consumption of direct operation external power supplies and indirect operation Class A external power supplies subject to the energy conservation standards set forth at § 430.32(w)(1).

3. *Definitions:* The following definitions are for the purposes of understanding terminology associated with the test method for measuring external power supply energy consumption.

Active mode means the mode of operation when the external power supply is connected to the main electricity supply and the output is (or ''all outputs are'' for external power supplies with multiple outputs) connected to a load (or ''loads'' for external power supplies with multiple outputs).

Active mode efficiency is the ratio, expressed as a percentage, of the total real output power produced by a power supply to the real input power required to produce it. (Reference for guidance only, see IEEE Standard 1515–2000, 4.3.1.1, § 430.4.)

Active power (P) (also *real power*) means the average power consumed by a unit. For a two terminal device with current and voltage waveforms i(t) and v(t), respectively, which are periodic with period T, the real or active power P is:

$$P = \frac{1}{T}\int_0^T v(t)i(t)dt$$

Adaptive external power supply means an external power supply that can alter its output voltage during active-mode based on an established digital communication protocol with the end-use application without any user-generated action.

Ambient temperature means the temperature of the ambient air immediately surrounding the unit under test.

Average Active-Mode Efficiency means the average of the active mode efficiencies at the loading conditions (100%, 75%, 50%, and 25% of unit under test's nameplate output current) for which that unit can sustain the output current.

Basic-voltage external power supply means an external power supply that is not a low-voltage external power supply.

Class A external power supply—

(1) Means an external power supply device that—

(i) Is designed to convert line voltage AC input into lower voltage AC or DC output;

(ii) Is able to convert to only one AC or DC output voltage at a time;

(iii) Is sold with, or intended to be used with, a separate end-use product that constitutes the primary load;

(iv) Is contained in a separate physical enclosure from the end-use product;

(v) Is connected to the end-use product via a removable or hard-wired male/female electrical connection, cable, cord, or other wiring; and

(vi) Has nameplate output power that is less than or equal to 250 watts;

(2) But, excludes any device that—

(i) Requires Federal Food and Drug Administration listing and approval as a medical device in accordance with section 513 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(c)); or

(ii) Powers the charger of a detachable battery pack or charges the battery of a product that is fully or primarily motor-operated.

Direct operation external power supply means an external power supply that can operate a consumer product that is not a battery charger without the assistance of a battery.

IEC 62301–Z means the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' as limited in section 1 of this appendix.

Indirect operation external power supply means an external power supply that cannot operate a consumer product that is not a battery charger without the assistance of a battery as determined by the steps in paragraphs (1)(i) through (v) of this definition:

(1) If the external power supply can be connected to an end-use consumer product and that consumer product can be operated using battery power, the method for determining whether that external power supply is incapable of operating that consumer product directly is as follows:

(i) If the end-use product has a removable battery, remove it for the remainder of the test and proceed to the step in paragraph (1)(v) of this definition. If not, proceed to the step in paragraph (1)(ii) of this definition.

(ii) Charge the battery in the application via the external power supply such that the application can operate as intended before taking any additional steps.

(iii) Disconnect the external power supply from the application. From an off-mode state, turn on the application and record the time necessary for it to become operational to the nearest five second increment (5 sec, 10 sec, etc.).

(iv) Operate the application using power only from the battery until the application stops functioning due to the battery discharging.

(v) Connect the external power supply first to mains and then to the application. Immediately attempt to operate the application. If the battery was removed for testing and the end-use product operates as intended, the external power supply is not an indirect operation external power supply and paragraph 2 of this definition does not apply. If the battery could not be removed for testing, record the time for the application to become operational to the nearest five second increment (5 seconds, 10 seconds, etc.).

(2) If the time recorded in paragraph (1)(v) of this definition is greater than the summation of the time recorded in paragraph (1)(iii) of this definition and five seconds, the external power supply cannot operate the application directly and is an indirect operation external power supply.

Low-voltage external power supply means an external power supply with a nameplate output voltage less than 6 volts and nameplate output current greater than or equal to 550 milliamps.

Manual on-off switch is a switch activated by the user to control power reaching the device. This term does not apply to any mechanical, optical, or electronic switches that automatically disconnect mains power from the device when a load is disconnected from the device, or that control power to the load itself.

Minimum output current means the minimum current that must be drawn from an output bus for an external power supply to operate within its specifications.

Multiple-voltage external power supply means an external power supply that is designed to convert line voltage AC input into more than one simultaneous lower-voltage output.

Nameplate output current means the current output of the power supply as specified on the manufacturer's label on the power supply housing (either DC or AC) or, if absent from the housing, as provided by the manufacturer.

Nameplate output power means the power output of the power supply as specified on the manufacturer's label on the power supply housing or, if absent from the housing, as specified in documentation provided by the manufacturer. For an adaptive external power supply with USB–PD ports, the nameplate output power is 10W at the 5 volt level per USB–PD port and as specified on the manufacturer's label or documentation at the highest voltage.

Nameplate output voltage means the voltage output of the power supply as specified on the manufacturer's label on the power supply housing (either DC or AC).

No-load mode means the mode of operation when an external power supply is connected to the main electricity supply and the output is (or ''all outputs are'' for a multiple-voltage external power supply) not connected to a load (or ''loads'' for a multiple-voltage external power supply).

Off-mode is the condition, applicable only to units with manual on-off switches, in which the external power supply is

(1) Connected to the main electricity supply;

(2) The output is not connected to any load; and

(3) All manual on-off switches are turned off.

Output bus means any of the outputs of the power supply to which loads can be connected and from which power can be drawn, as opposed to signal connections used for communication.

RMS means root mean square.

Single-voltage external AC–AC power supply means an external power supply that is designed to convert line voltage AC input into lower voltage AC output and is able to convert to only one AC output voltage at a time.

Standby mode means the condition in which the external power supply is in no-load mode and, for external power supplies with manual on-off switches, all such switches are turned on.

Switch-selectable single voltage external power supply means a single-voltage AC–AC or AC–DC power supply that allows users to choose from more than one output voltage.

Total harmonic distortion (''THD''), expressed as a percentage, is the RMS value of an AC signal after the fundamental component is removed and interharmonic components are ignored, divided by the RMS value of the fundamental component. THD of current is defined as:

$$THD = \frac{\sqrt{I_2^2 + I_3^2 + I_4^2 + \cdots I_n^2}}{I_1}$$

where I_n is the RMS value of the *n*th harmonic of the current signal.

Unit under test (''UUT'') is the external power supply being tested.

USB Power Delivery (''USB–PD'') EPS means an adaptive EPS that utilizes a USB Type-C output port and uses a digital protocol to communicate between the EPS and the end-user product to automatically switch between an output voltage of 5 volts and one or more of the following voltages: 9 volts, 15 volts, or 20 volts. The USB–PD output bus must be capable of delivering 3 amps at an output voltage of 5 volts, and the voltages and currents must not exceed any of the following values for the supported voltages: 3 amps at 9 volts; 3 amps at 15 volts, and; 5 amps at 20 volts.

USB Type-C means the reversible 24-pin physical USB connector system that supports USB–PD and allows for the transmission of data and power between compatible USB products.

4. *Test Apparatus and General Instructions*

(a) Any power measurements recorded, as well as any power measurement equipment utilized for testing, shall conform to the uncertainty and resolution specifications in section 4.4.1, ''Power measurement uncertainty,'' as well as Annexes B, ''Notes on the measurement of low power modes,'' and D, ''Determination of uncertainty of measurement,'' of IEC 62301–Z.

(b) Carry out tests in a room that has an air speed close to the unit under test (UUT) of ≤0.5 m/s. Maintain ambient temperature at 20 ± 5 °C throughout the test. Do not intentionally cool the UUT, for example, by use of separately powered fans, air conditioners, or heat sinks. Test the UUT on a thermally non-conductive surface. Products intended for outdoor use may be tested at additional temperatures, provided those are in addition to the conditions specified above and are noted in a separate section on the test report.

(c) If the UUT is intended for operation on AC line-voltage input in the United States, test it at 115 V at 60 Hz. If the UUT is intended for operation on AC line-voltage input but cannot be operated at 115 V at 60 Hz, do not test it. Ensure the input voltage is within ±1% of the above specified voltage and the input frequency is within ±1% of the specified frequency.

(d) The input voltage source must be capable of delivering at least 10 times the nameplate input power of the UUT as is specified in IEEE 1515–2000 (Referenced for guidance only, see § 430.4). Regardless of the AC source type, the THD of the supply voltage when supplying the UUT in the specified mode must not exceed 2%, up to and including the 13th harmonic. The peak value of the test voltage must be within 1.34 and 1.49 multiplied by its RMS value.

(e) Select all leads used in the test set-up with appropriate wire gauges and lengths to minimize voltage drops across the wires during testing. See Table B.2—''Commonly used values for wire gages [*sic*] and related voltage drops'' in IEEE 1515–2000 for further guidance (Referenced for guidance only; see § 430.4).

(f) Test Load. To load the power supply to produce all active-mode loading conditions, use passive loads, such as rheostats, or active loads, such as electronic loads. Resistive loads need not be measured precisely with an ohmmeter; simply adjust a variable resistor to the point where the ammeter confirms that the desired percentage of nameplate output current is flowing. For electronic loads, adjust the desired output current in constant current mode rather than adjusting the required output power in constant power mode.

(g) Test the external power supply at the end of the wire or cord that connects to an end-use product, regardless of whether the end of the wire or cord is integrated into an end-use product or plugs into and out of an end-use product. If a separate wire or cord is provided by the manufacturer to connect the external power supply to an end-use product, use this wire or cord and perform tests at the end of the cord that connects to an end-use product. If a wire or cord is not supplied by the manufacturer, test the external power supply at the output electrical contact that can be connected to a physical wire. If the connection to an end-use product is removable, there are two options for connecting metering equipment to the output connection of the external power supply:

(1) Cut the cord immediately adjacent to the output connector, or

(2) Attach leads and measure the efficiency from the output connector itself. If the connection to an end-use product is not removable, cut the cord immediately adjacent to the powered product and connect measurement probes at that point. Connect any additional metering equipment such as voltmeters and/or ammeters used in conjunction with resistive or electronic loads directly to the end of the output cable of the UUT. Conduct the tests on the sets of output wires that constitute the output busses. If the product has more than two output wires, including those wires that are necessary for controlling the product, the manufacturer must supply a connection diagram or test fixture that will allow the testing laboratory to put the UUT into active-mode. Figure 1 of this section provides one illustration of how to set up a single-voltage external power supply for testing; however, the actual test setup may vary pursuant to the type of external power supply being tested and the requirements of this appendix.

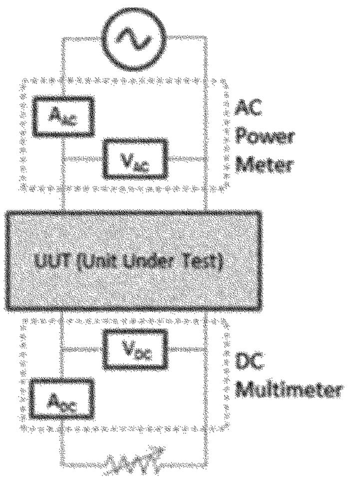

Figure 1. Example Connection Diagram for Single-Voltage External Power Supply Efficiency Measurements

(h) While external power supplies must be tested in their final, completed configuration in order to represent their measured efficiency on product labels or specification sheets, any functionality that is unrelated to the external power supply circuit may be disconnected during testing as long as the disconnection does not impact the functionality of the external power supply itself. Test the external power supply in its final configuration to the extent possible (within its enclosure and with all output cords that are shipped with it).

(i) If a product serves one or more other major functions in addition to converting household electric current into DC current or lower-voltage AC current, components of the product that serve other functions may be disconnected before testing so that test measurements do not include power used by other functions and as long as disconnecting such components do not affect the ability of the product to convert household electric current into DC current or lower-voltage AC current. For example, consider a surge protector that offers outlets supplying AC household electric current and one or more USB outputs supplying DC current. If power is provided to the AC outlets through a surge protection circuit, but power to the USB outlet(s) is not, then the surge protection circuit may be disconnected from AC power during testing. Similarly, if a lighted manual on-off switch disconnects power only to the AC outlets, but not the USB outputs, then the manual on-off switch may be turned off and power to the light disconnected during testing.

5. *Test Measurement for all External Power Supplies other than Adaptive External Power Supplies:*

(a) Single-Voltage External Power Supply

(1) Standby Mode and Active-Mode Measurement.

(i) Place in the ''on'' position any built-in switch in the UUT controlling power flow to the AC input, and note the existence of such a switch in the final test report.

(ii) Operate the UUT at 100% of nameplate output current for at least 30 minutes immediately prior to conducting efficiency measurements. After this warm-up period, monitor AC input power for a period of 5 minutes to assess the stability of the UUT. If the power level does not drift by more than 5% from the maximum value observed, the UUT is considered stable. If the UUT is stable, record the measurements obtained at the end of this 5-minute period. Measure subsequent loading conditions under the same 5-minute stability parameters. Note that only one warm-up period of 30 minutes is required for each UUT at the beginning of the test procedure. If the AC input power is not stable over a 5-minute period, follow the guidelines established by section 5.3.3 of IEC 62301–Z for measuring average power or accumulated energy over time for both input and output.

(iii) Test the UUT at the nameplate output voltage(s) at the loading conditions listed in Table 1, derated per the proportional allocation method presented in paragraph 5(a)(1)(iv) of this appendix. Conduct efficiency measurements in sequence from Loading Condition 1 to Loading Condition 4 as indicated in Table 1 of this section. For Loading Condition 5, place the UUT in no-load mode, disconnect any additional signal connections to the UUT, and measure input power.

TABLE 1—LOADING CONDITIONS FOR UNIT UNDER TEST

Loading Condition 1	100% of Derated Nameplate Output Current ±2%.
Loading Condition 2	75% of Derated Nameplate Output Current ±2%.
Loading Condition 3	50% of Derated Nameplate Output Current ±2%.
Loading Condition 4	25% of Derated Nameplate Output Current ±2%.
Loading Condition 5	0%.

The 2% allowance pertains to nameplate output current, not the calculated current value. For example, a UUT at Loading Condition 3 may be tested in a range from 48% to 52% of the derated output current.

(A) If testing of additional, optional loading conditions is desired, conduct that testing in accordance with this test procedure and subsequent to completing the sequence described in paragraph 5(a)(1)(iii) of this appendix.

(B) Where the external power supply lists both an instantaneous and continuous output current, test the external power supply at the continuous condition only.

(C) If an external power supply cannot sustain output at one or more of the Loading Conditions 1–4 as specified in Table 1, test the external power supply only at the loading conditions for which it can sustain output.

(iv) Proportional allocation method for loading single-voltage external power supplies with multiple busses. Use the following proportional allocation method to provide consistent loading conditions for single-voltage external power supplies with multiple output busses. For additional explanation (provided for guidance only), please refer to section 6.1.1 of the California Energy Commission's ''Generalized Test Protocol for Calculating the Energy Efficiency of Internal Ac-Dc Power Supplies Revision 6.7,'' March 2014.

(A) Consider a power supply with N output busses, each with the same nameplate output voltages V_1, * * *, V_N, corresponding output current ratings I_1, * * *, I_N, and a nameplate output power P. Calculate the derating factor D by dividing the power supply maximum output power P by the sum of the maximum output powers of the individual output busses, equal to the product of port nameplate output voltage and current I_iV_i, as follows:

$$D = \frac{P}{\sum_{i=1}^{N} V_i I_i},$$

(B) If D ≥1, then loading every port to its nameplate output current does not exceed the overall maximum output power for the power supply. In this case, load each output bus to the percentages of its nameplate output current listed in Table 1. However, if D <1, it is an indication that loading each port to its nameplate output current will exceed the overall maximum output power for the power supply. In this case, and at each loading condition, load each output bus to the appropriate percentage of its nameplate output current as listed in Table 1, multiplied by the derating factor D.

(v) Test switch-selectable single-voltage external power supplies twice—once at the highest nameplate output voltage and once at the lowest.

(vi) Efficiency calculation. Calculate and record efficiency at each loading point by dividing the UUT's measured active output power at a given loading condition by the active AC input power measured at that loading condition.

(A) Calculate and record average efficiency of the UUT as the arithmetic mean of the efficiency values calculated at Loading Conditions 1, 2, 3, and 4 in Table 1 of this section.

(B) If, when tested, a UUT cannot sustain output current at one or more of the loading conditions as specified in Table 1, the average active-mode efficiency is calculated as the average of the loading conditions for which it can sustain output.

(C) If the UUT can only sustain one output current at any of the output busses, test it at the loading condition that allows for the maximum output power on that bus (*i.e.* the highest output current possible at the highest output voltage on that bus).

(vii) Power consumption calculation. The power consumption of Loading Condition 5 (no-load) is equal to the active AC input power (W) at that loading condition.

(viii) Off-Mode Measurement. If the UUT incorporates manual on-off switches, place the UUT in off-mode, and measure and record its power consumption at Loading Condition 5 in Table 1 of this section. The measurement of the off-mode energy consumption must conform to the requirements specified in section 5(a)(1) of this appendix, except that all manual on-off switches must be placed in the ''off'' position for the off-mode measurement. The UUT is considered stable if, over 5 minutes with samples taken at least once every second, the AC input power does not drift from the maximum value observed by more than 1% or 50 milliwatts, whichever is greater. Measure the off-mode power consumption of a switch-selectable single-voltage external power supply twice—once at the highest nameplate output voltage and once at the lowest.

(b) Multiple-Voltage External Power Supply.

(1) Standby-Mode and Active-Mode Measurement.

(i) Place in the ''on'' position any built-in switch in the UUT controlling power flow to the AC input, and note the existence of such a switch in the final test report.

(ii) Operate the UUT at 100% of nameplate output current for at least 30 minutes immediately prior to conducting efficiency measurements. After this warm-up period, monitor AC input power for a period of 5 minutes to assess the stability of the UUT. If the power level does not drift by more than 1% from the maximum value observed, the UUT is considered stable. If the UUT is stable, record the measurements obtained at the end of this 5-minute period. Measure subsequent loading conditions under the same 5-minute stability parameters. Note that only one warm-up period of 30 minutes is required for each UUT at the beginning of the test procedure. If the AC input power is not stable over a 5-minute period, follow the guidelines established by section 5.3.3 of IEC 62301–Z for measuring average power or accumulated energy over time for both input and output.

(iii) Test the UUT at the nameplate output voltage(s) at the loading conditions listed in Table 2, derated per the proportional allocation method presented in paragraph 5(b)(1)(iv) of this appendix. Active or passive loads used for efficiency testing of the UUT must maintain the required current loading set point for each output voltage within an accuracy of ±0.5%. Conduct efficiency measurements in sequence from Loading Condition 1 to Loading Condition 4 as indicated in Table 2. For Loading Condition 5, place the UUT in no-load mode, disconnect any additional signal connections to the UUT, and measure input power.

TABLE 2—LOADING CONDITIONS FOR UNIT UNDER TEST

Loading Condition 1	100% of Derated Nameplate Output Current ±2%.
Loading Condition 2	75% of Derated Nameplate Output Current ±2%.
Loading Condition 3	50% of Derated Nameplate Output Current ±2%.
Loading Condition 4	25% of Derated Nameplate Output Current ±2%.
Loading Condition 5	0%.

The 2% allowance pertains to nameplate output current, not the calculated current value. For example, a UUT at Loading Condition 3 may be tested in a range from 48% to 52% of the derated output current.

(A) If testing of additional, optional loading conditions is desired, conduct that testing in accordance with this test procedure and subsequent to completing the sequence described in paragraph 5(b)(1)(iii) of this appendix.

(B) Where the external power supply lists both an instantaneous and continuous output current, test the external power supply at the continuous condition only.

(C) If an external power supply cannot sustain output at one or more of the Loading Conditions 1–4 as specified in Table 2 of this section, test the external power supply only at the loading conditions for which it can sustain output.

(iv) Proportional allocation method for loading multiple-voltage external power supplies. Use the following proportional allocation method to provide consistent loading conditions for multiple-voltage external power supplies. For additional explanation (provided for guidance only), please refer to section 6.1.1 of the California Energy Commission's ''Proposed Test Protocol for Calculating the Energy Efficiency of Internal Ac-Dc Power Supplies Revision 6.7,'' March 2014.

(A) Consider a power supply with N output busses, and nameplate output voltages V_1,

* * *, V_N, corresponding output current ratings I_1, * * *, I_N, and a maximum output power P as specified on the manufacturer's label on the power supply housing, or, if absent from the housing, as specified in the documentation provided with the unit by the manufacturer. Calculate the derating factor D by dividing the power supply maximum output power P by the sum of the maximum output powers of the individual output busses, equal to the product of bus nameplate output voltage and current I_iV_i, as follows:

$$D = \frac{P}{\sum_{i=1}^{N} V_i I_i},$$

(B) If D ≥1, then loading every bus to its nameplate output current does not exceed the overall maximum output power for the power supply. In this case, load each output bus to the percentages of its nameplate output current listed in Table 2. However, if D <1, it is an indication that loading each bus to its nameplate output current will exceed the overall maximum output power for the power supply. In this case, and at each loading condition, load each output bus to the appropriate percentage of its nameplate output current listed in Table 2, multiplied by the derating factor D.

(v) Minimum output current requirements. Depending on their application, some multiple-voltage power supplies may require a minimum output current for each output bus of the power supply for correct operation. In these cases, ensure that the load current for each output at Loading Condition 4 in Table 2 is greater than the minimum output current requirement. Thus, if the test method's calculated load current for a given voltage bus is smaller than the minimum output current requirement, the minimum output current must be used to load the bus. This load current shall be properly recorded in any test report.

(vi) Efficiency calculation. Calculate and record efficiency at each loading point by dividing the UUT's measured active output power at a given loading condition by the active AC input power measured at that loading condition.

(A) Calculate and record average efficiency of the UUT as the arithmetic mean of the efficiency values calculated at Loading Conditions 1, 2, 3, and 4, in Table 2 of this section.

(B) If, when tested, a UUT cannot sustain output current at one or more of the loading conditions as specified in Table 2 of this section, the average active mode efficiency is calculated as the average of the loading conditions for which it can sustain output.

(C) If the UUT can only sustain one output current at any of the output busses, test it at the loading condition that allows for the maximum output power on that bus (*i.e.* the highest output current possible at the highest output voltage on that bus).

(vii) Power consumption calculation. The power consumption of Loading Condition 5 (no-load) is equal to the active AC input power (W) at that loading condition.

(2) Off-mode Measurement—If the UUT incorporates manual on-off switches, place the UUT in off-mode and measure and record its power consumption at Loading Condition 5 in Table 2 of this section. The measurement of the off-mode energy consumption must conform to the requirements specified in paragraph (5)(b)(1) of this appendix, except that all manual on-off switches must be placed in the ''off'' position for the off-mode measurement. The UUT is considered stable if, over 5 minutes with samples taken at least once every second, the AC input power does not drift from the maximum value observed by more than 1% or 50 milliwatts, whichever is greater.

6. *Test Measurement for Adaptive External Power Supplies:*

(a) Single-Voltage Adaptive External Power Supply.

(1) Standby Mode and Active-Mode Measurement.

(i) Place in the ''on'' position any built-in switch in the UUT controlling power flow to the AC input, and note the existence of such a switch in the final test report.

(ii) Operate the UUT at 100% of nameplate output current for at least 30 minutes immediately prior to conducting efficiency measurements. After this warm-up period, monitor AC input power for a period of 5 minutes to assess the stability of the UUT. If the power level does not drift by more than 5% from the maximum value observed, the UUT is considered stable. If the UUT is stable, record the measurements obtained at the end of this 5-minute period. Measure subsequent loading conditions under the same 5-minute stability parameters. Note that only one warm-up period of 30 minutes is required for each UUT at the beginning of the test procedure. If the AC input power is not stable over a 5-minute period, follow the guidelines established by section 5.3.3 of IEC 62301–Z for measuring average power or accumulated energy over time for both input and output.

(iii) Test the UUT at the nameplate output voltage(s) at the loading conditions listed in Table 3, derated per the proportional allocation method presented in paragraph 6(a)(1)(iv) of this appendix. Adaptive external power supplies must be tested twice—once at the highest nameplate output voltage and once at the lowest nameplate output voltage as described in the following sections.

(A) At the highest nameplate output voltage, test adaptive external power supplies in sequence from Loading Condition 1 to Loading Condition 4, as indicated in Table 3 of this section. For Loading Condition 5, place the UUT in no-load mode, disconnect any additional signal connections, and measure the input power.

(B) At the lowest nameplate output voltage, with the exception of USB–PD EPSs, test all adaptive external power supplies in sequence from Loading Condition 1 to Loading Condition 4, as indicated in Table 3 of this section. For USB–PD adaptive external power supplies, at the lowest nameplate output voltage, test the external power supply such that for Loading Conditions 1, 2, 3, and 4, all adaptive ports are loaded to 2 amperes, 1.5 amperes, 1 ampere and 0.5 amperes respectively. All non-adaptive ports will continue to be loaded as indicated in Table 3 of this section. For Loading Condition 5, test all adaptive external power supplies by placing the UUT in no-load mode, disconnecting any additional signal connections, and measuring the input power.

TABLE 3—LOADING CONDITIONS FOR A SINGLE-VOLTAGE ADAPTIVE EXTERNAL POWER SUPPLY

Loading Condition 1	100% of Derated Nameplate Output Current ±2%.
Loading Condition 2	75% of Derated Nameplate Output Current ±2%.
Loading Condition 3	50% of Derated Nameplate Output Current ±2%.
Loading Condition 4	25% of Derated Nameplate Output Current ±2%.
Loading Condition 5	0%.

The 2% allowance pertains to nameplate output current, not the calculated current value. For example, a UUT at Loading Condition 3 may be tested in a range from 48% to 52% of the derated output current.

(C) If testing of additional, optional loading conditions is desired, conduct that testing in accordance with this test procedure and subsequent to completing the sequence described in paragraph 6(a)(1)(iii) of this appendix.

(D) Where the external power supply lists both an instantaneous and continuous output current, test the external power supply at the continuous condition only.

(E) If an external power supply cannot sustain output at one or more of the Loading Conditions 1–4 as specified in Table 3 of this section, test the external power supply only at the loading conditions for which it can sustain output.

(iv) Proportional allocation method for loading single-voltage adaptive external power supplies with multiple ports. Use the following proportional allocation method to provide consistent loading conditions for single-voltage adaptive external power supplies with multiple output busses. For additional explanation, please refer to section 6.1.1 of the California Energy Commission's ''Proposed Test Protocol for Calculating the Energy Efficiency of Internal Ac-Dc Power Supplies Revision 6.7,'' March 2014.

(A) Consider a power supply with N output busses, each with the same nameplate output voltages V_1, * * *, V_N, corresponding output current ratings I_1, * * *, I_N, and a maximum output power P as specified on the manufacturer's label on the power supply housing, or, if absent from the housing, as specified in the documentation provided with the unit by the manufacturer. Calculate the derating factor D by dividing the power supply maximum output power P by the sum of the maximum output powers of the individual output busses, equal to the product of port nameplate output voltage and current I_iV_i, as follows:

$$D = \frac{P}{\sum_{i=1}^{N} V_i I_i},$$

For USB–PD adaptive external power supplies, at the lowest nameplate output voltage, limit the contribution from each port to 10W when calculating the derating factor.

(B) If D ≥1, then loading every port to its nameplate output current does not exceed the overall maximum output power for the power supply. In this case, load each output bus to the percentages of its nameplate output current listed in Table 3 of this section. However, if D <1, it is an indication that loading each port to its nameplate output current will exceed the overall maximum output power for the power supply. In this case, and at each loading condition, each output bus will be loaded to the appropriate percentage of its nameplate output current listed in Table 3 of this section, multiplied by the derating factor D.

(v) Efficiency calculation. Calculate and record the efficiency at each loading point by dividing the UUT's measured active output power at that loading condition by the active AC input power measured at that loading condition.

(A) Calculate and record average efficiency of the UUT as the arithmetic mean of the efficiency values calculated at loading conditions 1, 2, 3, and 4 in Table 3 of this section.

(B) If, when tested, a UUT cannot sustain the output current at one or more of the loading conditions as specified in Table 3 of this section, the average active-mode efficiency is calculated as the average of the Loading Conditions for which it can sustain output.

(C) If the UUT can only sustain one output current at any of the output busses, test it at the loading condition that allows for the maximum output power on that bus (*i.e.* the highest output current possible at the highest output voltage on that bus).

(vi) Power consumption calculation. The power consumption of Loading Condition 5 (no-load) is equal to the active AC input power (W) at that loading condition.

(2) Off-Mode Measurement—If the UUT incorporates manual on-off switches, place the UUT in off-mode, and measure and record its power consumption at loading condition 5 in Table 3. The measurement of the off-mode energy consumption must conform to the requirements specified in paragraph 6(a)(1) of this appendix, except that all manual on-off switches must be placed in the ''off'' position for the off-mode measurement. The UUT is considered stable if, over 5 minutes with samples taken at least once every second, the AC input power does not drift from the maximum value observed by more than 1% or 50 milliwatts, whichever is greater. Measure the off-mode power consumption of a single-voltage adaptive external power supply twice—once at the highest nameplate output voltage and once at the lowest.

(b) Multiple-Voltage Adaptive External Power Supply.

(1) Standby Mode and Active-Mode Measurement.

(i) Place in the ''on'' position any built-in switch in the UUT controlling power flow to the AC input, and note the existence of such a switch in the final test report.

(ii) Operate the UUT at 100% of nameplate output current for at least 30 minutes immediately prior to conducting efficiency measurements. After this warm-up period, monitor AC input power for a period of 5 minutes to assess the stability of the UUT. If the power level does not drift by more than 1% from the maximum value observed, the UUT is considered stable. If the UUT is stable, record the measurements obtained at the end of this 5-minute period. Measure subsequent loading conditions under the same 5-minute stability parameters. Note that only one warm-up period of 30 minutes is required for each UUT at the beginning of the test procedure. If the AC input power is not stable over a 5-minute period, follow the guidelines established by section 5.3.3 of IEC 62301–Z for measuring average power or accumulated energy over time for both input and output.

(iii) Test the UUT at the nameplate output voltage(s) at the loading conditions listed in Table 4, derated per the proportional allocation method presented in paragraph 6(b)(1)(iv) of this appendix. Active or passive loads used for efficiency testing of the UUT must maintain the required current loading set point for each output voltage within an accuracy of ±0.5%. Adaptive external power supplies must be tested twice—once at the highest nameplate output voltage and once at the lowest nameplate output voltage as described in the following sections.

(A) At the highest nameplate output voltage, test adaptive external power supplies in sequence from Loading Condition 1 to Loading Condition 4, as indicated in Table 4 of this section. For Loading Condition 5, place the UUT in no-load mode, disconnect any additional signal connections, and measure the input power.

(B) At the lowest nameplate output voltage, with the exception of USB–PD EPSs, test all other adaptive external power supplies, in sequence from Loading Condition 1 to Loading Condition 4, as indicated in Table 4 of this section. For USB–PD adaptive external power supplies, at the lowest nameplate output voltage, test the external power supply such that for Loading Conditions 1, 2, 3, and 4, all adaptive ports are loaded to 2 amperes, 1.5 amperes, 1 ampere and 0.5 amperes respectively. All non-adaptive ports will continue to be loaded as indicated in Table 4 of this section. For loading condition 5, test all adaptive external power supplies by placing the UUT in no-load mode, disconnecting any additional signal connections, and measuring the input power.

TABLE 4—LOADING CONDITIONS FOR A MULTIPLE-VOLTAGE ADAPTIVE EXTERNAL POWER SUPPLY

Loading Condition 1	100% of Derated Nameplate Output Current ±2%.
Loading Condition 2	75% of Derated Nameplate Output Current ±2%.
Loading Condition 3	50% of Derated Nameplate Output Current ±2%.
Loading Condition 4	25% of Derated Nameplate Output Current ±2%.
Loading Condition 5	0%.

The 2% allowance pertains to nameplate output current, not the calculated current value. For example, a UUT at Loading Condition 3 may be tested in a range from 48% to 52% of the derated output current.

(C) If testing of additional, optional loading conditions is desired, conduct that testing in accordance with this test procedure and subsequent to completing the sequence described in paragraph 6(b)(1)(iii) of this appendix.

(D) Where the external power supply lists both an instantaneous and continuous output current, test the external power supply at the continuous condition only.

(E) If an adaptive external power supply is operating as a multiple-voltage external power supply at only the highest nameplate output voltage or lowest nameplate output voltage, test this external power supply as a multiple-voltage adaptive external power supply at both the highest nameplate output voltage and the lowest nameplate output voltage.

(F) If an external power supply has both adaptive and non-adaptive ports, and these ports operate simultaneously at multiple voltages, ensure that testing is performed with all ports active at both the highest and lowest nameplate output voltage. For example, if an external power supply has an USB–PD adaptive output bus that operates at 5 volts and 20 volts and a second non-adaptive output bus that operates at 9 volts, test this EPS at the highest nameplate output voltage with both the adaptive and non-adaptive ports respectively loaded at 20 volts and 9 volts; likewise, test it at the lowest nameplate output voltage with both the adaptive and non-adaptive ports respectively loaded at 5 volts and 9 volts.

(G) If an external power supply cannot sustain output at one or more of the Loading Conditions 1–4 as specified in Table 4 of this section, test the external power supply only at the loading conditions for which it can sustain output.

(iv) Proportional allocation method for loading multiple-voltage adaptive external power supplies. Use the following proportional allocation method to provide consistent loading conditions for multiple-voltage adaptive external power supplies. For additional explanation, please refer to section 6.1.1 of the California Energy Commission's ''Proposed Test Protocol for Calculating the Energy Efficiency of Internal Ac-Dc Power Supplies Revision 6.7,'' March 2014.

(A) Consider a multiple-voltage power supply with N output busses, and nameplate output voltages V_1, * * *, V_N, corresponding output current ratings I_1, * * *, I_N, and a maximum output power P as specified on the manufacturer's label on the power supply housing, or, if absent from the housing, as specified in the documentation provided with the unit by the manufacturer. Calculate the derating factor D by dividing the power supply maximum output power P by the sum of the maximum output powers of the individual output busses, equal to the product of bus nameplate output voltage and current I_iV_i, as follows:

$$D = \frac{P}{\sum_{i=1}^{N} V_i I_i},$$

For USB–PD adaptive external power supplies, at the lowest nameplate output voltage, limit the contribution from each port to 10W when calculating the derating factor.

(B) If D ≥1, then loading every bus to its nameplate output current does not exceed the overall maximum output power for the power supply. In this case, load each output bus to the percentages of its nameplate output current listed in Table 4 of this section. However, if D <1, it is an indication that loading each bus to its nameplate output current will exceed the overall maximum output power for the power supply. In this case, at each loading condition, load each output bus to the appropriate percentage of its nameplate output current listed in Table 4, multiplied by the derating factor D.

(v) Minimum output current requirements. Depending on their application, some multiple-voltage adaptive external power supplies may require a minimum output current for each output bus of the power supply for correct operation. In these cases, ensure that the load current for each output at Loading Condition 4 in Table 4 of this section is greater than the minimum output current requirement. Thus, if the test method's calculated load current for a given voltage bus is smaller than the minimum output current requirement, use the minimum output current to load the bus. Record this load current in any test report.

(vi) Efficiency calculation. Calculate and record the efficiency at each loading point by dividing the UUT's measured active output power at that loading condition by the active AC input power measured at that loading condition.

(A) Calculate and record average efficiency of the UUT as the arithmetic mean of the efficiency values calculated at Loading Conditions 1, 2, 3, and 4 in Table 4 of this section.

(B) If, when tested, a UUT cannot sustain the output current at one or more of the loading conditions as specified in Table 4, the average active-mode efficiency is calculated as the average of the loading conditions for which it can sustain output.

(C) If the UUT can only sustain one output current at any of the output busses, test it at the loading condition that allows for the maximum output power on that bus (*i.e.* the highest output current possible at the highest output voltage on that bus).

(vii) Power consumption calculation. The power consumption of loading condition 5 (no-load) is equal to the active AC input power at that loading condition.

(2) Off-mode Measurement—If the UUT incorporates manual on-off switches, place the UUT in off-mode, and measure and record its power consumption at loading condition 5 in Table 4. The measurement of the off-mode energy consumption must conform to the requirements specified in paragraph (6)(b)(1) of this appendix, except that all manual on-off switches must be placed in the ''off'' position for the off-mode measurement. The UUT is considered stable if, over 5 minutes with samples taken at least once every second, the AC input power does not drift from the maximum value observed by more than 1% or 50 milliwatts, whichever is greater. Measure the off-mode power consumption of a multiple-voltage adaptive external power supply twice—once at the highest nameplate output voltage and once at the lowest.

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Part V

Bureau of Consumer Financial Protection

12 CFR Part 1005

Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E); Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1005

[Docket No. CFPB–2019–0058]

RIN 3170–AA96

Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Electronic Fund Transfer Act (EFTA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), establishes certain protections for consumers sending international money transfers, or remittance transfers. The Bureau of Consumer Financial Protection's (Bureau) remittance rule in Regulation E (Remittance Rule or Rule) implements these protections. The Bureau is proposing changes to the Rule to mitigate the effects of the expiration of a statutory exception that allows insured institutions to disclose estimates instead of exact amounts to consumers. That exception expires on July 21, 2020. In addition, the Bureau is proposing to increase a safe harbor threshold in the Rule related to whether a person makes remittance transfers in the normal course of its business, which would have the effect of reducing compliance costs for entities that make a limited number of remittance transfers annually.

DATES: Comments must be received on or before January 21, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2019–0058 or RIN 3170–AA96, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 2019–NPRM-Remittances@cfpb.gov.* Include Docket No. CFPB–2019–0058 or RIN 3170–AA96 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Remittances, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Yaritza Velez, Counsel, or Kristine M. Andreassen, Krista Ayoub, or Jane Raso, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The Bureau is proposing several amendments to the Remittance Rule,[1] which implements EFTA section 919 governing international remittance transfers. First, the Bureau is proposing to increase a safe harbor threshold in the Rule which would have the effect of reducing compliance costs for entities that make a limited number of remittance transfers annually. Under both EFTA and the Rule, the term ''remittance transfer provider'' is defined, in part, to mean any person that provides remittance transfers for a consumer in the normal course of its business.[2] The Rule also provides a safe harbor, stating that a person is deemed not to be providing remittance transfers for a consumer in the normal course of its business if the person provided 100 or fewer remittance transfers in the previous calendar year and provides 100 or fewer remittance transfers in the current calendar year.[3] The Bureau is proposing to adjust the safe harbor threshold from 100 transfers to 500 transfers annually. The Bureau's proposed changes to the safe harbor threshold appear in the definition of remittance transfer provider in § 1005.30(f) and related commentary.

Second, the Bureau is proposing changes to the Rule to mitigate the effects of the expiration of a statutory exception that allows insured institutions to disclose estimates to consumers of the exchange rate and covered third-party fees instead of exact amounts. That exception expires on July 21, 2020. Specifically, with respect to the exchange rate, the Bureau is proposing to adopt a permanent exception that would permit insured institutions to estimate the exchange rate for a remittance transfer to a particular country if, among other things, the designated recipient will receive funds in the country's local currency and the insured institution made 1,000 or fewer remittance transfers in the prior calendar year to that country when the designated recipients received funds in the country's local currency. With respect to covered third-party fees, the Bureau is proposing to adopt a permanent exception that would permit insured institutions to estimate covered third-party fees for a remittance transfer to a particular designated recipient's institution if, among other things, the insured institution made 500 or fewer remittance transfers to that designated recipient's institution in the prior calendar year. The temporary exception and its statutorily mandated expiration date are in existing § 1005.32(a)(1) and (2); the Bureau's proposed changes to mitigate the expiration of that exception appear in proposed § 1005.32(b)(4) and (5) and related commentary, along with conforming changes in §§ 1005.32(c), 1005.33(a)(1)(iii)(A), and 1005.36(b)(3) and in the commentary accompanying §§ 1005.32, 1005.32(b)(1), (c)(3), and (d), and 1005.36(b).

Finally, the Bureau is also seeking comment on a permanent exception in the Rule (in § 1005.32(b)(1)) permitting providers to use estimates for transfers to certain countries and the process for adding countries to the safe harbor countries list maintained by the Bureau.

The Bureau has received a number of suggestions for other changes to the Remittance Rule to improve its effectiveness in helping consumers or to reduce the burden on providers. However, in light of the time sensitivity of the expiration of the temporary exception, this proposal is limited to the issues described above.

Due to changes in requirements by the Office of the Federal Register, when amending commentary the Bureau is

[1] 77 FR 6194 (Feb. 7, 2012); as amended on 77 FR 40459 (July 10, 2012), 77 FR 50243 (Aug. 20, 2012), 78 FR 6025 (Jan. 29, 2013), 78 FR 30661 (May 22, 2013), 78 FR 49365 (Aug. 14, 2013), 79 FR 55970 (Sept. 18, 2014), 81 FR 70319 (Oct. 12, 2016), and 81 FR 83934 (Nov. 22, 2016) (together, Remittance Rule or Rule).

[2] EFTA section 919(g)(3), codified at 15 U.S.C. 1693*o*-1(g)(3); 12 CFR 1005.30(f)(1).

[3] 12 CFR 1005.30(f)(2)(i).

now required to reprint certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of commentary included in this document show the language of those sections if the Bureau adopts its changes as proposed. The Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it is proposing to make to the regulatory text and commentary of the Remittance Rule.[4]

II. Background

A. Market Overview

Consumers in the United States send billions of dollars in remittance transfers to recipients in foreign countries each year. The term ''remittance transfers'' is sometimes used to describe consumer-to-consumer transfers of small amounts of money, often made by immigrants supporting friends and relatives in other countries. The term may also include, however, payments of larger amounts, for instance, to pay bills, tuition, or other expenses.

Money services businesses (MSBs) as well as banks and credit unions send remittance transfers on behalf of consumers. MSBs, however, provide the overwhelming majority of remittance transfers for consumers in the United States. For example, in the Bureau's October 2018 Remittance Rule Assessment Report,[5] which is discussed in greater detail below, the Bureau observed that in 2017, MSBs provided approximately 95.5 percent of all remittance transfers for consumers. The average amount of a remittance transfer sent by MSBs on behalf of consumers was approximately $381.

Banks and credit unions generally send fewer remittance transfers on behalf of consumers than MSBs. The Bureau found that in 2017, banks and credit unions conducted 4.2 and 0.2 percent of all remittance transfers, respectively. However, the average amount that banks and credit unions transferred was much greater than the average amount transferred by MSBs. For example, based on the Bureau's analysis, the average transfer size of a bank-sent remittance transfer was more than $6,500.[6] As such, based on information it received as part of its assessment of the Remittance Rule in connection with the Assessment Report, while banks and credit unions provide a small percentage of the overall number of remittance transfers, because the average amount of the transfers they send is higher than MSBs, banks and credit unions collectively sent approximately 45 percent of the dollar volume of all remittance transfers sent for consumers in the United States (43 percent attributed to banks and 2 percent attributed to credit unions).

In addition, MSBs differ from banks and credit unions in the means by which they provide remittance transfers. Traditionally, MSBs sending remittance transfers have predominantly relied on a storefront model and a network of the MSBs' employees and agents (such as grocery stores and neighborhood convenience stores).[7] Because MSBs receive and disburse funds either through their own employees or agents, the payment system by which MSBs facilitate remittance transfers is typically referred to as a ''closed network'' payment system. A single entity in this system—the MSB—exerts a high degree of end-to-end control over a transaction. Such level of control means, among other things, that an entity that uses a closed network payment system to send remittance transfers can disclose to its customers precise and reliable information about the terms and costs of a remittance transfer before the entity sends the remittance transfer on its customer's behalf.

In contrast to MSBs, banks and credit unions have predominantly utilized an ''open network'' payment system made up of the correspondent banking network[8] to send remittance transfers on behalf of consumers.[9] The open network payment system based on the correspondent banking network lacks a single, central operator. This feature distinguishes it from closed network payment systems. The correspondent banking network is a decentralized network of bilateral banking relationships between the world's tens of thousands of banks and credit unions. Most institutions only maintain relationships with a relatively small number of correspondent banks but can nonetheless ensure that their customers' remittance transfers are able to reach a wide number of recipient financial institutions worldwide even if the institution does not have control over, or a relationship with, all of the participants involved in the transmission of a remittance transfer. As discussed in greater detail in the section-by-section analysis of § 1005.32(a) below, the decentralized nature of the correspondent banking system has presented certain challenges to the ability of banks and credit unions to disclose precise and reliable information about the terms and costs of remittance transfers to its customers before these institutions send remittance transfers on their customers' behalf.

B. Remittance Rulemaking Under Section 1073 of the Dodd-Frank Act

Prior to the Dodd-Frank Act, remittance transfers fell largely outside of the scope of Federal consumer protection laws. Section 1073 of the Dodd-Frank Act amended EFTA by adding a new section 919, which created a comprehensive system for protecting consumers in the United States who send remittance transfers to individuals and businesses in foreign countries.[10] EFTA applies broadly in terms of the types of remittance transfers it covers. EFTA section 919(g)(2) defines ''remittance transfer'' as the electronic transfer of funds by a sender in any State to designated recipients located in foreign countries

[4] This redline can be found on the Bureau's regulatory implementation page for the Remittance Rule, at *https://www.consumerfinance.gov/policy-compliance/guidance/remittance-transfer-rule/*. If any conflicts exist between the redline and the text of the Remittance Rule or this proposed rule, the rules themselves, as published in the **Federal Register**, are the controlling documents.

[5] Bureau of Consumer Fin. Prot., *Remittance Rule Assessment Report* (Oct. 2018, rev. Apr. 2019) (Assessment Report), *https://www.consumerfinance.gov/documents/7561/bcfp_remittance-rule-assessment_report_corrected_2019–03.pdf.* The Bureau's initial rule and certain amendments took effect in October 2013. As explained in the Assessment Report, the Assessment Report considers all rules that took effect through November 2014 and refers to them collectively as the Remittance Rule. *See* Assessment Report at 115.

[6] *Id.* at 73.

[7] *Id.* at 54. As noted in the Assessment Report, increased access to digital devices has impacted the traditional MSB model by enabling more MSB-facilitated transfers to be conducted via the internet. *See also id.* at 102.

[8] Generally speaking, a correspondent banking network is made up of individual correspondent banking relationships, which consist of bilateral arrangements under which one bank (correspondent) holds deposits owned by other banks (respondents) and provides payment and other services to those respondent banks. *See, e.g.,* Bank for Int'l Settlements, *Correspondent Banking,* at 9 (2016) (2016 BIS Report), *https://www.bis.org/cpmi/publ/d147.pdf.*

[9] The Bureau notes that some methods of sending cross-border money transfers, including remittance transfers, include elements of closed and open payment networks and some providers may also rely on both types of systems to facilitate different transfers. For example, the Bureau understands that banks may offer low-cost international fund transfers to its commercial clients through the use of the automated clearing house (ACH) system, and a minority of banks also offer international ACH to their consumer clients. *See* Bd. of Governors of the Fed. Reserve Sys., *Report to Congress on the Use of the ACH System and Other Payment Mechanisms for Remittance Transfers to Foreign Countries,* at 7 (May 2019), *https://www.federalreserve.gov/publications/2019-may-ach-report-other-payment-mechanisms.htm.*

[10] 15 U.S.C. 1693 *et seq.* EFTA section 919 is codified at 15 U.S.C. 1693*o*-1.

that are initiated by a remittance transfer provider; only small dollar transactions are excluded from this definition.[11] EFTA also applies broadly in terms of the providers subject to it, including MSBs, banks, and credit unions.

The Bureau adopted subpart B of Regulation E to implement EFTA section 919 through a series of rulemakings that were finalized in 2012 and 2013, and which became effective on October 28, 2013.[12] The Bureau subsequently amended subpart B several times.[13] The Rule provides three significant consumer protections: It specifies the information that must be disclosed to consumers who send remittance transfers, including information related to the exact cost of a remittance transfer; it provides consumers with cancellation and refund rights; and it specifies procedures and other requirements for providers to follow in resolving errors.

III. Assessment Report, Requests for Information, and Other Outreach

The Bureau has received feedback regarding the Remittance Rule over time through both formal and informal channels. The following is a brief summary of some of the Bureau's requests for information regarding the Rule and recent informal feedback received by the Bureau outside those channels.

Assessment and 2017–2018 RFIs. The Bureau conducted an assessment of the Remittance Rule (Assessment), as required pursuant to section 1022(d) of the Dodd-Frank Act. Section 1022(d) requires the Bureau to conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law and to publish a report of such assessment not later than five years after the rule or order's effective date.[14] In 2017, the Bureau issued a request for information (RFI) in connection with the Assessment (2017 Assessment RFI) and received approximately 40 comments in response.[15] As referenced above, in October 2018, the Bureau published the results of the Assessment in the Assessment Report, providing insights into the effectiveness of the Rule and its provisions.

Separately, in 2018, the Bureau issued a series of RFIs as part of a call for evidence to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers.[16] One of the 2018 RFIs concerned whether the Bureau should amend any rules it has issued since its creation or exercise new rulemaking authorities provided for by the Dodd-Frank Act; another concerned whether the Bureau should amend rules or exercise the rulemaking authorities that it inherited from other Federal government agencies (together, the 2018 Adopted/Inherited Regulations RFIs).[17] The Bureau received a total of approximately 34 comments on the Remittance Rule in response to these two RFIs.

Industry commenters that responded to the three RFIs mentioned above suggested a variety of modifications to the Rule. Many recommended changing the scope of coverage of the Rule in various ways,[18] including raising the 100-transfer safe harbor threshold, because, they said, the current threshold is too low and causes consumer harm. Consumer advocacy groups conversely cautioned against changes to the Rule, including to the safe harbor threshold. Industry commenters suggested other scope-related changes as well, such as exempting transfers in excess of a certain amount (such as $10,000) from the Rule's definition of ''remittance transfer'' or creating blanket exemptions from the Rule for certain types of entities, such as for regulated entities with total assets under $10 billion or for all credit unions. A group of consumer advocates and a number of industry commenters also addressed the July 21, 2020 expiration of the temporary exception that allows disclosure of estimates instead of exact amounts in certain circumstances. Some industry commenters expressed concerns about the impact of the temporary exception's eventual expiration and urged the Bureau to make the exception permanent, while consumer advocacy groups expressed concern about the use of estimates permitted by the temporary exception and urged the Bureau to let the exception expire. Some industry commenters also requested that the Bureau expand the list of ''safe harbor'' countries that have laws impacting their ability to disclose exact exchange rates, arguing an expanded countries list would help alleviate some of the challenges certain providers will face when the temporary exception expires. Industry and consumer advocacy group commenters also raised other issues about various aspects of the Rule, including regarding other disclosure requirements, error resolution, and the 30-minute cancellation period.

2019 RFI. The Bureau published an RFI on April 29, 2019 (2019 RFI),[19] seeking information on several aspects of the Rule. First, based on comments and other feedback from various remittance transfer providers and their trade associations, as well as its own analysis, the Bureau was concerned about the potential negative effects of the expiration of the temporary exception. The Bureau thus sought information about the upcoming expiration of the temporary exception and potential options to mitigate its impact.

The Bureau was also concerned about the Rule's effects on certain remittance transfer providers that account for a small portion of the overall number of remittance transfers but nonetheless are subject to the Rule because they provide more than 100 transfers annually and thus are unable to rely on the current normal course of business safe harbor. The Bureau thus sought information in the 2019 RFI on possible changes to the current safe harbor threshold in the Rule[20] and whether an exception for ''small financial institutions'' may be appropriate.

The Bureau received approximately 44 comments on the 2019 RFI.[21] The overwhelming majority of comments came from banks and credit unions,

[11] 15 U.S.C. 1693*o*-1(g)(2). As adopted in the Remittance Rule, the term ''remittance transfer'' means: ''[The] electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. The term applies regardless of whether the sender holds an account with the remittance transfer provider, and regardless of whether the transaction is also an electronic fund transfer, as defined in [subpart A of Regulation E].'' The Rule's definition specifically excludes (1) transfer amounts of $15 or less and (2) certain securities and commodities transfers. 12 CFR 1005.30(e).

[12] 77 FR 6194 (Feb. 7, 2012); as amended on 77 FR 40459 (July 10, 2012); 77 FR 50243 (Aug. 20, 2012); 78 FR 6025 (Jan. 29, 2013); 78 FR 30661 (May 22, 2013); and 78 FR 49365 (Aug. 14, 2013).

[13] 79 FR 55970 (Sept. 18, 2014), 81 FR 70319 (Oct. 12, 2016), and 81 FR 83934 (Nov. 22, 2016).

[14] 12 U.S.C. 5512(d).

[15] 82 FR 15009 (Mar. 24, 2017). These comment letters are available on the public docket at *https://www.regulations.gov/document?D=CFPB-2017-0004-0001. See also* Assessment Report at 149.

[16] *See https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/archive-closed/call-for-evidence/.*

[17] *See* 83 FR 12286 (Mar. 21, 2018) and 83 FR 12881 (Mar. 26, 2018). The comment letters from these RFIs are available on the public dockets at *https://www.regulations.gov/docket?D=CFPB-2018-0011* and *https://www.regulations.gov/document?D=CFPB-2018-0012-0001.*

[18] *See, e.g.,* Assessment Report at 154–61.

[19] 84 FR 17971 (Apr. 29, 2019).

[20] As discussed above, the phrase ''normal course of business'' in the definition of ''remittance transfer provider'' determines whether a person providing remittance transfers is covered by the Rule. Also, as discussed, the Rule contains a safe harbor that clarifies that certain persons are deemed not to provide transfers in the ''normal course of business'' because they provide 100 or fewer transfers per year in both the previous and current calendar years.

[21] These comment letters are available on the public docket for the 2019 RFI at *https://www.regulations.gov/docket?D=CFPB-2019-0018.*

their trade associations, and their service providers. As discussed in greater detail below, these commenters generally urged the Bureau to replicate the temporary exception and raise the normal course of business safe harbor threshold. A number of them also supported a small financial institution exception. The Bureau received one comment letter from a ''fintech'' nonbank remittance transfer provider and one comment letter from a consumer advocacy group. These commenters generally did not support extending the temporary exception or making it permanent. They asserted that the Remittance Rule was intended to improve accountability and transparency, and said that continuing to permit estimates could stunt the movement toward realizing those objectives. Additionally, the nonbank remittance transfer provider also expressed concern that the temporary exception has helped to perpetuate a bifurcated regulatory approach, as only insured banks and credit unions are permitted to use the temporary exception. Several commenters also specifically addressed the existing permanent exception allowing estimates for transfers to certain countries and the related Bureau-established safe harbor countries list.

Ongoing market monitoring and other outreach. The Bureau has engaged in ongoing market monitoring and other outreach to industry and other stakeholders regarding the Remittance Rule. For example, in June 2019, Bureau staff met with the Bureau's Consumer Advisory Board, Community Bank Advisory Council, and Credit Union Advisory Council to discuss several topics, including the 2019 RFI.[22] The Bureau discusses feedback received through these various channels that is relevant to this proposal throughout this document.

IV. Legal Authority

Section 1073 of the Dodd-Frank Act created a new section 919 of EFTA requiring remittance transfer providers to provide disclosures to senders of remittance transfers, pursuant to rules prescribed by the Bureau. In particular, providers must give a sender a written pre-payment disclosure containing specified information applicable to the sender's remittance transfer, including the amount to be received by the designated recipient. The provider must also provide a written receipt that includes the information provided on the pre-payment disclosure, as well as additional specified information.[23] In addition, EFTA section 919(d) directs the Bureau to promulgate rules regarding appropriate error resolution standards and cancellation and refund policies.

In addition to the Dodd-Frank Act's statutory mandates, EFTA section 904(a) authorizes the Bureau to prescribe regulations necessary to carry out the purposes of EFTA. The express purposes of EFTA, as amended by the Dodd-Frank Act, are to establish ''the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems'' and to provide ''individual consumer rights.'' [24] EFTA section 904(c) further provides that regulations prescribed by the Bureau may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers or remittance transfers that the Bureau deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance. As described in more detail below, the changes herein are proposed pursuant to the Bureau's authority under EFTA sections 904(a) and (c).

V. Section-by-Section Analysis

1005.30 Remittance Transfer Definitions

30(f) Remittance Transfer Provider

EFTA section 919(g)(3) defines ''remittance transfer provider'' to be a person or financial institution providing remittance transfers for a consumer in the ''normal course of its business.'' The Rule uses a similar definition.[25] It states that whether a person provides remittance transfers in the normal course of its business depends on the facts and circumstances, including the total number and frequency of transfers sent by the provider.[26] The Rule currently contains a safe harbor whereby a person that provides 100 or fewer remittance transfers in each of the previous and current calendar years is deemed not to be providing remittance transfers in the normal course of its business, and therefore is outside of the Rule's coverage.[27]

When the Bureau finalized the normal course of business 100-transfer safe harbor threshold in August 2012, it stated that it intended to monitor that threshold over time.[28] The Bureau acknowledged, among other things, that the administrative record contained little data on the overall distribution and frequency of remittance transfers to support treating any particular number of transactions as outside the normal course of business.[29] After explaining the limitations in the data it did have, the Bureau stated that it did not believe it could rely on the data received to describe the number of remittance transfers provided by ''typical'' entities or to identify a clear pattern in the distribution of providers by the number of transfers provided.[30] The Bureau concluded that the data collected at the time provided some additional support for the 100 threshold, and that the threshold was ''not so low as to be meaningless.'' [31] The Bureau determined that a threshold of 100 was high enough that persons would not risk exceeding the safe harbor based on making transfers for just two or three customers each month, while low enough to serve as a reasonable basis for identifying persons who occasionally provide remittance transfers, but not in the normal course of their business. The Bureau also noted that 100 transfers per year is equivalent to an average of approximately two transfers per week, or the number of transfers needed to satisfy the needs of a handful of customers sending money abroad monthly.[32]

Since August 2012, the Bureau has received feedback suggesting that the 100-transfer safe harbor threshold is too low, including in response to several RFIs issued by the Bureau as well as during market monitoring and other outreach to industry. (See part III above for more information on these RFIs and other outreach.)

Comments Received in Response to the 2019 RFI

Comments on the safe harbor threshold. As noted above, the Bureau in the 2019 RFI sought information on possible changes to the current normal course of business 100-transfer safe harbor threshold. A variety of industry commenters as well as a consumer advocacy group responded to questions regarding coverage of certain remittance transfer providers in the 2019 RFI, primarily focusing on changing the 100-transfer safe harbor threshold.

[22] Minutes of these meetings are available at *https://www.consumerfinance.gov/documents/7852/201906_cfpb_CAB-Meeting-Minutes.pdf, https://www.consumerfinance.gov/documents/7853/201906_cfpb_CBAC-meeting-minutes.pdf,* and *https://www.consumerfinance.gov/documents/7854/201906_cfpb_CUAC-meeting-minutes.pdf.*

[23] EFTA section 919(a); 15 U.S.C. 1693*o*-1(a).

[24] EFTA section 902(b); 15 U.S.C. 1693(b).

[25] *See* 12 CFR 1005.30(f)(1).

[26] Comment 30(f)-2.i.

[27] 12 CFR 1005.30(f)(2)(i).

[28] 77 FR 50243, 50252 (Aug. 20, 2012).

[29] *Id.* at 50251–52.

[30] *Id.* at 50251–52.

[31] *Id.* at 50252.

[32] *Id.* at 50251.

The consumer advocacy group opposed any changes to the threshold, asserting that there is insufficient evidence to make such changes.[33] A number of industry commenters, on the other hand, including credit unions, banks, trade associations, and a payments service provider to banks and credit unions, suggested increasing the threshold; specific threshold suggestions ranged from 200 to 1,200 transfers annually. These industry commenters stated that credit unions and community banks offer remittance transfers as an accommodation for their customers and generally do not provide enough transfers to recover operational and compliance costs. A trade association commenter stated that the impact of compliance costs on small providers is especially significant as they are unable to spread their costs over a large volume of transactions.

Several industry commenters also asserted, among other things, that complying with the Remittance Rule has caused credit unions and community banks to exit the remittance transfer market, limit the number of transfers that they provide, or increase the price of transfers, which they asserted has resulted in consumer harm in the form of reduced access and other inconveniences. Several industry commenters offered anecdotes of one or two customers sending a high volume of transfers that pushed a bank or credit union beyond the 100-transfer safe harbor threshold. Some industry commenters suggested that raising the threshold may encourage banks and credit unions that have stopped or limited providing remittance transfers to begin offering them again or relax the limits. A number of industry commenters also stated that raising the threshold would promote competition and thus increase options for consumers and possibly lower prices. In addition, several industry commenters asserted that raising the threshold would increase consumer access to remittance transfer services, especially for consumers in rural areas or locations serviced primarily by local banks or credit unions.

Several industry commenters, including credit unions, banks, and trade associations, alternatively or additionally suggested basing the safe harbor threshold on something other than the number of transfers. Suggestions included, among other things, basing the threshold on the percentage of an entity's customers that send remittance transfers, or the percentage of an entity's transfers that are remittance transfers. A few industry commenters suggested setting a dollar amount threshold (*e.g.,* applying the Rule only to transfers over $1,000 or $10,000, or only to transfers under $500).

A few industry commenters noted the overlap between the expiration of the temporary exception and coverage of certain remittance transfer providers under the Rule. Several trade associations stated that raising the normal course of business safe harbor threshold would address concerns from credit unions and community banks regarding the expiration of the temporary exception. These commenters asserted that a small number of credit unions have already stopped providing remittance transfers anticipating the temporary exception's expiration in July 2020, and that community banks will discontinue providing transfers if they can no longer disclose estimates.

Comments on exempting small financial institutions. In the 2019 RFI, the Bureau sought information on a possible exemption from the Rule for small financial institutions. In response, a consumer advocacy group asserted that market data and the results of the Bureau's Assessment do not support creating such an exemption. Conversely, a number of industry commenters, including credit unions, banks, trade associations, and a payments service provider to banks and credit unions, supported a small financial institution exemption. They asserted that small institutions have fewer opportunities than larger institutions to offset the cost of compliance with the Remittance Rule and indicating that such an exemption would help small financial institutions serve their customers at a lower cost. A few industry commenters also asserted that a small financial institution exemption would be particularly helpful for community banks in underserved or rural areas. Industry commenters suggested a small financial institution exemption based on an asset size threshold of $500 million, $1 billion, $3 billion, or $10 billion. A credit union suggested that the Bureau increase the safe harbor threshold to 1,000 transfers annually for financial institutions with an asset size of less than $50 billion, explaining that the Dodd-Frank Act classifies ''large banks'' as those with more than $50 billion in assets. Another industry commenter stated that in addition to asset size, the particular markets served by the institution should also be considered for creating a small financial institution exemption.

Several banks, credit unions, credit union trade associations, and a payments service provider to banks and credit unions suggested exempting from the Remittance Rule credit unions or financial institutions altogether, arguing that such institutions account for a small percentage of the total number of remittance transfers sent and therefore do not actually provide remittance transfers in the normal course of their business.

Recent Outreach Regarding Coverage

As discussed in part III above, the Bureau has engaged in ongoing market monitoring and other outreach to industry and other stakeholders regarding the Remittance Rule. As in their comments on the 2019 RFI, the general consensus from industry representatives in these meetings and discussions was that the 100-transfer safe harbor threshold is too low. Representatives from two credit unions suggested raising the threshold to 500 transfers annually. One also suggested the Bureau create an accommodation for recurring transfers and stated that it did not believe a small financial institution exemption would be helpful. Several other entities' representatives noted that market dynamics (*e.g.,* mergers and consolidations) and customer demand can cause banks and credit unions to get close to crossing the 100-transfer safe harbor threshold.

Representatives of several entities suggested other metrics for a safe harbor. A representative for a credit union stated that whether an entity provides remittance transfers in the ''normal course of business'' should be based on the entity's proportion of customers sending remittance transfers to total customers overall, while representatives of several other credit unions offered ideas for tying the safe harbor to an entity's asset size. Similarly, a representative of a bank suggested using relative size measures, such as the percentage of an entity's total transactions that are remittance transfers, or the percentage of an entity's revenue that is earned from providing remittance transfers.

Representatives of several banks offered insights as to the kind of information that entities not subject to the Rule provide or would provide to consumers. The representative for a bank currently subject to the Rule stated that if the bank no longer had to comply with the Rule, it would end its correspondent banking relationship

[33] For example, the consumer advocacy group stated that the Bureau would need additional information to raise the safe harbor threshold, such as the size and location of entities providing just above 100 transfers, the number of transfers above 100 that those entities provide, and other options in the market for sending remittance transfers and their cost.

(which it had established to provide the disclosures required by the Rule) and provide consumers with information about its own fees for sending remittance transfers but likely not the exchange rate or the date of availability. Representatives of two banks not currently subject to the Remittance Rule indicated that the only information they provide to their remittance customers are the amount of funds debited from the customer's account and their banks' wire transfer fees.

The Bureau's Proposal

The Bureau has monitored the normal course of business 100-transfer safe harbor threshold in the years since the Rule became effective. Based on comments received on the 2019 RFI, other previous RFIs, the results of the Assessment, and other informal feedback received over time, the Bureau is preliminarily persuaded that the safe harbor threshold should be increased to 500 transfers and that such a change is appropriate to implement Congress' definition of remittance transfer provider in EFTA section 919(g)(3) as a person or financial institution providing remittance transfers in the normal course of its business, whether or not the consumer holds an account with such person. The Bureau believes that a threshold of 500 transfers may be more appropriate to identify persons who occasionally provide remittance transfers, but not in the normal course of their business, and would remove them from coverage under the Rule. Five hundred transfers annually would be equivalent to an average of approximately 10 transfers per week, which the Bureau believes would allow entities to send a relatively limited number of transfers without having to incur the costs of developing and implementing processes and procedures to comply with the Rule or the costs of continued compliance with the Rule. The Bureau believes that, at this volume, entities are generally offering remittance transfers as an accommodation for their account-holding customers rather than operating a separate remittance transfers line of business. In addition, the Bureau believes that raising the safe harbor threshold would mitigate any issues that insured institutions currently providing between 101 and 500 transfers annually [34] might otherwise encounter with respect to the upcoming expiration of the temporary exception.

The Bureau seeks comment on its proposal to increase the normal course of business safe harbor threshold. Specifically, the Bureau seeks comment on its proposed 500-transfer safe harbor threshold, as well as on whether a different threshold, such as 200 or a number between 200 and 500, would be more appropriate. In particular, the Bureau requests data or other evidence that would assist it in determining what number would be most appropriate for the safe harbor threshold in the Remittance Rule. The Bureau also seeks comment on whether its proposal to increase the safe harbor threshold would in fact help reduce burden for banks and credit unions that provide transfers only as an accommodation to their customers. The Bureau also recognizes that any safe harbor interpreting the phrase ''normal course of business'' could limit the protections afforded to some consumers and seeks data and other information demonstrating the nature and magnitude of any harm to consumers as a result of such a limit.

The Bureau believes that raising the safe harbor threshold to 500 transfers would appropriately implement the purposes of EFTA section 919, including the statutory definition of remittance transfer provider, by helping to reduce burden for banks and credit unions that provide transfers only as an accommodation to their customers, thereby ensuring that banks and credit unions continue to offer the service to benefit consumers and do not bear a disproportionate cost to do so. The data now available through Call Reports [35] indicate that a substantial proportion of banks and credit unions make between 101 and 500 remittance transfers per year (*i.e.,* above the current safe harbor threshold but within the proposed threshold), although their percentage of the overall annual volume of remittance transfers is quite small.

Specifically, based on the Bureau's analysis of the 2018 Call Report data, raising the threshold from 100 to 500 transfers would remove approximately 414 banks and 247 credit unions (which represent 54.6 percent and 62.3 percent of such entities currently covered by the Remittance Rule, respectively). These entities account for 0.8 percent (92,600) of bank transfers and 6.2 percent (49,300) of credit union transfers, for a total of approximately 141,900 transfers that would no longer be covered by the Rule. Given that MSBs provide more than 95 percent of remittance transfers annually (discussed in greater detail in part II above), the combined number of bank and credit union transfers that would no longer be covered at a threshold of 500 represents only a minimal percentage of all transfers—specifically, under 0.059 percent of all remittance transfers.

If the Bureau were to raise the threshold from 100 to 200 transfers, it would remove 156 banks and 138 credit unions (which represent 20.6 percent and 34.8 percent of such entities currently covered by the Remittance Rule, respectively). These entities account for 0.18 percent (19,900) of bank transfers and 2.31 percent (18,200) of credit union transfers, for a total of approximately 38,100 transfers that would no longer be covered by the Rule. As with the proposed increase from 100 transfers to 500 transfers, given that MSBs provide more than 95 percent of remittance transfers annually, the combined number of bank and credit union transfers that would no longer be covered at a threshold of 200 represents only a minimal percentage of all transfers—specifically, under 0.016 percent of all remittance transfers.[36]

The Bureau notes that the safe harbor, as it currently exists in the Rule as well as with the proposed modification, is not limited to depository institutions but rather is applicable to all persons. However, the types of entities that would qualify for the proposed safe harbor are predominantly banks and credit unions. MSBs provide far greater numbers of transfers annually. The Bureau is not aware of any MSBs providing such a low volume of remittance transfers that they would qualify for the proposed 500-transfer safe harbor threshold, much less a 200-transfer safe harbor threshold.[37] The Bureau seeks comment on whether there are any MSBs, or other persons, that

[34] As used in this document, ''between 101 and 500'' means 101 or more and 500 or fewer—that is, above the current safe harbor threshold but at or below the proposed threshold.

[35] Banks and credit unions are required to submit quarterly ''Call Reports'' by the Federal Financial Institutions Examination Council (FFIEC) and the National Credit Union Administration (NCUA), respectively. For a more detailed description of these reporting requirements, see Assessment Report at 24.

[36] In the Assessment Report, the Bureau estimated the number of remittance transfers in 2017 to be 325 million (*see id.* at 63–64) and that more than 95 percent of transfers were provided by MSBs in 2017. The Bureau does not have an estimate of the total transfers in 2018, but assumed that 95 percent of transfers were provided by MSBs in 2018 to calculate this proportion.

[37] The Bureau's information on MSBs that provide a small number of remittance transfers is incomplete. States that license MSBs collect information on the ''international transfers'' that are sent by MSBs, which may not be ''remittance transfers'' as defined by the Remittance Rule. Therefore, it is challenging to determine which MSBs are ''remittance transfer providers,'' as defined by the Rule, and the number of remittance transfers they provide. However, few MSBs provide 500 or fewer transfers annually and to the best of the Bureau's knowledge, none of them are remittance transfer providers under the Rule.

provide remittance transfers as their primary business that would qualify for the safe harbor at the proposed revised threshold.

As noted above, some industry representatives have claimed that some community banks and credit unions have stopped or limited remittance transfer services due to the Remittance Rule. The Bureau in its Assessment found no evidence that, on net, banks or credit unions ceased or limited providing remittance transfers because of the safe harbor threshold.[38] To the extent that this has occurred, however, the Bureau expects a likely result of raising the safe harbor threshold might be that at least some of those entities would resume their offering of transfers. The Bureau seeks comment on whether any banks or credit unions actually exited the market or limited the number of remittance transfers provided as a result of compliance costs associated with the Remittance Rule and, if so, whether they would reenter the market or lift the limits they placed on their remittance transfer services if the Bureau raised the safe harbor threshold as proposed.

The Bureau acknowledges that raising the safe harbor threshold would likely result in a reduction of protections for some consumers, because consumers that send remittance transfers from entities that newly qualify for the safe harbor would likely receive less information about the exchange rates and fees related to their remittance transfers, and those entities would likely not give the same cancellation rights or error resolution protections as required under the Remittance Rule. However, based on the results of the Assessment, as well as the updated analysis contained herein, the Bureau understands that the number of affected consumers would likely be relatively small, given that the banks and credit unions that would no longer be covered by the Rule if the Bureau raised the safe harbor threshold to 500 transfers account for a very small proportion of all remittance transfers annually.[39] The Bureau also notes that it has received relatively few consumer complaints related to any providers of remittance transfers,[40] including the subset of providers that would newly qualify for the safe harbor under this proposal. It is not clear why the Bureau does not receive many complaints about possible violations of the Remittance Rule. One possibility is that providers are complying with the law and therefore the Bureau receives few complaints.[41] Another possibility is that some consumers who send remittance transfers may have limited English proficiency and, therefore, be less likely to know that they can submit complaints to the Bureau or may be less likely to seek help from a government agency than other consumers. The Bureau seeks comment on whether entities that would no longer be covered under the Remittance Rule would discontinue providing the disclosures, cancellation rights, or error resolution protections that they are currently required to provide pursuant to the Rule. If such entities would continue providing consumer protections for some or all of their remittance transfers, the Bureau seeks comment on what those protections would be.

Based on the data the Bureau currently has, and in order to effectuate the purposes of EFTA and to facilitate compliance, the Bureau is proposing to raise the safe harbor threshold from 100 to 500 remittance transfers. Specifically, the Bureau is proposing to revise existing § 1005.30(f)(2)(i) to state that a person is deemed not to be providing remittance transfers for a consumer in the normal course of its business (and thus not subject to the Remittance Rule), if the person provided 500 or fewer transfers in the previous calendar year and provides 500 or fewer transfers in the current calendar year. The Bureau is also proposing to revise part of existing § 1005.30(f)(2)(ii) regarding the safe harbor transition period to reflect the proposed 500-transfer safe harbor threshold and the proposed effective date for this rulemaking. (The proposed effective date is discussed in more detail in part VI below.) Specifically, the proposed revision to § 1005.30(f)(2)(ii) states that if, beginning on July 21, 2020, a person that provided 500 or fewer remittance transfers in the previous calendar year provides more than 500 remittance transfers in the current calendar year, and if that person is then providing remittance transfers for a consumer in the normal course of its business pursuant to § 1005.30(f)(1), the person has a reasonable period of time, not to exceed six months, to begin complying with subpart B.

The Bureau is also proposing to add new § 1005.30(f)(2)(iii) to address the transition period for persons qualifying for the safe harbor. Proposed § 1005.30(f)(2)(iii) states that if a person who previously provided remittance transfers in the normal course of its business in excess of the safe harbor threshold set forth in § 1005.30(f)(2) determines that, as of a particular date, it will qualify for the safe harbor, it may cease complying with the requirements of subpart B of Regulation E with respect to any remittance transfers for which payment is made after that date. The requirements of EFTA and Regulation E, including those set forth in §§ 1005.33 and 1005.34, as well as the requirements set forth in § 1005.13, continue to apply to transfers for which payment is made prior to that date.

The Bureau notes that existing language in § 1005.30(f)(2)(ii) regarding the six month transitional period for coming into compliance after ceasing to qualify for the safe harbor, as well as the proposed language in § 1005.30(f)(2)(iii) regarding newly qualifying for the safe harbor, both peg their requirements for particular transfers based on when payment is made for such transfers. The phrase ''payment is made'' is used numerous times throughout the Rule, and the Bureau believes that it provides a clear test as to whether any particular transfer is or is not subject to the Rule.[42] The Bureau is concerned that hinging the standard on, for example, when a transfer is made may not provide adequate certainty, in particular for transfers that are scheduled in advance. The Bureau seeks comment on whether when ''payment is made'' is the appropriate standard on which to hinge these provisions, or whether a different

[38] Assessment Report at 133–35.

[39] Per the Assessment Report, only about 20 percent of banks and about 25 percent of credit unions that offered remittance transfer services were covered by the Remittance Rule at the time of the report; a large portion of banks and credit unions either offered no remittance transfer services or provided 100 or fewer transfers per year and thus were excluded from coverage under the Remittance Rule by virtue of the current safe harbor threshold. *Id.* at 79 n.200.

[40] The Bureau's complaint form lists ''international money transfers'' as an option for consumers to select when submitting a complaint, which is the closest available approximation for ''remittance transfers'' as defined by the Remittance Rule. From April 1, 2013 through December 31, 2017, the Bureau received approximately 1,260,600 consumer complaints, including 4,700 international money transfer complaints representing about 0.4 percent of the total complaints received. *Id.* at 114.

[41] Bureau examinations have uncovered mixed levels of compliance among persons under the Bureau's supervision that provide remittance transfers, including general compliance at certain institutions as well as individual and wholesale violations. *See* Bureau of Consumer Fin. Prot., *Supervisory Highlights,* at 11–14 (Issue 10, Mar. 2016), *https://files.consumerfinance.gov/f/201603_cfpb_supervisory-highlights.pdf.*

[42] For example, the phrase ''payment is made'' is used in the portion of existing § 1005.30(f)(2)(ii) (that the Bureau is not proposing to modify) which states that compliance with subpart B of Regulation E will not be required for any remittance transfers for which payment is made during the reasonable period of time that a person has to transition in to compliance with the Rule once that person no longer qualifies for the safe harbor. *See also, e.g.,* comment 31(e)–2, which discusses the timing of certain disclosure requirements.

standard would be better and, if so, why.

With respect to transfers scheduled before the date of transfer pursuant to § 1005.36, in particular for a series of transfers that are scheduled in advance, the Bureau notes that remittance transfer providers subject to the Rule are required to give consumers disclosures in accordance with the Rule's requirements, including but not limited to consumers' cancellation and error resolution rights. The Bureau notes that the transition from being covered by the Rule to qualifying for the safe harbor is not a new issue presented by this proposal, and seeks comment on what persons that were remittance transfer providers subject to the Rule before qualifying for the safe harbor have done—or expect to do—with respect to any transfers scheduled in advance after they qualify for the safe harbor. The Bureau further seeks comment on whether it is necessary and appropriate for the Bureau to prescribe specific notice obligations in this situation and, if so, what those obligations should be. The Bureau notes that if a provider gives consumers the required disclosures under the Rule, but does not subsequently inform consumers of its changed compliance obligations with respect to what it has previously disclosed, that person risks exposing itself to potential liability under the Dodd-Frank Act or other laws.

With respect to the commentary accompanying § 1005.30(f), first, the Bureau is proposing to revise the last sentence in existing comment 30(f)–2.i in order to avoid potential conflict or confusion with the proposed safe harbor threshold of 500 transfers. The Bureau is also proposing to revise existing comments 30(f)–2.ii and iii regarding the safe harbor and transition period for consistency with the proposed changes to § 1005.30(f)(2)(i) and (ii). In addition, the Bureau is proposing to add a sentence in comment 30(f)–2.ii that states that on July 21, 2020, the safe harbor threshold in § 1005.30(f)(2)(i) changed from 100 transfers to 500 transfers, to memorialize the change. The Bureau is also proposing to renumber existing comment 30(f)–2.iv as 30(f)–2.iv.A (in order to add two additional examples, described below), to revise the heading for this comment to make clear that it provides an example of the safe harbor and transition period for the 100-transfer safe harbor threshold that was effective prior to the proposed effective date of July 21, 2020, and to change the verb tense from present to past throughout the example. The Bureau requests comment on whether it is useful to retain this example, as it has proposed to do, or whether the example should be eliminated.

The Bureau is proposing to add new comment 30(f)–2.iv.B to provide an example of the safe harbor for a person that provided 500 or fewer transfers in 2019 and provides 500 or fewer transfers in 2020. The Bureau is also proposing to add new comment 30(f)–2.iv.C, which provides an example of the safe harbor and transition period for the 500-transfer threshold that would be effective beginning on the proposed effective date of July 21, 2020. This proposed comment is based on the example in existing comment 30(f)–2.iv, with modifications to reflect the changes the Bureau is proposing to § 1005.30(f)(2).

Finally, the Bureau is proposing to add new comment 30(f)–2.v to address continued obligations under the Rule with respect to transfers for which payment was made before a person qualifies for the safe harbor. The proposed comment states that proposed § 1005.30(f)(2)(iii) addresses situations where a person who previously was required to comply with subpart B of Regulation E newly qualifies for the revised safe harbor in proposed § 1005.30(f)(2)(i). It explains that proposed § 1005.30(f)(2)(iii) states that the requirements of EFTA and Regulation E, including those set forth in §§ 1005.33 and 1005.34 (which address procedures for resolving errors and procedures for cancellation and refund of remittance transfers, respectively), as well as the requirements set forth in § 1005.13 (which, in part, governs record retention), continue to apply to transfers for which payment is made prior to the date the person qualifies for the safe harbor in § 1005.30(f)(2)(i). The comment also explains that qualifying for the safe harbor in § 1005.30(f)(2)(i) likewise does not excuse compliance with any other applicable law or regulation. For example, if a remittance transfer is also an electronic fund transfer, any requirements in subpart A of Regulation E that apply to the transfer continue to apply, regardless of whether the person must comply with subpart B. Relevant requirements in subpart A of Regulation E may include, but are not limited to, those relating to initial disclosures, change-in-terms notices, liability of consumers for unauthorized transfers, and procedures for resolving errors.

The Bureau seeks comment on its proposed revisions and additions to commentary, as described above. The Bureau also requests comment on whether any additional clarification or guidance regarding the proposed revised safe harbor threshold is needed and, if so, what specifically should be addressed. In particular, the Bureau seeks comment on whether and to what extent providers have encountered transitional issues when qualifying for the existing safe harbor after complying with the Rule, as well as whether providers who expect to qualify for the proposed revised safe harbor anticipate any transitional issues. The Bureau also solicits comment on whether providers anticipate any particular issues with a mid-year effective date (July 21, 2020) for its proposed change to the safe harbor threshold (see also the discussion of the proposed effective date in part VI below). Finally, the Bureau seeks comment on whether there are any other provisions in existing commentary that should be modified or removed in light of the changes proposed herein.

Other potential approaches considered by the Bureau. As noted above, several industry commenters responded to the Bureau's query in the 2019 RFI as to whether there were any other factors the Bureau should consider in determining whether a person is providing remittance transfers in the ''normal course of its business.'' Suggestions included basing the term on the percentage of an entity's customers that send remittance transfers, the percentage of an entity's transfers that are remittance transfers, or an entity's total revenue generated from providing remittance transfers.

The Bureau notes that it considered these and other approaches when it finalized the 100-transfer safe harbor threshold in 2012. The Bureau stated it did not believe it was appropriate, based on the administrative record at the time, to define a safe harbor based on a relative size measure, such as percentage of revenue, or other suggested criteria, and that commenters did not provide, and the Bureau did not have data suggesting, across the remittance transfer industry, why any of the suggestions made by commenters would be an appropriate basis for the safe harbor threshold. The Bureau also stated that it believed that due to the wide variety of business models for offering remittance transfers and lack of currently available data, it would be difficult to craft a single standalone measure of relative size for identifying persons who provide remittance transfers on only a limited basis.[43] The Bureau does not have any further data to inform such approaches and thus its position on adopting any such

[43] 77 FR 50243, 50250 (Aug. 20, 2012).

alternative thresholds remains unchanged.

Entities are familiar with tracking their remittance transfers for purposes of the current safe harbor, Call Report requirements, and other purposes; the Bureau does not believe that tracking remittance transfer volume in order to confirm that entities qualify for the safe harbor will be any more difficult if the safe harbor threshold were 500 than it is with the current threshold of 100. While tracking total revenue (rather than profits) from remittance transfers may also be somewhat straightforward, the Bureau is particularly concerned that some alternative approaches, such as tracking a proportion (*e.g.,* percentage of customers that send remittance transfers), could be difficult for an entity to track on an ongoing or real-time basis and could fluctuate both up and down over the course of the year. The Bureau also believes that a safe harbor provides the most certainty if it is based on a bright-line measure that permits entities to easily identify whether or not they qualify, especially if it is a measure with which industry is already familiar.

Nonetheless, the Bureau solicits comment on whether it should adopt any alternate or additional approach for the safe harbor from the ''normal course of business'' definition. Specifically, regarding the suggestion to base the safe harbor threshold on the percentage of an entity's customers that send remittance transfers, the Bureau seeks comment on whether this would be a viable approach and if so, what the appropriate percentage of customers would be and why. In addition, the Bureau seeks comment on the time frame over which any such alternate approach should be tracked and the timing for any transitional provisions that might be necessary using such an approach. The Bureau also seeks comment on the potential burdens to entities, or challenges that could arise, in basing the safe harbor on an approach other than the annual number of remittance transfers.

In the 2019 RFI, the Bureau also requested information and evidence to determine whether an exception for small financial institutions (for example, based on asset size) might be appropriate.[44] EFTA section 904(c) contains a ''small financial institution'' exception, which provides that the Bureau ''shall by regulation modify'' EFTA's statutory requirements for such institutions if the Bureau determines that ''such modifications are necessary to alleviate any undue compliance burden on small financial institutions and such modifications are consistent with the purpose and objective of [EFTA].'' The Bureau considered the information received in response to the 2019 RFI and assessed whether the data it has would be sufficient to develop a proposed small financial institution exception that meets the criteria in section 904(c). The Bureau also considered whether other options might be more preferable to address the issue of coverage under the Remittance Rule. While some industry commenters requested a small financial institution exemption and provided some information in support of that request, the Bureau has concluded that proposing to adjust the safe harbor threshold would be a more effective approach to addressing the concerns of small financial institutions. In addition, a consumer advocacy group asserted that market data and the results of the Assessment do not support creating a small financial institution exemption. On balance, the Bureau believes that its proposal to raise the safe harbor threshold would be a more effective way to address the issue of coverage under the Remittance Rule and thus is not proposing to create a small financial institution exemption.

1005.32 Estimates

As discussed in part II above, a significant consumer protection provided by the Remittance Rule is the requirement that remittance transfer providers disclose certain information to consumers that send remittance transfers. Specifically, a provider generally must provide a pre-payment disclosure (as set forth in § 1005.31(b)(1)) to a sender when the sender requests the remittance transfer, but prior to payment for the transfer. The provider also generally must provide a receipt (as required by § 1005.31(b)(2)) to the sender when payment is made for the remittance transfer. As an alternative to providing the separate pre-payment disclosure and the receipt, a provider may provide a combined disclosure (as described in § 1005.31(b)(3)) to the sender when the sender requests a remittance transfer, but prior to payment. Section 1005.36(a)(1) and (2) sets forth special rules for when the disclosures must be given for a one-time transfer scheduled five or more business days before the date of transfer or for the first in a series of preauthorized remittance transfers.

The disclosures required by §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2) include a disclosure of the exchange rate if the transfer will be received in a currency other than the one in which the transfer was funded, as described in § 1005.31(b)(1)(iv). The disclosures required by §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2) also must include the following disclosures as set forth in § 1005.31(b)(1)(v) through (vii), respectively: (1) If ''covered third-party fees'' as defined in § 1005.30(h) are imposed, the total amount that will be transferred to the recipient inclusive of the covered third-party fees; (2) the amount of any covered third-party fees; and (3) the amount that will be received by the designated recipient (after deducting any covered third-party fees). The above disclosures set forth in § 1005.31(b)(1)(v) through (vii) must be provided in the currency in which the designated recipient will receive the funds.

Relatedly, an important requirement established by EFTA section 919 is that remittance transfer providers generally must disclose (both prior to and at the time the consumer pays for the transfer) the exact exchange rate and the amount to be received by the designated recipient of a remittance transfer.[45] Accordingly, the Rule generally requires that providers disclose to senders the exact amount of currency that the designated recipient will receive. Section 1005.32, however, sets forth several exceptions to this general requirement, including the temporary exception in existing § 1005.32(a). As such, the Bureau is proposing two new permanent exceptions to address the expiration of the temporary exception, set forth in proposed § 1005.32(b)(4) and (5) and related commentary.

32(a) Temporary Exception for Insured Institutions

As noted above, EFTA section 919 sets forth a temporary exception that permits certain financial institutions to disclose estimates instead of exact amounts to consumers. Remittance transfer providers qualify for the temporary exception in EFTA section 919 if: (i) They are insured depository institutions or insured credit unions (collectively, ''insured institutions'') that make a transfer from an account that the sender holds with them; and (ii) they are unable to know, for reasons beyond their control, the amount of currency that will be made available to the designated recipient. If these conditions are met, EFTA's temporary exception provides that these institutions need not disclose the amount of currency that will be received by the designated recipient but rather may disclose ''a reasonably accurate

[44] 84 FR 17971 (Apr. 29, 2019).

[45] 15 U.S.C. 1693*o*–1(a)(1) and (2).

estimate of the foreign currency to be received.'' [46]

EFTA set the temporary exception to expire five years from the enactment of the Dodd-Frank Act. EFTA also provided a one-time ability for the Bureau to extend the exception for up to five more years, until July 21, 2020, if the Bureau determined that the expiration of the exception would negatively affect the ability of insured institutions to send remittance transfers to foreign countries. In 2014, the Bureau by rule extended the exception for five years to July 21, 2020.[47] As EFTA section 919 expressly limits the length of the temporary exception to the term specified therein, the temporary exception will expire on July 21, 2020.

In implementing the temporary exception in EFTA section 919, § 1005.32(a)(1) provides that a remittance transfer provider may give estimates in compliance with § 1005.32(c) for the exchange rate (if applicable), covered third-party fees, and certain other disclosures if the provider meets three conditions. The three conditions are: (1) The provider must be an insured institution; (2) the provider must not be able to determine the exact amounts to be disclosed for reasons beyond its control; and (3) the transfer generally must be sent from the sender's account with the insured institution.[48]

Section 1005.32(a)(3) provides that insured depository institutions, insured credit unions, and uninsured U.S. branches and agencies of foreign depository institutions are considered ''insured institutions'' for purposes of the temporary exception. MSBs are not ''insured institutions'' for purposes of the temporary exception. The Bureau is not proposing to amend § 1005.32(a) but provides a discussion of this provision and related comments received in response to the 2019 RFI as background to explain its proposed two new exceptions in § 1005.32(b)(4) and (5), discussed below.

Challenges of Insured Institutions in Disclosing Exact Amounts

As discussed in part II above, banks and credit unions have predominantly utilized an ''open network'' payment system made up of the correspondent banking network to send remittance transfers on behalf of consumers, and most banks and credit unions only maintain a relatively small number of correspondent banking relationships. As such, in many cases involving remittance transfers sent via the correspondent banking network, the sending institution must find a chain of one or more intermediary financial institutions to transmit funds from the sending institution to the designated recipient's institution.

There are two basic ways of how such a chain works where the originating (sending) institution has no correspondent banking relationship with the designated recipient's institution: the ''serial'' method and the ''cover'' method (also known as the ''split and cover'' method).[49] Sending a remittance transfer using the serial method means that the payment is instructed and settled one step at a time between each of the financial institutions in the transmittal route. Each connected pair of financial institutions in the transmittal route have a correspondent banking relationship with each other, which enables fund settlement.[50] By current market practice, each intermediary financial institution typically deducts a fee from the payment amount, which results in the recipient of the payment not receiving the full amount of the original payment order.[51] Sending a remittance transfer using the cover method means that the payment information is conveyed from the sending institution to the designated recipient's institution while settlement is handled separately through correspondent banks.[52] Further, current market practice is such that correspondent banks typically do not deduct transaction fees from payments sent using the cover method.[53]

As discussed above, the temporary exception permits insured institutions to disclose estimates (rather than exact amounts) of the exchange rate and covered third-party fees (and other amounts that have to be estimated because the exchange rate and covered third-party fees are estimated). With respect to the exchange rate, insured institutions and their trade associations have reported to the Bureau that because exchange rates fluctuate, sending institutions comply with the requirement to disclose exact exchange rates by ''fixing'' the exchange rate at the time a sender requests a remittance transfer. They do this by converting the funds to the applicable foreign currency up front themselves, or by using their correspondent bank or third-party service provider (instead of having an intermediary financial institution or the designated recipient's institution perform the foreign currency conversion). As discussed in greater detail below in the section-by-section analysis of proposed § 1005.32(b)(4), insured institutions may face a number of hurdles with respect to converting funds to certain currencies upfront. In such cases, they may rely on the temporary exception with respect to the disclosure of the exchange rate.[54] With respect to covered third-party fees, insured institutions and their trade associations have told the Bureau that when banks and credit unions send remittance transfers using the serial method (where sending institutions do not have a correspondent relationship with all the financial institutions in the remittance transfer's transmittal route), they cannot control or even know transaction fees imposed by another financial institution in the payment chain without having a correspondent relationship with that financial institution. As such, they rely on the temporary exception with respect to the disclosure of covered third-party fees.[55]

Recent market developments and potential solutions. In the Assessment Report, the Bureau observed that the remittance market has undergone substantial change since the Rule became effective. The Assessment Report described several developments regarding the growth and incorporation of innovative technologies by providers of cross-border money transfers and other companies that support such providers.[56]

The Bureau has continued to monitor the remittance transfer market since the publication of the Assessment Report and observes that most of these developments continue to progress. Examples include: (1) The continued growth and expanding functionality of the Society for Worldwide Interbank Financial Telecommunication (SWIFT)'s ''global payment innovation'' (gpi) tracking product, which can increase the amount of up-front information available to sending

[46] 15 U.S.C. 1693*o*–1(a)(4).

[47] 79 FR 55970 (Sept. 18, 2014).

[48] For the purposes of the temporary exception, a sender's account does not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.

[49] *See* 2016 BIS Report at 33–34.

[50] *Id.* at 34.

[51] *Id.* at 37.

[52] Every cross-border money transfer, including remittance transfers, sent via the correspondent banking network has two components: The payment information and the settlement instruction. Whereas these two components travel together when using the serial method, the cover method separates the payment information from the settlement instructions.

[53] 2016 BIS Report at 37.

[54] Section 1005.32(b) also contains other exceptions that permit the estimation of the exchange rate in certain circumstances.

[55] See below in the section-by-section analysis of proposed § 1005.32(b)(5) for a discussion of why sending institutions are not always able to send cover payments to designated recipients' institutions.

[56] Assessment Report at 97–106.

institutions, and the expansion of the major payment card networks' capacity to support cross-border payments;[57] (2) the continued growth of ''fintech'' nonbank remittance transfer providers and their further expansion into partnerships and other relationships with banks and credit unions, which allow such entities to tap into the closed network payment systems that nonbank remittance transfer providers have developed;[58] and (3) the continued growth and expanding partnerships of virtual currency companies, such as Ripple, which offer both a payments messaging platform to support cross-border money transfers as well as a proprietary virtual currency, XRP, which can be used to effect settlement of those transfers.[59]

These developments suggest that in the future there may be means by which banks and credit unions could reduce their remaining reliance on estimates. These developments all share a fundamental similarity: They all apply elements of a closed network payment system to cross-border money transfers sent by banks and credit unions. As discussed in part II above, in a closed network payment system, a single entity generally exerts a high degree of end-to-end control over a transaction. This control generally facilitates standardization and uniformity over terms, conditions, and processes to which participants in a closed network payment system must adhere. That standardization and uniformity, in turn, can provide a great deal of certainty to all participants in such a system as to the terms and conditions that will apply to individual transactions within that system.

To the degree banks and credit unions increase their reliance on closed network payment systems for sending remittance transfers and other cross-border money transfers, the Bureau notes that this could result in greater standardization and ease by which sending institutions can quote exact covered third-party fees and exchange rates. The Bureau also believes that expanded adoption of SWIFT's gpi product or Ripple's suite of products could similarly allow banks and credit unions to know the exact final amount that recipients of remittance transfers will receive before they send the transfer.

However, based on comments that banks, credit unions, and their trade associations submitted in response to the 2019 RFI and the Bureau's own market monitoring, the Bureau believes it is unlikely in the short-to-medium term that the developments described above will be able to fully eliminate reliance on the correspondent banking network as the predominant method for banks and credit unions to send remittance transfers. There are thousands of financial institutions worldwide that could receive remittance transfers. If, as noted above, the different approaches described above share the similarity of replicating some elements of a closed network payment system, they likely would need to enroll all or most of those financial institutions into their platforms to offer banks and credit unions up-front certainty when sending transfers for which they currently rely on the temporary exception. It may be costly, excessively time-consuming, or otherwise difficult to enroll all or even most of these institutions, especially the smaller ones. Accordingly, the Bureau believes that it is unlikely in the short-to-medium term for the developments discussed above to replace the correspondent banking system as the predominant means that banks and credit unions use to send remittance transfers.

Comments Received in Response to the 2019 RFI

As noted in part III above, the Bureau in the 2019 RFI sought information on the upcoming expiration of the temporary exception and potential options to mitigate its impact. In response to the 2019 RFI, the overwhelming majority of comments came from banks, credit unions, their trade associations, and their service providers. The Bureau received one comment from a ''fintech'' nonbank remittance transfer provider and one comment from a consumer advocacy group.

Comments from credit unions, banks, their trade associations, and their service providers. Many of these industry commenters indicated that insured institutions should still be permitted to estimate the exchange rate and covered third-party fees (and the disclosures that depend on those amounts) after the temporary exception expires. As discussed in more detail below in the section-by-section analyses of proposed § 1005.32(b)(4) and (5), several industry commenters asserted that: (1) The vast majority of international payments sent by banks and credit unions, including commercial cross-border transfers and remittance transfers, are wire transfers sent via correspondent banks in an open network payment system; and (2) as a result, depending on the identity and location of the designated recipient's institution, insured institutions have difficulty knowing the exact exchange rate and covered third-party fees for all remittance transfers at the time the disclosures required by the Remittance Rule must be given. See the section-by-section analysis of proposed § 1005.32(b)(4) for a discussion of the comments received on the exchange rate, and the section-by-section analysis of proposed § 1005.32(b)(5) for a discussion of the comments received on covered third-party fees.

Several industry commenters asserted that insured institutions might stop sending remittance transfers in situations where the insured institutions cannot provide exact disclosures of the exchange rate or covered third-party fees. Several other industry commenters acknowledged that it is possible for them to send certain remittance transfers for consumers via international ACH, or use nonbank service providers, closed network payment systems, or other methods that could allow them to control or eliminate covered third-party fees and thus provide exact amounts of those fees in the disclosures required by the Remittance Rule. They also asserted, however, that none of these methods provide a comprehensive alternative to the correspondent banking system.

Several industry commenters asserted that after the temporary exception expires, if the Bureau does not allow insured institutions to continue providing estimates, it will hurt smaller insured institutions and their customers. These industry commenters indicated that if the larger correspondent banks react to the expiration of the temporary exception by limiting or increasing the cost of their offerings, there will likely be a domino effect in the industry that will negatively influence the cost of, or access to, these services for consumers. Several industry commenters indicated that if community banks and credit

[57] SWIFT provides financial messaging services that support a large share of all cross-border interbank payments sent via correspondent banks. *See, e.g.,* Press Release, SWIFT, *SWIFT enables payments to be executed in seconds* (Sept. 23, 2019), *https://www.swift.com/news-events/press-releases/swift-enables-payments-to-be-executed-in-seconds;* John Adams, *Small cross-border deals play a big role for Visa, Mastercard,* PaymentsSource (May 21, 2019), *https://www.paymentssource.com/news/small-cross-border-deals-play-a-big-role-for-visa-mastercard.*

[58] *See, e.g.,* Zoe Murphy, *TransferWise launches TransferWise for Banks in the U.S. with Novo,* Tearsheet (Sept. 26, 2019), *https://tearsheet.co/new-banks/transferwise-launches-transferwise-for-banks-in-the-u-s-with-novo/.*

[59] *See, e.g.,* Press Release, Ripple, *Ripple Announces Strategic Partnership with Money Transfer Giant, MoneyGram* (June 17, 2019), *https://www.ripple.com/insights/ripple-announces-strategic-partnership-with-money-transfer-giant-moneygram/;* Sharon Kimathi, *PNC becomes first US bank on RippleNet,* FinTech Futures (Aug. 29, 2019), *https://www.fintechfutures.com/2019/08/pnc-becomes-first-us-bank-on-ripplenet/.*

unions start reducing or eliminating remittance transfer services, customers, especially those in rural communities, would have limited options for remittance transfers and could be left without safe, convenient, and cost-effective means to transmit funds.

Several industry commenters indicated that insured institutions that continue to offer remittance transfers may see costs increase when sending transfers to certain destinations if insured institutions have to change the ways they provide remittance transfers in order to disclose exact amounts. With respect to the exchange rate, two bank commenters indicated that if banks have to move to providing an exact exchange rate for all wire transfers, banks will have no choice but to build in an extra buffer in the exact exchange rate disclosed, so that they do not lose money on the transactions. One trade association indicated that (1) for credit unions that rely primarily on correspondent institutions to provide exchange rate and fee information, the expiration of the temporary exception could have indirect effects if correspondent banks adopt costlier processes for ensuring accurate disclosure of amounts received; and (2) if the compliance costs of correspondents are passed on to credit unions, this could further challenge credit unions' ability to offer remittance transfers at reasonable and competitive rates.

Several industry commenters asserted that they believed that there is no evidence of consumer harm from disclosing estimates rather than exact amounts. Several trade associations indicated that banks maintain databases of fee information to allow them to provide highly reliable estimates when they are unable to know with certainty the exact covered third-party fees that will be assessed.

Based on the concerns discussed above, a number of industry commenters requested that the Bureau exempt all wire transfers from the requirement to disclose the exact exchange rate and covered third-party fees to accommodate the characteristics of remittance transfers sent through correspondent banks in an open network payment system. They asserted that the Bureau could use its general exception and adjustment authority under EFTA section 904(c) to exempt wire transfers from the requirement to provide exact exchange rates or covered third-party fees (and the disclosures that depend on those amounts) when insured institutions are not able to determine exact amounts. In the alternative, several trade associations suggested that the Bureau should use its authority under EFTA section 919(c) to exempt wire transfers where exact amounts cannot reasonably be determined in advance.[60] These trade associations asserted that (1) the use of correspondent banks to send remittance transfers in an open network payment system is a method of making the transfers and that this network system does not allow insured institutions to know the amount of currency that will be received by the designated recipient for all transfers; and (2) the correspondent banking network is decentralized and that decentralization places inherent limits on the ability of insured institutions to obtain accurate exchange rate and covered third-party fee information. Relatedly, several industry commenters suggested that the Bureau amend the criteria and process for using the ''countries'' exception in § 1005.32(b)(1) (which implements EFTA section 919(c)) to make it easier to include countries on the Bureau-maintained ''countries list'' so that insured institutions can provide estimates of the exchange rate or covered third-party fees for remittance transfers to those countries. (See the end of this part V for the Bureau's request for comment on this issue.)

Other industry commenters discussed other approaches to address concerns specifically related to providing exact exchange rates, and these approaches are discussed below in the section-by-section analysis of proposed § 1005.32(b)(4). Industry suggestions to address concerns specifically relating to providing exact covered third-party fees are discussed below in the section-by-section analysis of proposed § 1005.32(b)(5).

Several industry trade associations indicated that, if the Bureau does not extend or make permanent the temporary exception, the Bureau should adopt a one-year transition period to provide a safe harbor for banks' good faith implementation and compliance efforts. These trade associations indicated that this one-year transition period is needed because of the complexities of determining how any changes in a final rule will affect services to consumers and other banks, the need to communicate those impacts to customers, and the need to create new procedures and training to enable compliance.

Comment from a nonbank remittance transfer provider. The one ''fintech'' nonbank remittance transfer provider that commented on the 2019 RFI indicated that the temporary exception was never intended to be permanent, whether directly or indirectly through an extension of other exceptions. This commenter asserted its belief that extending the exception directly or indirectly will stunt the movement toward transparency and continue the bifurcated regulatory approach under which insured institutions may be able to provide estimates but MSBs cannot.

Comment from a consumer advocacy group. The consumer advocacy group that commented on the 2019 RFI indicated that (1) the Remittance Rule is designed to improve accountability and transparency, and through those benefits to consumers, also benefit competition and innovation; (2) the temporary exception was put into place to accommodate existing practices while the market adapted to new standards under the Rule; and (3) evidence from pricing and market innovation indicate that the market has substantially adapted and is poised to move away from a need for the exception. The commenter also encouraged institutions that might consider terminating their remittance transfer services to instead partner with larger institutions or nonbank money transmitters including MSBs to act as a service provider to that withdrawing institution's customers. The commenter asserted that these partnerships would be especially useful in situations where the institution terminating the remittance transfer services serves a segment of consumers with few alternatives available when sending remittance transfers.

Recent Outreach on Impacts of the Expiring Temporary Exception

As noted in part III above, the Bureau has engaged in ongoing market monitoring and other outreach to industry and other stakeholders regarding the Remittance Rule. As in their comments on the 2019 RFI, the general consensus from industry in these meetings and discussions was that, if the Bureau does not take steps to allow estimates of the exchange rate or covered third-party fees to mitigate the expiration of the temporary exception, insured institutions may stop sending remittance transfers in situations where, despite reasonable efforts, they cannot provide exact disclosures. One trade association emphasized the difficulties that some

[60] EFTA section 919(c) (implemented in § 1005.32(b)(1)) permits the Bureau to except remittance transfer providers from having to provide exact amounts for transfers to certain nations if the Bureau determines that a recipient country does not legally allow, or the method by which transactions are made in the recipient country does not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient. See below for a discussion of this exception.

insured institutions face in providing exact disclosures for certain remittance transfers sent through correspondent banks in an open network payment system. This trade association reiterated the suggestions in its comment letter for potential regulatory solutions, such as the Bureau using its general exception and adjustment authority under EFTA section 904(c), or its authority under EFTA section 919(c), to exempt wire transfers from the requirement to provide exact disclosures when insured institutions are not able to determine accurate amounts.

Several large insured institutions provided information on the circumstances in which they use the temporary exception and discussed their concerns about the potential impact its expiration would have on whether they could continue to provide certain remittance transfers. These institutions indicated that they do not rely on the temporary exception to estimate the exchange rate but do rely on it in certain circumstances to estimate covered third-party fees. They also described the actions they have taken or plan to take to mitigate the potential impacts of the expiring temporary exception, and potential measures that the Bureau could take to limit further its impact. One large insured institution also identified the countries where it uses the temporary exception most often to estimate covered third-party fees, and for each of these countries provided information about the number of remittance transfers for which it uses the temporary exception.

The Bureau also received a letter from several members of Congress expressing concern that if insured institutions are no longer able to provide estimates of exchange rates and covered third-party fees after the temporary exception expires, many institutions would likely discontinue providing remittance transfer services to their customers because they would be unable to comply with the Remittance Rule. These members of Congress requested that the Bureau use its authority under EFTA section 904(a) and (c), or its authority under EFTA section 919(c), or its authority under section 1032 of the Dodd-Frank Act, to allow insured institutions to continue providing estimates of exchange rates and covered third-party fees in cases where exact disclosures are not possible. These members of Congress stated that a solution should be permanent, not temporary, so insured institutions are able to make long-term decisions regarding the provision of remittance transfer services.

The Bureau's Proposal

To mitigate the impact of the temporary exception's expiration, the Bureau is proposing two new permanent exceptions, as discussed in greater detail below in the section-by-section analyses of proposed § 1005.32(b)(4) and (5). The Bureau is retaining the temporary exception in § 1005.32(a)(1), with the current sunset date of July 21, 2020. As discussed in the 2019 RFI, EFTA section 919 expressly limits the length of the temporary exception to July 21, 2020. The Bureau, therefore, is not proposing to extend the exception or make it permanent. As such, the exception will expire on July 21, 2020 unless Congress changes the law. For similar reasons, the Bureau is not proposing to replicate the temporary exception, as some trade association commenters suggested the Bureau should do.[61]

32(b) Permanent Exceptions

32(b)(4) Permanent Exception for Estimation of the Exchange Rate by an Insured Institution

The Bureau is proposing to add a new permanent exception to the Remittance Rule that would permit insured institutions to estimate the exchange rate (and other disclosures that depend on the exchange rate) that must be disclosed in the disclosures required by §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2) in certain circumstances. This proposed exception is designed to help mitigate the impact of the expiration of the temporary exception on consumers' access to certain remittance transfers.

Comments Received on Estimating the Exchange Rate in Response to the 2019 RFI

Several industry commenters asserted that insured institutions have difficulty knowing the exact exchange rate at the time they must provide the disclosures required by the Remittance Rule. For example, several industry trade associations indicated that (1) insured institutions can provide the exact exchange rate in the disclosures if the insured institution, its service provider, or its correspondent bank conducts the foreign currency exchange prior to the transfer; they noted, however, that it may be difficult for this to occur for all remittance transfers sent by insured institutions; (2) in many cases, local customs or practices may make foreign currency exchange outside the United States difficult or impossible even if these restrictions are not pursuant to the laws of the receiving country; (3) for some currencies, the market is too small and illiquid, which makes maintenance of a currency-trading desk in the United States difficult or impossible; (4) for other currencies, it may not be economically viable for a correspondent bank to conduct the foreign currency exchange for other reasons, including that some currencies may just simply be difficult or expensive to purchase; and (5) banks generally profit on their foreign currency exchange services, and some foreign banks may refuse to process incoming wire transfers not denominated in U.S. dollars so as not to lose the revenue they receive from exchanging the currency themselves. One bank also indicated that it is expensive to ''lock in'' an exchange rate for highly volatile currencies because of the fluctuations in those exchange rates.

As discussed in more detail above in the section-by-section analysis of § 1005.32(a), several industry commenters indicated that if the Bureau does not adopt an exception that allows insured institutions to continue to estimate the exchange rate in certain circumstances, insured institutions may stop sending remittance transfers in situations where the insured institutions cannot disclose the exact exchange rate. Several other industry commenters indicated that insured institutions that continue to offer remittance transfers may see costs increase when sending transfers to certain countries if insured institutions have to change the ways they provide transfers in order to disclose exact exchange rates.

Several trade associations suggested that the Bureau should permit exchange rate estimates for any remittance transfer that involves exchanging a foreign currency if the remittance transfer provider or its foreign currency provider is unable to conduct foreign currency exchange ''in the ordinary course of its business.'' The trade associations indicated that this suggested exception would cover the following situations: (1) Local customs and practices, rather than specific laws, prevent banks from disclosing the exact exchange rate; (2) currencies with very small or illiquid markets, which makes the maintenance of a currency-trading desk in the U.S. difficult or impossible;

[61] Specifically, these trade association commenters asked the Bureau to exempt wire transfers generally from the requirement to disclose exact exchange rates or covered third-party fees to accommodate the characteristics of open network transactions when insured institutions are not able to determine exact amounts at the time the disclosures are provided. They also suggested that, under EFTA 919(c), the Bureau should specify that wire transfers are a ''method by which transactions are made in the recipient country'' that does not allow exact disclosures if such amounts cannot be reasonably determined at the time the disclosures are provided.

and (3) currencies that are difficult or expensive to buy so it is not economically viable for a correspondent bank to conduct the exchange.

In addition, one credit union raised a specific issue related to Department of Defense (DoD) regulations that require the credit union to benchmark the exchange rate it offers as a credit union on a military installation in a foreign country to the Military Banking Facility (MBF) rate. For one-time transfers scheduled one to four days in advance, the credit union indicates that it uses the temporary exception to estimate the exchange rate because it does not know the benchmark rate that will apply on the date of transfer and does not qualify for the existing permanent exception in § 1005.32(b)(2), which permits estimates for transfers scheduled five or more business days before the date of transfer when certain conditions are met.[62]

The Bureau's Proposal

The Bureau is proposing to add a new permanent exception to the Remittance Rule that would permit insured institutions to estimate the exchange rate (and other disclosures that depend on the exchange rate) in certain circumstances. Based on the comments received on the 2019 RFI and other outreach and research, the Bureau is concerned that if it does not adopt any additional exceptions that allow estimates of the exchange rate after the temporary exception expires, some insured institutions may choose to stop sending remittance transfers to recipients in certain countries. These insured institutions may choose to stop providing certain remittance transfers because they deem the costs of determining exact amounts for the exchange rate to be prohibitively expensive. The Bureau is concerned that if these institutions discontinue providing such transfers, consumer access to remittance transfer services for certain countries may be reduced or eliminated. As discussed in more detail above in the section-by-section analysis of § 1005.32(a), it appears increasingly unlikely that any new technologies or partnerships will be able to fully eliminate insured institutions' reliance on estimates in the short-to-medium term.

Also, the Bureau is concerned that, when the temporary exception expires, if the Rule does not allow estimates of the exchange rate in certain circumstances, insured institutions that continue to offer remittance transfer services may see costs increase when sending transfers to certain countries if insured institutions have to change the ways they provide remittance transfers in order to disclose exact exchange rates. This would predictably lead to increased prices for consumers. In addition, the Bureau is concerned that prices for consumers may also increase for transfers to certain countries (due to reduced competition) if the number of remittance transfer providers offering remittance transfers to such countries is reduced due to some providers eliminating or curtailing transfer services because they could not determine and disclose exact exchange rates for those countries.

Proposed § 1005.32(b)(4)(i) generally provides that for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for a remittance transfer to a particular country in accordance with § 1005.32(c) for the amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii) if the designated recipient of the remittance transfer will receive funds in the country's local currency and all of the following conditions are met: (1) The remittance transfer provider is an insured institution as defined in § 1005.32(a)(3); (2) the insured institution cannot determine the exact exchange rate for that particular remittance transfer at the time it must provide the applicable disclosures; (3) the insured institution made 1,000 or fewer remittance transfers in the prior calendar year to the particular country for which the designated recipients of those transfers received funds in the country's local currency; and (4) the remittance transfer generally is sent from the sender's account with the insured institution.[63] The Bureau also is proposing conforming changes to the following provisions to reference the proposed exception in § 1005.32(b)(4) where the temporary exception in § 1005.32(a) currently is referenced and pertains to the estimation of the exchange rate: (1) § 1005.32(c); (2) § 1005.33(a)(1)(iii)(A); (3) § 1005.36(b)(3); (4) comment 32–1; (5) comment 32(b)(1)–4.ii; (6) comment 32(d)–1; and (7) comment 36(b)-3.

Proposed § 1005.32(b)(4)(i) would generally apply to the following disclosures set forth in § 1005.31(b)(1)(iv) through (vii) respectively: (1) The exchange rate (as applicable); (2) if "covered third-party fees" as defined in § 1005.30(h) are imposed, the total amount that will be transferred to the recipient inclusive of the covered third-party fees; (3) the amount of any covered third-party fees; and (4) the amount that will be received by the designated recipient (after deducting any covered third-party fees). Proposed § 1005.32(b)(4)(ii) makes clear, however, that the total amount that will be transferred to the recipient inclusive of covered third-party fees, the amount of covered third-party fees, and the amount that will be received by the designated recipient (after deducting covered third-party fees) may be estimated under proposed § 1005.32(b)(4)(i) only if the exchange rate is permitted to be estimated under proposed § 1005.32(b)(4)(i) and the estimated exchange rate affects the amount of such disclosures. For example, if a remittance transfer will be received by the designated recipient in the same currency as the one in which the transfer is funded, the insured institution would not disclose an exchange rate for the transfer, and the total amount that will be transferred to the recipient inclusive of covered third-party fees, the amount of covered third-party fees, and the amount that will be received by the designated recipient (after deducting covered third-party fees) will not be affected by an exchange rate. In that case, an insured institution may not use proposed § 1005.32(b)(4) to estimate those disclosures. The insured institution, however, may be able to use another permanent exception set forth in § 1005.32(b), including the exception in proposed § 1005.32(b)(5), to estimate those disclosures if the conditions of those exceptions are met.

Proposed § 1005.32(b)(4) also would apply only if the designated recipient of the remittance transfer will receive funds in the country's local currency. Current comment 31(b)(1)(iv)–1 provides guidance on how a remittance transfer provider can determine in which currency the designated recipient will receive the funds. The comment provides that for purposes of determining whether an exchange rate is applied to the transfer, if a remittance transfer provider does not have specific knowledge regarding the currency in which the funds will be received, the provider may rely on a sender's representation as to the currency in which funds will be received. For example, if a sender requests that a remittance transfer be deposited into an account in U.S. dollars, the provider need not disclose an exchange rate, even if the account is denominated in Mexican pesos and the funds are

[62] The Bureau believes that the DoD regulations are not in conflict with the requirements in the Remittance Rule for one-time transfers scheduled one to four days in advance.

[63] For the purposes of the proposed exception in proposed § 1005.32(b)(4), a sender's account would not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.

converted prior to deposit into the account. Thus, under this comment, a remittance transfer provider may rely on a sender's representation as to the currency in which funds will be received for purposes of determining whether an exchange rate is applied to the transfer, unless the remittance transfer provider has actual knowledge regarding the currency in which the funds will be received for the transfer. If a sender does not know the currency in which funds will be received, the provider may assume that the currency in which funds will be received is the currency in which the remittance transfer is funded.

Each of the four conditions set forth in proposed § 1005.32(b)(4)(i)(A) through (D) is discussed in more detail below. The Bureau solicits comment generally on this proposed exception, and on each condition as discussed in more detail below.

The remittance transfer provider is an insured institution. Proposed § 1005.32(b)(4)(i)(A) provides that the remittance transfer provider must be an insured institution as defined in § 1005.32(a)(3).[64] As with the temporary exception, the exception in proposed § 1005.32(b)(4) is primarily designed to address providers' concerns about knowing the exact exchange rate at the time disclosures are provided for wire transfers sent via correspondent banks in an open network payment system. The Bureau believes that the great majority of these transfers are provided by insured institutions and that, in turn, these open network transfers are the most common type of remittance transfer provided by insured institutions.

Nonetheless, the Bureau understands that some remittance transfer providers that are not insured institutions could use the correspondent banking system to send remittance transfers.[65] The Bureau solicits comment on whether the Bureau should extend the exception in proposed § 1005.32(b)(4) to apply to remittance transfer providers that are not insured institutions, including MSBs and broker-dealers, and the reasons why the proposed exception should apply to these persons.

The insured institution cannot determine the exact exchange rate for the transfer at the time it must provide the applicable disclosures. As a condition of using the exception in proposed § 1005.32(b)(4), proposed § 1005.32(b)(4)(i)(B) would require that, at the time the insured institution must provide the disclosure required by § 1005.31(b)(1) through (3) or § 1005.36(a)(1) or (2), as applicable, the insured institution cannot determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) for that remittance transfer. Proposed comment 32(b)(4)–1 provides guidance on whether an insured institution cannot determine the exact exchange rate applicable to a remittance transfer at the time the disclosures must be given. Specifically, proposed comment 32(b)(4)–1 explains that for purposes of proposed § 1005.32(b)(4)(i)(B), an insured institution cannot determine the exact exchange rate required to be disclosed under § 100531(b)(1)(iv) for a remittance transfer to a particular country where the designated recipient of the transfer will receive funds in the country's local currency if the exchange rate for the transfer is set by a person other than (1) the insured institution; (2) an institution that has a correspondent relationship with the insured institution; (3) a service provider for the insured institution; or (4) a person that acts as an agent of the insured institution. The Bureau believes that proposed comment 32(b)(4)–1 sets forth the circumstances in which an insured institution cannot determine the exchange rate for a particular transfer sent through correspondent banks in an open network payment system and seeks comment on this provision.

Proposed comment 32(b)(4)–1.i provides an example of when an insured institution cannot determine an exact exchange rate under proposed § 1005.32(b)(4)(i)(B) for a remittance transfer. Proposed comment 32(b)(4)–1.ii provides two examples of when an insured institution can determine an exact exchange rate under proposed § 1005.32(b)(4)(i)(B) for a remittance transfer, and thus the insured institution may not use the proposed exception in proposed § 1005.32(b)(4) to estimate the disclosures required under § 1005.31(b)(1)(iv) through (vii) for the remittance transfer. The Bureau solicits comment on the condition set forth in proposed § 1005.32(b)(4)(i)(B) generally, and on the guidance and examples set forth in proposed comment 32(b)(4)–1 for whether an insured institution can or cannot determine the exact exchange rate for a remittance transfer for purposes of proposed § 1005.32(b)(4)(i)(B).

The insured institution made 1,000 or fewer remittance transfers in the prior calendar year to the particular country for which the designated recipients of those transfers received funds in the country's local currency. Proposed § 1005.32(b)(4)(i)(C) provides that with respect to the country to which the remittance transfer is being sent, the insured institution must have made 1,000 or fewer remittance transfers in the prior calendar year to the particular country for which the designated recipients of those transfers received funds in the country's local currency.

Proposed comment 32(b)(4)–2.i provides that for purposes of determining whether an insured institution made 1,000 or fewer remittance transfers in the prior calendar year to a particular country pursuant to proposed § 1005.32(b)(4)(i)(C), the number of remittance transfers provided includes transfers in the prior calendar year to that country when the designated recipients of those transfers received funds in the country's local currency regardless of whether the exchange rate was estimated for those transfers. The proposed comment provides an example to illustrate. Also, proposed comment 32(b)(4)–2.ii provides that for purposes of the 1,000 transfer threshold, the number of remittance transfers does not include remittance transfers to a country in the prior calendar year when the designated recipients of those transfers did not receive the funds in the country's local currency. The proposed comment provides an example to illustrate.

The Bureau is concerned that if an insured institution is sending 1,000 or fewer remittance transfers to a particular country in the country's local currency, it may be unduly costly for the institution to establish and maintain currency-trading desk capabilities and risk management policies and practices related to foreign exchange trading of that currency, or to use service providers, correspondent institutions, or persons that act as the insured institution's agent to obtain exact exchange rates for that currency. Based on the comments received on the 2019 RFI and additional outreach and research, the Bureau believes that cost is a primary factor in whether an insured institution will perform the currency exchange and thus whether it would know the exact exchange rate to provide in its disclosures. In these cases where the volume is less than the proposed

[64] The term "insured institution" is defined in § 1005.32(a)(3) to mean insured depository institutions (which includes uninsured U.S. branches and agencies of foreign depository institutions) as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and insured credit unions as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

[65] As noted in the 2019 RFI, a no-action letter issued by staff at the Securities and Exchange Commission (SEC) provided that staff will not take any enforcement action under Regulation E against broker-dealers that provide disclosures consistent with the requirements of the temporary exception. *See https://www.sec.gov/divisions/marketreg/mr-noaction/2012/financial-information-forum-121412-rege.pdf.*

1,000-transfer threshold in the previous calendar year to a particular country in the country's local currency, the Bureau is concerned that if the insured institution cannot estimate the exchange rate for a particular transfer to that country, the institution will no longer continue to make transfers to that country in the country's local currency because of the costs associated with performing the currency exchange. The Bureau is particularly concerned about smaller financial institutions that may lack the scale for it to be practicable to cover the costs of establishing and maintaining currency-trading desks and managing the risk of exchange rate trading of currency for certain countries, or to use service providers, correspondent institutions, or persons that act as the insured institution's agent to obtain exact exchange rates for those currencies.

The Bureau has received feedback from banks, credit unions, and their trade associations that there are other circumstances in which an insured institution does not perform the foreign currency conversion upfront, and they do not appear to be directly or primarily related to the cost to the insured institution of performing the currency exchange or the scale of an insured institution's foreign exchange business. For example, some trade association commenters on the 2019 RFI asserted that local customs or practices may make foreign currency exchange outside the United States ''difficult or impossible'' even if these restrictions are not pursuant to the laws of the receiving country, or that some foreign banks may refuse to process incoming wire transfers not denominated in U.S. dollars so as not to lose the revenue they receive from performing the currency exchange themselves. Based on outreach and its understanding of the market, however, the Bureau believes that insured institutions with foreign currency exchange businesses that have reached a sufficient or large-enough scale may be better-equipped at navigating these situations. As such, the proposed threshold, if adopted, should largely obviate the concerns related to these circumstances.[66]

The Bureau solicits comment generally on this proposed condition and, in particular, on the proposed 1,000-transfer threshold. The Bureau solicits comment on whether the proposed 1,000-transfer threshold is an appropriate number of transfers to avoid institutions incurring undue costs in establishing and maintaining currency-trading desks and managing the risks related to foreign exchange trading of currency for certain countries, or to use service providers, correspondent institutions, or persons that act as the insured institution's agent to obtain exact exchange rates for those currencies. The Bureau also solicits comment on whether some other number of transfers would be more appropriate in light of these cost considerations. The Bureau further solicits comment on whether there are other defined conditions which would warrant an exemption.

The Bureau notes that the proposed threshold amount focuses on the number of transfers to a particular country (in the country's local currency) that the insured institution made to that country in the previous calendar year. Unlike covered third-party fees, where the amount of the fees charged vary by institution, the Bureau understands that the exchange rate generally is determined at the country level. Nonetheless, the Bureau recognizes that in some cases, several countries may use the same currency, such as the Euro currency, and that in other cases one country may use more than one currency, such as Bhutan which officially allows both the ngultrum and the Indian rupee currencies to be used in the country.[67] The Bureau also notes that in some cases, a designated recipient may receive a transfer in a currency other than the country's local currency, such as where the transfer is sent to a designated recipient's institution in South Korea and the designated recipient receives the funds in Japanese yen. The Bureau solicits comment on whether this proposed exception should focus on the number of transfers in a particular currency (as opposed to a particular country in the country's local currency). For example, under this alternative approach, if more than one country uses the same currency, the insured institution would need to count the number of all the remittance transfers sent in that currency in the prior calendar year for purposes of the threshold amount, regardless of the country to which that transfer was sent. The Bureau solicits comment on whether it would be more difficult for insured institutions to count the number of remittance transfers sent in a particular currency in the prior calendar year, as opposed to counting the number of remittance transfers sent to a particular country in the country's local currency in the prior calendar year.

The remittance transfer is sent from the sender's account with the insured institution. Consistent with the temporary exception in § 1005.32(a), proposed § 1005.32(a)(4)(i)(D) provides that the remittance transfer must be sent from the sender's account with the insured institution; provided, however, for the purposes of proposed § 1005.32(b)(4)(i)(D), a sender's account does not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account. Currently, prepaid accounts generally are subject to the Remittance Rule, but the temporary exception in § 1005.32(a) does not apply to transfers from these accounts, unless the prepaid account is a payroll card account or a government benefit account, and the other conditions of the temporary exception are met. Proposed § 1005.32(a)(4)(i)(D) is intended to continue the current application of the Remittance Rule to prepaid accounts.

Permanent exception. Proposed § 1005.32(b)(4) would be a permanent exception with no sunset date. Based on the comments received on the 2019 RFI and further outreach and research, the Bureau believes that for at least the short-to-medium term it is likely that many insured institutions will depend primarily on the correspondent banking network to send remittance transfers where it may be unduly costly to provide exact exchange rates. As discussed in more detail above in the section-by-section analysis of § 1005.32(a), the Bureau believes that certain developments in the market eventually could make it practicable for insured institutions to disclose exact exchange rates for transfers, although the Bureau cannot forecast when technological and market development will permit this to occur. As such, the Bureau solicits comment on whether the Bureau should include a sunset provision with respect to the exception in proposed § 1005.32(b)(4) and, if so, what that sunset date should be.

Legal authority. To effectuate the purposes of EFTA and to facilitate compliance, the Bureau is proposing to use its EFTA section 904(a) and (c) authority to propose a new exception under § 1005.32(b)(4). Under its EFTA section 904(c) authority the Bureau ''may provide for such adjustments and exceptions for any class of electronic

[66] For example, the ''difficulty'' or ''impossibility'' some trade association commenters raised with respect to certain local customs or practices may refer to difficulty or impossibility due to disproportionate cost.

[67] *See* Int'l Monetary Fund, Monetary & Capital Markets Dep't, *Annual Report on Exchange Arrangements and Exchange Restrictions 2018,* at 17 (Apr. 16, 2019), *https://www.imf.org/en/Publications/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions/Issues/2019/04/24/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions-2018–46162.*

fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.'' [68] The Bureau believes that this proposed exception would facilitate compliance with EFTA, preserve consumer access, and effectuate its purposes. Specifically, the Bureau interprets ''facilitate compliance'' to include enabling or fostering continued operation in conformity with the law. The Bureau believes that the proposed exception would facilitate compliance where it may be infeasible or impracticable (due to undue cost) for insured institutions to determine the exchange rate because of an insufficient number of transfers to a particular country. Compliance difficulties or challenges that insured institutions face in providing exact disclosures could cause those institutions to reduce or cease offering transfers to certain countries, which in turn could mean that consumers have less access to remittance transfer services or have to pay more for them. By preserving such access, the proposed exception could also help maintain competition in the marketplace, therefore effectuating one of EFTA's purposes. If the temporary exception expires without the Bureau taking any mitigation measure, the Bureau believes certain insured institutions may stop sending transfers to certain countries, therefore potentially reducing competition for those transfers. This potential loss of competition could be detrimental to senders because the price of transfers could increase or because it could become less convenient to send them.[69]

Other approaches suggested by commenters on the 2019 RFI. The Bureau is not proposing to permit estimates for any remittance transfer that involves exchanging a foreign currency if the remittance transfer provider or its foreign currency provider is unable to conduct foreign exchange ''in the ordinary course of its business.'' The Bureau believes that the exception in proposed § 1005.32(b)(4) is a better approach in that it would create a bright-line threshold with respect to estimating exchange rates. The Bureau believes that the clarity of this standard is more likely than the suggested alternative to reduce uncertainty and promote compliance. The Bureau also believes that its proposed 1,000 threshold may address most of the concerns related to circumstances in which it is difficult for institutions to provide exact exchange rates for certain remittance transfers.

32(b)(5) Permanent Exception for Estimation of Covered Third-Party Fees by an Insured Institution

The Bureau is proposing to add a new permanent exception to the Remittance Rule that would permit insured institutions to estimate covered third-party fees (and other disclosures that depend on the covered third-party fees) that must be included in certain circumstances in the disclosures required by §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2). This proposed exception is designed to help mitigate the impact of the expiration of the temporary exception on consumers' access to certain remittance transfers.

The term ''covered third-party fees'' is defined in § 1005.30(h)(1) to mean any fees (other than ''non-covered third-party fees'' described in § 1005.30(h)(2)) that a person other than the remittance transfer provider imposes on the transfer. Fees imposed on a wire transfer by an intermediary institution are covered third-party fees. In addition, fees imposed by a designated recipient's institution on a wire transfer are covered third-party fees if the designated recipient's institution acts as an agent for the remittance transfer provider.

In contrast, the term ''non-covered third-party fees'' is defined as any fees imposed by the designated recipient's institution for receiving a remittance transfer into an account except if the institution acts as an agent of the remittance transfer provider. Fees a designated recipient's institution imposes on a wire transfer are non-covered third-party fees if the designated recipient's institution does not act as an agent of the remittance transfer provider. The term ''agent'' is defined in § 1005.30(a) to mean an agent, authorized delegate, or person affiliated with a remittance transfer provider, as defined under State or other applicable law, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider.

Comments Received on Estimating Covered Third-Party Fees in Response to the 2019 RFI

Many industry commenters noted that most transfers sent by insured institutions are wire transfers sent through correspondent banks in an open network payment system. Several industry trade associations indicated that currently there are two ways in which an insured institution may know the amount of covered third-party fees for a remittance transfer sent through correspondent banks in an open network payment system. One way is for the insured institution to form correspondent banking relationships with other financial institutions, because such relationships allow the insured institution to know or control the transaction fees that could apply to a remittance transfer. The other way is for the insured institution to send payments to institutions using the cover method as discussed above in the section-by-section analysis of § 1005.32(a) and the ''OUR'' charge code.[70] According to these trade associations, assuming the OUR code is honored,[71] the insured institution can disclose the exact transfer amount because in honoring the OUR code the designated recipient's institution and intermediary institutions will not deduct any transaction fees from the transfer amount. However, these trade associations have asserted that an insured institution is limited in the financial institutions to whom it may send such a payment, because to send a cover payment the insured institution must have a SWIFT relationship management application (RMA) [72] with the designated recipient's institution.[73]

Several industry commenters indicated, however, that it is not possible to use correspondent relationships or the cover method for all remittance transfers sent through correspondent banks in an open network payment system. One bank indicated that due to its size and its volume of remittance transfers, it is not feasible for the bank to develop correspondent banking relationships in many foreign countries.[74] Several trade

[68] 15 U.S.C. 1693b(c).

[69] As the Bureau stated in the 2019 RFI, the Bureau recognizes the value to consumers of being able to send remittance transfers directly from a checking account to the account of a recipient in a foreign country through their bank or credit union. 84 FR 17971, 17974 (Apr. 29, 2019).

[70] The OUR code instructs financial institutions that receive payment instructions sent via SWIFT that the sending institution will bear all of the payment transaction fees and the recipient of the payment will not pay any such fees.

[71] The Bureau also notes that, as discussed above in the section-by-section analysis of § 1005.32(a), it understands that by current market practice, financial institutions do not deduct transaction fees from cover payments.

[72] When an insured institution sends payment messages through SWIFT, it needs an RMA with the designated recipient's institution to send certain types of messages to that institution.

[73] Similarly, in connection with the Bureau's 2014 rulemaking to extend the temporary exception, one large bank told the Bureau that it could only send cover payments to institutions with which it has a preexisting agreement or relationship. *See* 79 FR 23234, 23245 (Jan. 31, 2014).

[74] Several trade associations submitted a comment letter to the Bureau in response to the 2017 Assessment Report RFI in which the trade

associations indicated that (1) with respect to the cover method, insured institutions are limited in the RMAs they can establish due to anticipated volume, anti-money laundering and other risk management requirements; (2) OUR instructions are market practices, not legally binding requirements; (3) some banks do not honor OUR instructions for a number of reasons, including local custom and the additional cost and complexity to downstream banks of collecting fees from the insured institution; and (4) the nature of an open network payment system does not allow banks to know with certainty at the time the disclosures are given whether other institutions will honor an OUR code, absent sending payments to one's correspondent bank or sending cover payments.

As discussed in more detail above in the section-by-section analysis of § 1005.32(a), several industry commenters indicated that if the Bureau does not adopt any additional exceptions that allow insured institutions to continue to estimate covered third-party fees in certain circumstances, insured institutions may stop sending remittance transfers in situations where the insured institutions cannot provide exact disclosures of covered third-party fees. Several other industry commenters indicated that insured institutions that continue to offer remittance transfers may see costs increase when sending transfers to certain designated recipients' institutions if insured institutions have to change the ways they provide remittance transfers in order to disclose exact covered third-party fees.

One trade association suggested that the Bureau should expand the definition of ''non-covered third-party fees'' to cover any fees imposed by a third-party that the insured institution cannot determine after reasonable inquiry, thereby no longer requiring the disclosure of those fees. (As discussed above, non-covered third-party fees are not required to be disclosed under the Remittance Rule.) The trade association also suggested that the Bureau should amend the definition of ''error'' in § 1005.33, or provide relevant interpretive guidance, to ensure that the definition of ''error'' does not include instances in which covered third-party fees are charged that were not previously identified during a reasonable review by the remittance transfer provider.

The Bureau's Proposal

The Bureau is proposing to add a new permanent exception to the Remittance Rule that would permit insured institutions to estimate the amount of covered third-party fees (and other disclosures that depend on the amount of those fees) in certain circumstances. Based on the comments received on the 2019 RFI and other outreach and research, the Bureau is concerned that if it does not adopt any additional exceptions that allow estimates of covered third-party fees after the temporary exception expires, some insured institutions may choose to stop sending remittance transfers to recipients with accounts at certain designated recipients' institutions. These insured institutions may choose to stop providing certain remittance transfers because they deem the costs of determining exact covered third-party fees to be prohibitively expensive. The Bureau is concerned that if these institutions discontinue providing such transfers, consumer access to remittance transfer services for certain designated recipients' institutions may be reduced or eliminated. As discussed in more detail above in the section-by-section analysis of § 1005.32(a), it appears increasingly unlikely that any new technologies or partnerships will be able to fully eliminate insured institutions' reliance on estimates in the short-to-medium term.

Also, the Bureau is concerned that in a scenario where the Bureau provides no additional exceptions that allow estimates of covered third-party fees when the temporary exception expires, insured institutions that continue to offer remittance transfer services may see costs increase when sending transfers to certain designated recipients' institutions if insured institutions have to change the ways they provide remittance transfers in order to disclose exact covered third-party fees. This would predictably lead to increased prices for consumers. In addition, the Bureau is concerned that prices for consumers may also increase for transfers to certain designated recipients' institutions (due to reduced competition) if the number of remittance transfer providers offering remittance transfers to such designated recipients' institutions is reduced due to some providers eliminating or curtailing transfer services because they could not determine and disclose exact covered third-party fees for those designated recipients' institutions.

Proposed § 1005.32(b)(5)(i) generally provides that for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for a remittance transfer to a particular designated recipient's institution in accordance with § 1005.32(c) for the amounts required to be disclosed under § 1005.31(b)(1)(vi) through (vii), if all of the following conditions are met: (1) The remittance transfer provider is an insured institution, as defined in § 1005.32(a)(3); (2) the insured institution cannot determine the exact covered third-party fees for a remittance transfer to a particular designated recipient's institution at the time it must provide the applicable disclosures; (3) the insured institution made 500 or fewer remittance transfers in the prior calendar year to that designated recipient's institution; and (4) the remittance transfer generally is sent from the sender's account with the insured institution.[75] The Bureau is also proposing conforming changes to the following provisions to reference the proposed exception in § 1005.32(b)(5) where the temporary exception in § 1005.32(a) currently is referenced and pertains to the estimation of covered third-party fees: (1) § 1005.32(c); (2) § 1005.33(a)(1)(iii)(A); (3) § 1005.36(b)(3); (4) comment 32–1; (5) comment 32(c)(3)–1; and (6) comment 36(b)–3.

Proposed § 1005.32(b)(5)(i) would generally apply to the following disclosures set forth in § 1005.31(b)(1)(vi) through (vii) respectively: (1) The amount of any covered third-party fees; and (2) the amount that will be received by the designated recipient (after deducting any covered third-party fees). Proposed § 1005.32(b)(5)(ii) makes clear, however, that the amount that will be received by the designated recipient (after deducting covered third-party fees) may be estimated under proposed § 1005.32(b)(5)(i) only if covered third-party fees are permitted to be estimated under proposed § 1005.32(b)(5)(i) and the estimated covered third-party fees affect the amount of such disclosure. For example, if the covered third-party fees for a remittance transfer may not be estimated under proposed § 1005.32(b)(5), the amount that will be received by the designated recipient (after deducting any covered third-party

associations indicated that insured institutions are unable to determine exact amounts for certain destinations because the low volume of transactions and resulting lack of correspondent relationships in such geographies makes the usual means by which insured institutions gather information to enable exact disclosures cost prohibitive or not operationally feasible. These trade associations made similar comments in a letter to the Bureau in response to the 2018 Adopted Regulations RFI.

[75] For the purposes of proposed § 1005.32(b)(5), a sender's account would not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.

fees) may not be estimated under proposed § 1005.32(b)(5). The insured institution, however, may be able to use another permanent exception set forth in § 1005.32(b), including the proposed exception in § 1005.32(b)(4), to estimate that disclosure if the conditions of those exceptions are met.

Each of the four conditions set forth in proposed § 1005.32(b)(5)(i)(A) through (D) is discussed in more detail below. The Bureau solicits comment generally on this proposed exception, and on each condition as discussed in more detail below.

The remittance transfer provider is an insured institution. Proposed § 1005.32(b)(5)(i)(A) provides that the remittance transfer provider must be an insured institution as defined in § 1005.32(a)(3).[76] The Bureau solicits comment on whether the Bureau should extend this exception to apply to remittance transfer providers that are not insured institutions, including MSBs and broker-dealers, and the reasons why the proposed exception should apply to these persons.[77]

The insured institution cannot determine the exact covered third-party fees for a remittance transfer to a particular designated recipient's institution at the time it must provide the applicable disclosures. As a condition of using the exception in proposed § 1005.32(b)(5), proposed § 1005.32(b)(5)(i)(B) would require that, at the time the insured institution must provide, as applicable, the disclosure required by § 1005.31(b)(1) through (3) or § 1005.36(a)(1) or (2), the insured institution cannot determine the exact covered third-party fees required to be disclosed under § 1005.31(b)(1)(vi) for that remittance transfer. Proposed comment 32(b)(5)–1 provides guidance on when an insured institution cannot determine the exact covered third-party fees as applicable to a remittance transfer at the time the disclosures must be given. Specifically, proposed comment 32(b)(5)–1 provides that for purposes of § 1005.32(b)(5)(i)(B), an insured institution cannot determine, at the time it must provide the applicable disclosures, the exact covered third-party fees required to be disclosed under § 1005.31(b)(1)(vi) for a remittance transfer to a designated recipient's institution when all of the following conditions are met: (1) The insured institution does not have a correspondent relationship with the designated recipient's institution; (2) the designated recipient's institution does not act as an agent of the insured institution; (3) the insured institution does not have an agreement with the designated recipient's institution with respect to the imposition of covered third-party fees on the remittance transfer (*e.g.,* an agreement whereby the designated recipient's institution agrees to charge back any covered third-party fees to the insured institution rather than impose the fees on the remittance transfer); and (4) the insured institution does not know at the time the disclosures are given that the only intermediary financial institutions that will impose covered third-party fees on the transfer are those institutions that have a correspondent relationship with or act as an agent for the insured institution, or have otherwise agreed upon the covered third-party fees with the insured institution. The Bureau believes that proposed comment 32(b)(5)–1 sets forth the circumstances in which an insured institution cannot determine the exact covered third-party fees for remittance transfers sent through correspondent banks in an open network payment system and seeks comment on this provision.

In contrast, proposed comment 32(b)(5)–2 provides that for purposes of proposed § 1005.32(b)(5)(i)(B), an insured institution can determine, at the time it must provide the applicable disclosures, exact covered third-party fees for a remittance transfer, and thus the insured institution may not use the exception in proposed § 1005.32(b)(5) to estimate the disclosures required under § 1005.31(b)(1)(vi) or (vii) for the transfer, if any of the following conditions are met: (1) An insured institution has a correspondent relationship with the designated recipient's institution; (2) the designated recipient's institution acts as an agent of the insured institution; (3) an insured institution has an agreement with the designated recipient's institution with respect to the imposition of covered third-party fees on the remittance transfer; or (4) an insured institution knows at the time the disclosures are given that the only intermediary financial institutions that will impose covered third-party fees on the transfer are those institutions that have a correspondent relationship with or act as an agent for the insured institution, or have otherwise agreed upon the covered third-party fees with the insured institution. The Bureau believes that proposed comment 32(b)(5)–2 sets forth the circumstances in which an insured institution can determine the exact covered third-party fees for remittance transfers sent through a correspondent banks in an open network payment system and seeks comment on this provision.

The Bureau solicits comment on the condition set forth in proposed § 1005.32(b)(5)(i)(B) generally, and on the guidance set forth in proposed comments 32(b)(5)–1 and –2 for whether an insured institution can or cannot determine the exact covered third-party fees for a remittance transfer for purposes of proposed § 1005.32(b)(5)(i)(B).

The insured institution made 500 or fewer remittance transfers in the prior calendar year to that designated recipient's institution. Proposed § 1005.32(b)(5)(i)(C) provides that, with respect to the designated recipient's institution to which the remittance transfer is being sent, the insured institution must have made 500 or fewer remittance transfers in the prior calendar year to that designated recipient's institution. The Bureau notes that the proposed threshold amount focuses on the number of transfers to the particular designated recipient's institution that the insured institution made in the previous calendar year. The Bureau understands that covered third-party fees generally are determined by each institution rather than at the country level.

Proposed comment 32(b)(5)–3.i provides that for purposes of determining whether an insured institution made 500 or fewer remittance transfers in the prior calendar year to a particular designated recipient's institution pursuant to proposed § 1005.32(b)(5)(i)(C), the number of remittance transfers provided includes remittance transfers in the prior calendar year to that designated recipient's institution regardless of whether the covered third-party fees were estimated for those transfers. The proposed comment provides an example to illustrate.

Proposed comment 32(b)(5)–3.ii also provides that for purposes of the proposed 500 threshold, the number of remittance transfers includes remittance transfers provided to the designated recipient's institution in the prior calendar year regardless of whether the designated recipients received the funds in the country's local currency or in another currency. The proposed comment provides an example to illustrate.

[76] The term ''insured institution'' is defined in § 1005.32(a)(3) to mean insured depository institutions (which includes uninsured U.S. branches and agencies of foreign depository institutions) as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and insured credit unions as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

[77] See the section-by-section analysis of proposed § 1005.32(b)(4) above for a discussion of a similar request for comment related to proposed § 1005.32(b)(4)(i)(A).

The Bureau is concerned that if an insured institution is sending 500 or fewer transfers annually to a given designated recipient's institution, it may be unduly costly for the insured institution to establish the necessary relationships to know the covered third-party fees that will apply to a remittance transfer at the time the disclosures must be given. For example, based on comments received on the 2019 RFI and other outreach and research, the Bureau understands insured institutions sending remittance transfers through correspondent banks in an open network payment system would know the exact amount of covered third-party fees that will apply to a remittance transfer at the time disclosures are given if the insured institution has a correspondent relationship with the designated recipient's institution. The Bureau understands that another way in which the insured institution may know at the time the disclosures must be given the exact amount of covered third-party fees for a particular remittance transfer is through using the cover method under the SWIFT network, as discussed above. To use the cover method, the insured institution would need an RMA with the designated recipient's institution.

The Bureau understands that there are costs to maintaining the relationships that are needed to enable insured institutions to provide exact disclosures of covered third-party fees for remittance transfers.[78] Based on comments on the 2019 RFI and other outreach and research, the Bureau believes that anticipated transfer volume from an insured institution to a particular designated recipient's institution is an important factor in the insured institution's decision about whether to form and maintain such relationships.

The Bureau also recognizes that transfer volume is not the only factor in determining whether an insured institution enters into a correspondent banking relationship or an RMA with another financial institution. Industry commenters on the 2019 RFI identified factors that relate to the insured institution's risk assessment requirements and asked the Bureau to take these into consideration when contemplating regulatory solutions. It appears that these risk assessment requirements weigh various risk factors, such as cybercrime risk, to the insured institution. Because insured institutions could take significantly different approaches to managing such risks, based on their risk appetite, the Bureau believes that it would be difficult to adopt specific exceptions to address all of these risk factors and the varying risk appetites across institutions. Thus, with respect to permitting estimates of covered third-party fees, the Bureau is proposing a bright-line threshold of insured institutions making 500 or fewer transfers to a particular designated recipient's institution in the prior calendar year. The Bureau believes the proposed threshold, if adopted, would obviate a number of the concerns related to these risk factors.

The Bureau solicits comment generally on this proposed condition, and in particular, on the proposed 500 transfer threshold amount. The Bureau solicits comment on whether the proposed 500 transfer threshold is appropriate in determining whether it is cost effective for insured institutions to incur the costs of establishing and maintaining the necessary relationships so that they can determine the exact covered third-party fees for remittance transfers to that designated recipient's institution. The Bureau also solicits comment on whether the transfer threshold should be higher or lower than 500 transfers to achieve this objective. The Bureau further solicits comment on whether there are other defined conditions which would warrant an exemption.

The remittance transfer is sent from the sender's account with the insured institution. Proposed § 1005.32(a)(5)(i)(D) provides that the remittance transfer must be sent from the sender's account with the insured institution; provided however, for the purposes of proposed § 1005.32(b)(5), a sender's account would not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.[79]

Permanent exception. Proposed § 1005.32(b)(5) would be a permanent exception with no sunset date. The Bureau solicits comment on whether the Bureau should include a sunset provision with respect to the proposed exception in § 1005.32(b)(5) and, if so, what that sunset date should be.[80]

Legal authority. To effectuate the purposes of EFTA and to facilitate compliance, the Bureau is proposing to use its EFTA section 904(a) and (c) authority to add a new exception under § 1005.32(b)(5). Under its EFTA section 904(c) authority, the Bureau ''may provide for such adjustments and exceptions for any class of electronic fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.''[81] The Bureau believes that the proposed exception would facilitate compliance with EFTA, preserve consumer access, and effectuate its purposes. Specifically, the Bureau interprets ''facilitate compliance'' to include enabling or fostering continued operation in conformity with the law. The Bureau believes that the proposed exception would facilitate compliance where it may be infeasible or impracticable (due to disproportionate cost) for insured institutions to determine covered third-party fees because of insufficient volume to a particular designated recipient's institution. Compliance difficulties or challenges that insured institutions face in providing exact covered third-party fees could cause those institutions to reduce or cease offering transfers to certain designated recipients' institutions, which in turn could mean that consumers have less access to remittance transfer services. By preserving such access, the proposed exception also could help maintain competition in the marketplace, therefore effectuating one of EFTA's purposes. If the temporary exception expires without the Bureau taking any mitigation measure, the Bureau believes certain insured institutions may stop sending transfers to particular designated recipients' institutions, therefore reducing competition for those transfers. This potential loss of market participants could be detrimental to senders because it could increase the price of remittance transfers or such transfer services could become less convenient.[82]

Other approaches suggested by commenters on the 2019 RFI. The Bureau is not proposing to expand the definition of ''non-covered third-party fees'' to include any fees imposed by a third-party that the insured institution cannot determine after reasonable inquiry, thereby no longer requiring the disclosure of those fees. (Non-covered third-party fees are not required to be

[78] *See* Financial Stability Board, *FSB Correspondent Banking Data Report,* at 4, 44 (2017); 2016 BIS Report at 11.

[79] See the section-by-section analysis of proposed § 1005.32(b)(4)(i)(D) above for a discussion of a similar provision related to proposed § 1005.32(b)(4).

[80] See the section-by-section analysis of proposed § 1005.32(b)(4) above for a discussion of a similar request for comment related to proposed § 1005.32(b)(4).

[81] 15 U.S.C. 1693b(c).

[82] As the Bureau stated in the 2019 RFI, the Bureau recognizes the value to consumers of being able to send remittance transfers directly from a checking account to the account of a recipient in a foreign country though their bank or credit union. 84 FR 17971, 17974 (Apr. 29, 2019).

disclosed under the Remittance Rule.) The Bureau is likewise not proposing to amend the definition of ''error'' in § 1005.33 to exclude instances in which a covered third-party fee is charged that was not previously identified during a reasonable review by the remittance transfer provider. The Bureau believes proposed § 1005.32(b)(5) is a better approach in that it would create a bright-line threshold with respect to estimating covered third-party fees. The proposed approach would allow insured institutions to provide estimates of covered third-party fees where it may not be cost effective for those institutions to continue providing such transfers if they could not provide estimates. Also, the Bureau believes that the proposed approach would benefit consumers more than the suggested alternative related to ''non-covered third-party fees'' because the sender of the transfer would receive an estimate of the covered third-party fees if the conditions of proposed § 1005.32(b)(5) are met, rather than not receiving any information about the fees if these fees were deemed to be ''non-covered third-party fees.''

Additional Issue for Comment: The Permanent Exception in § 1005.32(b)(1) and the Bureau's Safe Harbor Countries List

As discussed above, EFTA generally requires a remittance transfer provider to disclose the exact exchange rate to be applied to a remittance transfer.[83] Also as described above, an exception to this requirement (in section 919(c) of EFTA) allows the Bureau to write regulations specific to transfers to certain countries if it has determined that the recipient country does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency the designated recipient will receive. If these conditions are met, the provider may use a reasonably accurate estimate of the foreign currency to be received, based on the exchange rate the provider conveyed to the sender at the time the sender initiated the transaction.[84]

The Bureau implemented section 919(c) of EFTA in § 1005.32(b)(1), creating a ''permanent exception for transfers to certain countries.'' The exception is available in two situations. First, § 1005.32(b)(1)(i) permits providers to use estimates if they cannot determine exact amounts because (A) the laws of the recipient country do not permit such a determination, or (B) the method by which transactions are made in the recipient country does not permit such determination. Comment 32(b)(1)–2.i explains that, for example, under the first category, the laws do not permit exact disclosures when the exchange rate is determined after the provider sends the transfer or at the time of receipt. Comment 32(b)(1)–3 offers an example of a situation that qualifies for the methods exception. The example provided is a situation where transactions are sent via international ACH on terms negotiated between the U.S. government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank or other governmental authority after the provider sends the remittance transfer. Comments 32(b)(1)–4.i through iii provide additional examples of situations that do and do not qualify for the methods exception.

Second, § 1005.32(b)(1)(ii) offers a safe harbor allowing remittance transfer providers to disclose estimates instead of exact amounts for remittance transfers to certain countries as determined by the Bureau. Notably, however, the Rule does not allow a remittance transfer provider to use the safe harbor if the provider has information that a country's laws or the method by which transactions are conducted in that country permits a determination of the exact disclosure amount.

In 2012, the Bureau issued a list of five countries—Aruba, Brazil, China, Ethiopia, and Libya—that qualify for this safe harbor.[85] The list contains countries whose laws the Bureau has decided prevent providers from determining, at the time the required disclosures must be provided, the exact exchange rate on the date of availability for a transfer involving a currency exchange.[86] The Bureau also explained that the safe harbor countries list was subject to change, and provided instructions for contacting the Bureau to request that countries be added or removed from the list.[87] Since 2012, the Bureau has not added any additional countries to this list.

The Bureau has received feedback over the years from some remittance transfer providers and their trade associations regarding the Bureau's countries list. In the 2019 RFI, the Bureau again sought comment on what other countries, if any, should be added to the list because their laws do not permit the determination of exact amounts at the time the pre-payment disclosure must be provided.[88] In response, several industry commenters, including trade associations, banks, and a credit union, made various requests, primarily suggesting that particular countries or regions be added to the list. A few of these commenters requested that the Bureau make other changes to the permanent exception in § 1005.32(b)(1) to address, for example, difficulties in obtaining accurate fee and exchange rate information that they assert occur when sending open network transfers. A group of trade association commenters also suggested that the Bureau loosen and revise its requirements for the inclusion of additional countries on the countries list as a way to mitigate the expiration of the temporary exception.

The Bureau again seeks comment on the permanent exception in § 1005.32(b)(1) and the Bureau's process for adding countries to the list. The Bureau requests that any commenters seeking to have particular countries added to the list describe how the relevant laws or method prevent such a determination. The Bureau is particularly interested in whether these countries are ones for which remittance transfer services are not currently being provided, or whether providers are currently relying on estimates for providing disclosures required by the Rule.

The Bureau has, to date, only put countries on the list where the *laws* of the country prevent determining the exact exchange rate, although EFTA and the Rule permit the Bureau to add counties to the list if there is an issue with the *method* as well. As noted above, some have suggested that the Bureau amend § 1005.32(b)(1)(i) to provide that wire transfers are a ''method by which transactions are made in the recipient country'' that does not allow exact disclosures if such amounts cannot be reasonably determined at the time the disclosures are provided. However, for reasons discussed above in the section-by-section analysis of § 1005.32(a), the Bureau is not proposing to do so.

[83] EFTA section 919(a)(2)(A)(iii), codified at 15 U.S.C. 1693*o*–1(a)(2)(A)(iii).

[84] EFTA section 919(c)(2), codified at 15 U.S.C. 1693*o*–1(c)(2).

[85] Bureau of Consumer Fin. Prot., *Remittance Rule Safe Harbor Countries List* (Sept. 26, 2012), *http://files.consumerfinance.gov/f/201209_CFPB_Remittance-Rule-Safe-Harbor-Countries-List.pdf.* The Bureau subsequently published that list in the **Federal Register**. 78 FR 66251 (Nov. 5, 2013).

[86] *Id.* at 3.

[87] *Id.* at 3–4.

[88] The Bureau also asked that commenters describe how the relevant laws prevent such a determination, and whether the countries were ones for which remittance transfer services were not currently being provided, or whether providers were relying on estimates. 84 FR 17971, 17977 (Apr. 29, 2019).

Nonetheless, the Bureau is interested in suggestions regarding possible changes to the substantive criteria by which it adds countries to the countries list, whether based on the laws or method. For example, the law of a country precluding determining exact amounts could mean both the express terms of the law or the law as applied.

The Bureau is also interested in suggestions regarding possible changes to the processes and standards by which it adds countries to the countries list, including standards related to the nature or quantum of evidence needed for the Bureau to determine that the law or method of transfer to a country precludes providing exact disclosures. Currently, the Bureau's instructions to persons wishing to have countries considered for the countries list is to send feedback regarding whether the Bureau should make changes to the list, and any supporting materials (in English), to a specified email or mailing address. The Bureau has only included countries on the countries list where it has been able to verify that the law or regulation warrants inclusion. The Bureau has not, historically, added countries to the list when it has not been able to verify that they merit inclusion. The Bureau seeks comment on whether, in order to facilitate its review of countries list requests, it should articulate a more detailed list of information and documents (such as copies of relevant laws and regulations, as well as affidavits) that an applicant might submit to make such a request of the Bureau.

Given the new permanent exceptions proposed herein to address the expiration of the temporary exception, the Bureau seeks comment on whether insured institutions expect that proposed § 1005.32(b)(4) and (5) will address their concerns regarding providing estimates or whether they would additionally need to rely on § 1005.32(b)(1). The Bureau relatedly requests comment on the volume of transfers that remittance transfer providers send to the countries that are currently on the countries list as well as to those that they are requesting be added.

Finally, the Bureau seeks comment on whether any remittance transfer providers use estimates pursuant to § 1005.32(b)(1)(i) with respect to any countries that are not on the countries list. As the Bureau has stated in the past, that provision permits a remittance transfer provider to make its own determination that the laws of other recipient countries not on the list, or the method of sending transfers to such countries, do not permit a determination of exact amounts.[89] If providers are not relying on § 1005.32(b)(1)(i) to provide estimates, the Bureau requests comment on why they are not doing so.

The Bureau notes that its focus in this rulemaking is to address the expiration of the temporary exception and the safe harbor threshold. Accordingly, the Bureau cautions that, in light of its time frame for doing so, it will give priority to addressing those issues over the issues relating to the countries list.

VI. Effective Date

The Bureau is proposing that any final rule take effect on July 21, 2020. The Bureau anticipates that at least 30 days prior to July 21, 2020, it will publish any final rule in the **Federal Register**, as required under section 553(d) of the Administrative Procedure Act.[90] As discussed above, the temporary exception in § 1005.32(a) expires on July 21, 2020. The Bureau is proposing that its modifications to the Rule, which are intended to mitigate the effects of the expiration of the temporary exception, become effective on the day the temporary exception expires.

The Bureau's proposed change to the safe harbor threshold in § 1005.30(f)(2) will also, among other things, mitigate the effect of the temporary exception's expiration on insured institutions that provide between 100 and 500 remittance transfers per year. Given the Bureau's expected timing for publication of a final rule addressing the safe harbor threshold and provisions to mitigate the expiration of the temporary exception, and the interplay between the safe harbor threshold and the temporary exception, the Bureau is likewise proposing that the change to the safe harbor threshold become effective on July 21, 2020. The Bureau seeks comment on this aspect of the proposal. The Bureau also seeks comment on whether a mid-year change in the safe harbor threshold would pose any complications for providers or cause confusion, and if so, whether the Bureau should make the change to the safe harbor threshold effective on some later date, such as January 1, 2021.

The Bureau also solicits comment on any compliance issues that might arise for insured institutions when transitioning from use of the temporary exception to use of the two new proposed exceptions set forth in proposed § 1005.32(b)(4) and (5).

After considering comments on this proposal, the Bureau intends to publish a final rule with respect to the safe harbor threshold and provisions to mitigate the expiration of the temporary exception.

VII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing the proposed rule, the Bureau has considered the potential benefits, costs, and impacts.[91] The Bureau also consulted with appropriate Federal agencies regarding the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies as required by section 1022(b)(2)(B) of the Dodd-Frank Act.[92] The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts.

The proposed rule would amend several elements of the Remittance Rule. (1) It would raise the safe harbor threshold for providing remittance transfers in the normal course of business from 100 transfers to 500 transfers. Under this proposed change, a person that provided 500 or fewer remittance transfers in the previous calendar year and provides 500 or fewer remittance transfers in the current calendar year would be deemed not to be providing remittance transfers in the normal course of its business and thus is not subject to the Rule. (2) It would provide a permanent exception that would allow insured institutions to estimate the exchange rate (and other disclosures that depend on the exchange rate) under certain conditions when sending to a country, principally that the designated recipient of the remittance transfer will receive funds in the country's local currency and (a) the insured institution made 1,000 or fewer

[89] 78 FR 66251, 66252 (Nov. 5, 2013).

[90] 5 U.S.C. 553(d). Under the Congressional Review Act (5 U.S.C. 801 through 808), if the Office of Management and Budget determines that a rule constitutes a ''major rule'' as defined in 5 U.S.C. 804(2), the rule may not take effect until the later of 60 days after it is received by Congress or published in the **Federal Register**. 5 U.S.C. 801(a)(3)(A).

[91] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(A)) requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact of the proposed rule on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act (12 U.S.C. 5516); and the impact on consumers in rural areas.

[92] Section 1022(b)(2)(B) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(B)) requires that the Bureau consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

transfers in the prior calendar year to that country where the designated recipients received funds in the country's local currency and (b) the insured institution cannot determine the exact exchange rate for that particular transfer at the time it must provide the applicable disclosures. (3) It would provide a permanent exception that would permit insured institutions to estimate covered third-party fees (and disclosures that depend on the amount of those fees) under certain conditions when sending to a designated recipient's institution, principally that the insured institution (a) made 500 or fewer remittance transfers to that designated recipient's institution in the prior calendar year and (b) the insured institution cannot determine the exact covered third-party fees for that particular transfer at the time it must provide the applicable disclosures.

The Bureau would generally consider the benefits, costs, and impacts of the proposed rule against the baseline in which the Bureau takes no action. Under that approach, the baseline would be premised on an assumption that the Rule's existing temporary exception allowing certain insured institutions to disclose estimates instead of exact amounts to consumers would expire and the normal course of business safe harbor threshold would remain at 100 transfers. However, if the Bureau adopts the proposal as set forth herein, certain entities currently benefitting from the temporary exception would be exempt from the Rule entirely because of the expansion of the normal course of business safe harbor threshold. These entities would obtain no additional reduction in burden from the permanent exceptions for exchange rates and covered third-party fees because they would be excepted entirely from the Rule. Given this, the Bureau believes it is appropriate to consider the reduction in burden from the proposed permanent exceptions against a baseline in which the Bureau has amended the normal course of business safe harbor threshold as proposed. In other words, the Bureau considers the potential benefits, costs, and impacts of the proposed permanent exceptions only on insured institutions that provide more than 500 transfers in the prior and current calendar years. The impact analysis therefore discusses two baselines in sequence, as follows: (1) For purposes of considering the proposed normal course of business safe harbor threshold of 500 transfers, the Bureau uses a no-action baseline that assumes the temporary exception will expire and no permanent exceptions will be adopted; and (2) for purposes of considering the proposed permanent exceptions for exchange rates and covered third-party fees, the Bureau uses a baseline in which the temporary exception has expired and the agency has amended the normal course of business safe harbor threshold as proposed, so entities that provide 500 or fewer transfers in the previous and current calendar years are excluded.

With respect to the provisions of the proposed rule, the Bureau's analysis considers the benefits and costs to remittance transfer providers (covered persons) and as well as to senders (consumers). The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to benefits, costs, and impacts, as well as an appropriate baseline or baselines.

B. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion in this impact analysis relies on data the Bureau obtained from industry, other regulatory agencies, and publicly available sources. The Bureau has done extensive outreach on many of the issues the proposal raises, including conducting the Assessment and issuing the Assessment Report as required under section 1022(d) of the Dodd-Frank Act, issuing the 2019 RFI, holding discussions with a number of remittance transfer providers that are banks and credit unions of different sizes, and consulting with other stakeholders. However, as discussed further below, the data with which to quantify the potential costs, benefits, and impacts of the proposed rule are generally limited.

Quantifying the benefits of the proposed rule for consumers presents certain challenges. As discussed further below, the proposed rule would tend to preserve access to wire transfers, the great majority of which are provided by insured institutions, and would tend to hold steady the pricing of wire transfers for certain, but not necessarily all, consumers who send wire transfers. The proposed rule would allow some insured institutions to continue using estimates in disclosures while other insured institutions would have to provide exact amounts in disclosures. Determining the number of consumers experiencing these different effects would require representative market-wide data on the prevalence of consumers who receive exact amounts versus estimated amounts in disclosures as well as the costs to providers of conveying this information to consumers in compliance with the Rule and the Bureau's proposed amendments thereto. The Bureau would then need to predict the responses of providers to these costs and the prevalence of consumers who would receive exact information versus estimated information in disclosures under the proposed rule. The Bureau does not have the data needed to quantify these effects, nor could it readily quantify the benefits to consumers of these effects. The Bureau asks interested parties to provide data, research results, and other factual information that would allow the Bureau to further quantify the effects of the proposed rule.

In light of these data limitations, the analysis below provides both a quantitative and qualitative discussion of the potential benefits, costs, and impacts of the proposed rule. Where possible given the data available, the Bureau has made quantitative estimates based on economic principles. Where the data is limited or not available, the Bureau relies on general economic principles and the Bureau's experience and expertise in consumer financial markets to provide a qualitative discussion of the benefits, costs, and impacts of the proposed rule.

C. Potential Benefits and Costs to Covered Persons and Consumers

As discussed above in explaining the baseline, the cost to certain insured institutions of the expiration of the temporary exception would be mitigated, although to differing extents, by the proposed increase in the normal course of business safe harbor threshold and the proposed permanent exceptions that would permit insured institutions to provide estimates of exchange rates and covered third-party fees in certain circumstances. In particular, insured institutions that currently provide between 101 and 500 transfers [93] in the prior and current calendar years would no longer be covered by the Rule and would therefore no longer need to provide any disclosures at all. If the Bureau were to adopt all of the proposed provisions, the permanent exceptions permitting estimation of exchange rates and covered third-party fees would not have any additional effect on the insured institutions (and their customers) that the Rule would no longer cover. The Bureau therefore believes that it is appropriate to consider the benefits and costs to consumers and covered persons of the proposed rule through considering: (1) The proposed permanent exceptions that would increase the normal course of business safe harbor threshold; and

[93] As noted above in the section-by-section analysis of § 1005.30(f), ''between 101 and 500'' means 101 or more and 500 or fewer.

(2) the effects of the proposals to allow certain insured institutions to provide estimates in certain disclosures under certain circumstances on banks and credit unions that currently provide more than 500 transfers annually.

As explained above, the Bureau is not aware of any nonbank remittance transfer providers that would qualify for exclusion from the Rule under the proposed 500-transfer normal course of business safe harbor threshold. In particular, the Bureau believes that all MSBs that provide remittance transfers provide more than 500 transfers annually. Further, the two proposed permanent exceptions would apply only to insured institutions and would not apply to nonbank remittance transfer providers like MSBs.

In light of the above, the proposed rule overall could affect MSBs only indirectly, through shifts in the volume of remittance transfers sent by MSBs relative to the volume sent by insured institutions. The Bureau believes, however, that these shifts would be limited because MSBs provide a somewhat different service than banks and credit unions to meet different consumer demands. For example, as discussed in part II above, in the Assessment Report, the Bureau found that the dollar value of the average remittance transfer provided by MSBs is typically much smaller (approximately $381 on average) than the dollar value of transfers (more than approximately $6,500 on average) provided by banks or credit unions.[94] Thus, in general, if certain insured institutions increase the cost of sending remittance transfers or cease sending remittance transfers to certain countries and/or designated recipients' institutions when the temporary exception expires, the Bureau believes that consumers who had been using these insured institutions to send wire transfers would generally shift to other insured institutions and not to MSBs. The Bureau therefore expects only a modest impact relative to the market today on MSBs from the expiration of the temporary exception, with or without the proposals herein. Thus, the Bureau expects only a modest impact on MSBs from the proposals relative to the assumed baseline.[95]

1. Raising the Normal Course of Business Safe Harbor Threshold to 500 Transfers Annually

The proposed rule would raise the normal course of business safe harbor threshold for Rule coverage from 100 transfers to 500 transfers. Under the proposed rule, a person that provided 500 or fewer remittance transfers in the previous calendar year and provides 500 or fewer remittance transfers in the current calendar year would be deemed not to be providing remittance transfers in the normal course of its business and thus would not be subject to the Rule. Based on their respective Call Reports,[96] 414 banks and 247 credit unions provided between 101 and 500 transfers in either 2017 or 2018, but not more than 500 in either year.[97] These banks and credit unions are currently covered by the Remittance Rule but would not be covered if the 500-transfer threshold was adopted as proposed. These institutions represent 55 percent of banks providing more than 100 transfers and 62 percent of credit unions providing more than 100 transfers. Thus, under the proposed rule, 661 previously covered institutions would no longer need to provide exact disclosures or meet any of the other requirements of the Rule. Comparing these numbers to calculations from 2017 and earlier in the Assessment Report, the number of banks and credit unions providing between 101 and 500 transfers has not changed much from year to year, so are likely to be representative of the impact going forward.

Benefits and Costs to Insured Institutions

As discussed above, 414 banks and 247 credit unions subject to the Rule under the no-action baseline would no longer incur the compliance costs of the Rule if the 500-transfer safe harbor threshold were adopted as proposed. The Bureau does not have a precise estimate of the costs these institutions would stop incurring if the Bureau adopts the 500-transfer normal course of business safe harbor threshold. However, the Assessment Report discusses the kinds of compliance costs faced by providers covered by the Rule.[98] These costs include staff training costs, information acquisition costs for disclosures, and error investigation and resolution costs.

In addition, if any banks and credit unions were restricting the number of remittance transfers that they provide to 100 or fewer in order to qualify for the existing normal course of business safe harbor threshold, it is possible they may decide to start providing more remittance transfers if the threshold were increased to 500 transfers as proposed. However, the Assessment Report indicates that banks and credit unions did not limit the number of transfers to stay under the existing normal course of business safe harbor threshold, nor did banks or credit unions appear to cease providing remittance transfers because of the Rule.[99] These facts suggest it is unlikely that many institutions would start providing more remittance transfers if the normal course of business safe harbor threshold were increased from 100 to 500 transfers as proposed.

Finally, it is possible that some insured institutions would see effects from an increased normal course of business safe harbor threshold because of the preferences of their customers. One possibility is that the customers of insured institutions that would be excluded from coverage if the Bureau were to increase the normal course of business safe harbor threshold to 500 transfers, might decide to start transferring with insured institutions that would remain subject to the Rule. These customers might prefer receiving the pre-payment disclosure and receipts or having the error resolution rights required under the Rule, even if they have to pay more to send remittance transfers. Conversely, if the price of sending remittance transfers is lower with the newly non-covered institutions, some customers may switch to those institutions. Given the inconvenience of changing remittance transfer providers, and the analysis of the impact of the 100-transfer normal course of business safe harbor threshold in the Assessment Report,[100] the Bureau expects that the net change in transfers and market participation would likely be small for insured institutions that

[94] Assessment Report at 68, 73.

[95] Entities besides insured institutions and traditional MSBs can be remittance transfer providers, including broker-dealers. The Bureau lacks data on the number of remittance transfers sent by these entities. The Bureau understands that broker-dealers may use wire services provided by banks for remittance transfers and that a broker-dealer's reliance on the temporary exception may mirror that of the banks with whom they are associated. As discussed above in the section-by-section analysis of proposed § 1005.32(b)(4), there is an SEC no-action letter that concluded SEC staff will not recommend enforcement actions to the SEC under Regulation E if a broker-dealer provides disclosures as though the broker-dealer were an insured institution for purposes of the temporary exception. The Bureau declines to speculate on the potential impact of the proposed rule on these entities but welcomes comment on this point.

[96] As noted above in the section-by-section analysis of § 1005.30(f), banks and credit unions are required to submit quarterly "Call Reports" by the FFIEC and the NCUA, respectively. For a more detailed description of these reporting requirements, see Assessment Report at 24.

[97] The 2018 transfers of a bank or credit union is included in this calculation if it provided between 101 and 500 transfers in either year, even if, for example, it transferred 100 or fewer transfers in 2018. Similarly, it is excluded if it provided more than 500 transfers in either year.

[98] *Id.* at 117–20.

[99] *Id.* at 133–38.

[100] *Id.* at 133–37.

would be no longer covered by the Rule if the normal course of business safe harbor threshold was set at 500 transfers as proposed.

Benefits and Costs to Consumers

In 2018, insured institutions that would not have been covered if the normal course of business safe harbor threshold was set at 500 transfers provided approximately 141,900 transfers.[101] These transfers represent 1.2 percent of 2018 transfers by insured institutions providing more than 100 transfers in either 2017 or 2018.[102] The Assessment Report found that these numbers have been fairly stable from year to year before 2018, so are likely to be representative of the impact going forward.[103]

The proposed rule has potential benefits and costs to the remittance customers of banks and credit unions providing between 101 and 500 remittance transfers annually. The benefits include potentially lower prices for consumers if the remittance transfer provider passes on any reduction in regulatory compliance costs. As discussed in the Assessment Report, at least some bank and credit union providers reported to the Bureau that in response to the Rule, they increased the price they charged consumers to send remittance transfers.[104] Excepting such entities from the Rule's coverage could result in decreased prices by these banks and credit unions for sending remittance transfers.

The costs to customers of banks and credit unions providing between 101 and 500 remittance transfers annually are the potential loss of the Rule's pre-payment disclosures, which may facilitate comparison shopping, and other Rule protections, including cancellation and error resolution rights. The Bureau does not have the information necessary to quantify these costs. The Bureau has received relatively few complaints from consumers arising from transfers provided by banks and credit unions not covered by Rule.[105] The Assessment Report found that consumers asserted errors for as many as 1.9 percent of transfers and cancelled between 0.29 and 4.5 percent of transfers depending on the provider.[106] Some banks and credit unions providing between 101 and 500 remittance transfers annually may continue to provide certain of these protections to their customers, although perhaps in a more limited manner than required by the Rule.

As noted above, it is possible that, to the extent any banks and credit unions intentionally provide 100 or fewer transfers (so as to qualify for the existing normal course of business safe harbor), it is possible they may decide to start providing more if the proposed rule was adopted. The Assessment Report did not find that banks or credit unions were limiting the number of transfers they provided to stay under the existing 100-transfer normal course of business safe harbor threshold or that banks or credit unions had stopped providing remittance transfers because of the Rule.[107] Thus, the Bureau does not believe that there would be much if any increase in access to remittance transfer services resulting from the proposed increase in the normal course of business safe harbor threshold.

Alternatives

The Bureau is considering an alternative 200-transfer threshold for the normal course of business safe harbor threshold. There were 156 banks and 138 credit unions in 2018 that provided between 101 and 200 transfers in either 2017 or 2018, but not more than 200 in either year, based on their respective Call Reports. As reported above, the corresponding numbers under the proposed rule are 414 banks and 247 credit unions. Thus, the proposed rule more than doubles the number of banks that would not be subject to the Rule relative to the alternative. The corresponding relative increase under the proposed rule for credit unions is 79 percent. Under the alternative, the banks and credit unions that would not be subject to the Rule represent 21 percent of banks providing more than 100 transfers in either 2017 or 2018 and 35 percent of credit unions providing more than 100 transfers in either 2017 or 2018. As reported above, the corresponding numbers under the proposed rule are 55 percent for banks and 62 percent for credit unions. The other impacts as described above for a 500-transfer normal course of business safe harbor threshold would follow for a 200-transfer threshold.

The total number of transfers in 2018 for banks and credit unions that provided between 101 and 200 transfers in either 2017 or 2018, but not more than 200 in either year, were 19,900 bank transfers and 18,200 credit union transfers. As reported above, the corresponding numbers under the proposed rule are approximately 92,600 bank transfers and 49,300 credit union transfers. Thus, the proposed rule would more than quadruple the number of bank transfers and would more than double the number of credit unions transfers that would not be subject to the Rule relative to the alternative. Under the alternative, the bank and credit union transfers in 2018 that would not be subject to the proposed rule represent 0.18 percent of transfers by banks providing more than 100 transfers in either 2017 or 2018, and 2.31 percent of transfers by credit unions providing more than 100 transfers in either 2017 or 2018. Overall this is 0.32 percent of transfers in 2018 by insured institutions providing greater than 100 transfers in either 2017 or 2018. The corresponding numbers under the proposed rule are 0.83 percent for bank transfers and 6.3 percent for credit union transfers. As reported above, this is 1.2 percent of all 2018 transfers by insured institutions providing more than 100 transfers in either 2017 or 2018. Again, the other impacts as described above for a 500-transfer normal course of business safe harbor threshold would follow for a 200-transfer threshold.

The Bureau has also considered, and is soliciting comment on, whether it should adopt any alternate or additional measures for the ''normal course of business'' safe harbor. As stated above, the Bureau particularly seeks comment on whether to base the term ''normal course of business'' on the percentage of an entity's customers that send remittance transfers, and if so, what the appropriate percentage of customers should be and why. In addition, the Bureau seeks comment on the time frame over which any such alternate metric should be tracked and the timing for any transitional provisions that might be necessary using such a metric. The Bureau also seeks comment on the potential burden to entities, or challenges that could arise, in basing the safe harbor on an approach other than the annual number of remittance transfers.

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[101] From the bank and credit union Call Reports. The total represents approximately 92,600 bank transfers and 49,300 credit union transfers.

[102] From the bank and credit union Call Reports. The dollar volume of the transfers provided by banks providing between 101 and 500 transfers in either 2017 or 2018, but not more than 500 in either year, was $2 billion. Credit unions do not report their dollar volume.

[103] *Id.* at 76–77, 83–84.

[104] *Id.* at 94.

[105] About 0.4 percent of complaints the Bureau has received are about ''international money transfers'' including remittance transfers. *Id.* at 113–16. As noted above, the number of complaints may be low because providers are complying with the law. Another possibility is that some consumers who send remittance transfers may have limited English proficiency, and therefore, be less likely to know that they can submit complaints to the Bureau or may be less likely to seek help from a government agency than other consumers.

[106] *Id.* at 126, 131.

[107] *Id.* at 133–38.

A limitation on the ability of the Bureau to consider the impacts of this alternative is the lack of institutional-level data or representative averages for groups of institutions on, among other things, the percentage of customers that send remittance transfers, the average number of remittance transfers sent by customers who send remittance transfers, and the distribution of transfers across customers (*e.g.,* whether sending remittance transfers is concentrated among a small share of customers or dispersed). The numbers of consumers and covered persons affected by different per-consumer thresholds would depend on this information. The qualitative effects on consumers and covered persons that would be not be covered by the Rule at different normal course of business safe harbor thresholds would be as described above. The Bureau requests data and other information that would be useful for quantifying the number of affected consumers and persons sending remittance transfers and the benefits and costs on the affected consumers and persons.

2. Proposed Permanent Exceptions

This section considers the benefits, costs, and impacts of the two permanent exceptions proposed by the Bureau that would allow remittance transfer providers that are insured institutions to estimate exchange rates and covered third-party fees in certain circumstances. This analysis proceeds in two steps. First, it examines the information available to the Bureau to determine the likely impact of the expiration of the existing temporary exception. The analysis then considers the likely benefits, costs, and impacts of the proposed permanent exceptions. For reasons explained above, the analysis generally considers only the impacts of the expiration and proposed permanent exceptions on banks and credit unions that provide more than 500 transfers annually.

According to their Call Reports, of 343 banks providing more than 500 transfers in 2017 or 2018, 48 (14 percent) reported using the temporary exception in 2018.[108] These 48 banks estimate they used the temporary exception for approximately 770,000 transfers in 2018, representing approximately 7.0 percent of all transfers by banks providing more than 500 transfers annually. The Bureau does not have comparable information on the use of the temporary exception for credit unions. Under the circumstances, the Bureau considers it appropriate to assume that credit union usage is similar to that of banks.[109] Specifically, assuming that the same proportion of credit unions providing more than 500 transfers annually use the temporary exception as banks and use the temporary exception for the same proportion of transfers as banks, around 21 credit unions would have used the temporary exception for 52,000 transfers. Thus, absent any mitigation to address the potential impact of the expiration of the temporary exception (other than the expansion of the normal course of business safe harbor threshold described above), it is reasonable to estimate that 70 insured institutions using the temporary exception for approximately 822,000 transfers would need to undertake certain adjustments.[110]

Bank Call Reports do not differentiate between the use of the temporary exception for exchange rates and covered third-party fees. From discussions with some large banks and a trade association representing a number of the largest banks, the Bureau understands that the temporary exception generally is not used by very large banks to estimate exchange rates because providing the exact exchange rate is not difficult for such banks. Accordingly, the analysis assumes that a substantial majority of the remittance transfers and institutions using the temporary exception are using it exclusively for covered third-party fees. The Bureau requests additional data and other information on the share of remittance transfers that rely on the temporary exception to estimate exchange rates alone, covered third-party fees alone, and both exchange rates and covered third-party fees.

Proposed Permanent Exception for Estimation of the Exchange Rate by an Insured Institution

The proposed rule would provide a permanent exception that would allow insured institutions to estimate the exchange rate (and other disclosures that depend on the exchange rate) under certain conditions when sending to a country. Principally, these conditions are that the designated recipient of the remittance transfer will receive funds in the country's local currency and (a) the insured institution made 1,000 or fewer transfers in the prior calendar year to that country where the designated recipients received funds in the country's local currency and (b) the insured institution cannot determine the exact exchange rate for that particular transfer at the time it must provide the applicable disclosures.

The information available to the Bureau indicates that the predominant use of the temporary exception is for estimating covered third-party fees. However, as discussed below, the Bureau understands that certain insured institutions may incur additional costs in order to disclose exact exchange rates. Further, these costs, as well as the willingness to incur them, may differ across insured institutions. Thus, under the baseline in which the temporary exception expires and the Bureau raises the normal course of business safe harbor threshold to 500 transfers as proposed, it is possible that the requirement to disclose exact exchange rates may cause some insured institutions to cease providing transfers to certain countries. The proposed permanent exception for estimating exchange rates would tend to mitigate cost increases and reductions in the provision of remittance transfers at any particular insured institution.

Benefits and Costs to Insured Institutions

Under the baseline, insured institutions that are covered by the Rule and have been using the temporary exception to estimate exchange rates would either need to provide exact exchange rate disclosures or stop sending those transfers. To provide exact exchange rate disclosures, these insured institutions would incur certain costs. An insured institution may need to establish and maintain currency-trading desk capabilities and risk management policies and practices related to the foreign currency and country or to use service providers, correspondent institutions, or persons that act as the insured institution's agent. These additional costs may also differ across insured institutions, due to differences in existing arrangements with service providers or correspondent banks, the ability to negotiate changes in those arrangements, the expertise of existing staff, and the likely volume of transfers. Insured institutions may also

[108] It is possible that there are more banks using the temporary exception than report it on their Call Reports. For example, smaller bank providers that rely on a larger service provider may not accurately report their usage.

[109] The Bureau requests data and other information on the use of the temporary exception by credit unions, and in particular by credit unions providing more than 500 transfers annually.

[110] According to their Call Reports, 34 banks providing between 101 and 500 remittance transfers annually relied on the temporary exception for 6,500 transfers. Assuming proportional use for credit unions providing between 101 and 500 remittance transfers annually approximately 20 credit unions relied on the temporary exception for 3,500 transfers. For a baseline in which the normal course of business safe harbor threshold was not increased, the impacts on consumers and covered persons considered would also apply to these transfers and covered persons.

differ in the level of commitment to sending remittance transfers to particular countries, based on the needs of their customers, and thus their willingness to incur additional costs. Overall, the requirement to disclose exact exchange rates under the baseline may cause some insured institutions to cease providing transfers to certain countries. These effects would likely differ across insured institutions.

The Bureau believes that the proposed permanent exception for estimating the exchange rate would tend to mitigate these costs and impacts. The Bureau lacks information about the percentage of transfers by recipient country that rely on the temporary exception for exchange rates and the portion of those transfers that could rely on the permanent exception being proposed. However, the Bureau understands that insured institutions are predominantly using the temporary exception to estimate covered third-party fees, rather than exchange rates. Thus, the Bureau believes that the additional costs under the baseline may be relatively modest overall, and the proposed permanent exception could mitigate most of the increase that would otherwise occur. Further, it is the Bureau's understanding from discussion with some large banks and a trade association representing a number of the largest banks that providing exact exchange rates is not difficult for very large banks. Thus, to the extent that very large banks would have an advantage under the baseline in sending transfers to particular countries, the proposed permanent exception would mitigate this advantage by allowing smaller institutions to continue to estimate exchange rates in disclosures for certain remittance transfers.

Some insured institutions that currently provide exact exchange rates might have been able to accommodate customers from other insured institutions that currently use the temporary exception and that would choose not to begin providing exact exchange rates under the baseline. Under the proposed permanent exception for estimation of exchange rates, these insured institutions will not obtain the benefit of these new customers.

Benefits and Costs to Consumers

Under the baseline in which the temporary exception expires and the Bureau raises the normal course of business safe harbor threshold to 500 transfers as proposed, the preferred insured institution for some consumers might not be able to provide an exact exchange rate disclosure for transfers to certain countries. Some consumers, therefore, would need to seek out an alternate remittance transfer provider to send transfers to those countries. As noted above, it is the Bureau's understanding from discussion with some large banks and a trade association representing a number of the largest banks that providing the exact exchange rate is not difficult for very large banks. Thus, to the extent that a consumer's preferred insured institution cannot provide the exact exchange rate, there would likely be a less preferred insured institution that could provide the exact exchange rate and send the transfer.[111]

Under the proposed permanent exception for estimating the exchange rate, more consumers would be able to continue to use their preferred insured institution to send transfers. These consumers may also potentially be able to do so at lower prices if, for example, an insured institution decided to pass on the higher costs incurred to obtain exact exchange rate information.

The cost to these consumers is that they will not receive exact disclosures. Disclosures that include exact exchange rate information make it easier for a consumer to know whether a designated recipient is going to receive an intended sum of money, or the amount in U.S. dollars that the consumer must send to deliver a specific amount of foreign currency to a designated recipient. Requiring the disclosure of exact exchange rates may also make it easier for consumers to compare prices across providers. The proposed permanent exception for estimating exchange rates may therefore impose a cost on certain consumers in the form of these foregone benefits.

Overall, the evidence available to the Bureau suggests that the costs to consumers of allowing providers to use estimates for exchange rates are not likely to be significant. Certain consumers may be less likely to engage in comparison shopping or the comparison shopping may be less effective. However, as discussed above, the Bureau believes the proposed permanent exception for estimating exchange rates would be used for only a small portion of all remittance transfers sent by insured institutions. Further, as discussed in the Assessment Report and noted above, the Bureau reviewed evidence from its complaints database and did not find evidence of significant consumer complaints regarding the use of estimates for exchange rates or for covered third-party fees.[112]

Proposed Permanent Exception for Estimation of Covered Third-Party Fees by an Insured Institution

As noted above, under the baseline in which the temporary exception expires and the Bureau raises the normal course of business safe harbor threshold to 500 transfers as proposed, the Bureau estimates that approximately 70 insured institutions would need to stop providing estimated disclosures for 822,000 transfers. Based on its analysis of available information, the Bureau expects that many of these insured institutions could form additional relationships or set up new systems to provide exact fee disclosures for a large portion of the transfers currently using the temporary exception for estimating covered third-party fees. The Bureau held discussions with banks and a trade association representing a number of the largest banks, reviewed comments from the 2019 RFI, and analyzed Call Reports from banks that have reduced their reliance on the temporary exception. Based on the information received from these sources, banks appear to be willing to set up the relationships or establish other systems (such as international ACH) necessary to reduce their reliance on estimates to around half of the number of transfers for which they used the temporary exception in 2018.[113] The Bureau has no information that would suggest a different conclusion for credit unions. Forming these relationships would allow these insured institutions to provide exact disclosures and continue to send these transfers and their customers would gain the benefit of receiving exact disclosures. However, forming these relationships comes at some cost to insured institution providers, and some of these costs could be passed on to consumers. Note that these costs are not costs of the proposed rule; they are costs incurred under the baseline in which the temporary exception expires and the Bureau increases the normal course of business safe harbor threshold as proposed.

There are a limited number of outcomes for the remaining half of

[111] These consumers may also consider using an MSB to send transfers if it is too difficult or expensive to find an insured institution that can send the transfer. MSBs are generally able to provide exact exchange rate information for the reasons discussed in part II above. However, MSBs provide a somewhat different service than banks and credit unions to meet different consumer demands. The Bureau therefore considers that there would be relatively few consumers, under the baseline, who use an MSB because they find it too difficult or expensive to use an insured institution.

[112] Assessment Report at 113–16.

[113] The Bureau cautions that this prediction is not necessarily accurate and is based on limited information.

transfers for which insured institutions used the temporary exception in 2018 and which could not be sent with estimated disclosures under the baseline. Consumers requesting these transfers would need to find an alternative remittance transfer provider. The Bureau understands that the alternative remittance transfer provider would most likely be an insured institution that sends enough remittance transfers to the designated recipient's institution that the sending insured institution either has relationships or would form additional relationships or set up new systems to provide exact covered third-party fee disclosures. The alternative provider might also be an MSB. As discussed above, however, MSBs provide a somewhat different service than banks and credit unions to meet different consumer demands. This would tend to reduce any substitution from insured institutions to MSBs. In either case, these consumers would lose the convenience and other benefits of transferring with their preferred bank or credit union. Finally, it is hypothetically possible that no insured institution or MSB (or combination of MSBs), at any price, could transfer a consumer's preferred amount to certain designated recipients' institutions. This would occur if no insured institution is able to provide exact disclosures and no MSB (or combination of MSBs) is able to transfer high enough amounts to certain designated recipients' institutions.

The Bureau does not have the information necessary to quantify how many transfers would fall into each category. For purposes of the analysis below, the Bureau assumes that under the baseline, customers of an insured institution that would no longer send remittance transfers to a designated recipient's institution would generally search for and find a different insured institution that would send the transfer. The Bureau considers it unlikely that no insured institution or MSB (or combination of MSBs), at any price, could send the desired amount of funds to a designated recipient's institution.

Under the proposed permanent exception for estimating covered third-party fees, transfers covered by the Rule fall into two main categories: (1) Transfers that are below the threshold for covered third-party fees, and therefore disclose estimates, but under the baseline would have been provided with exact disclosures at a higher price or by a remittance transfer provider other than the consumer's first choice; or (2) transfers that are above the threshold for covered third-party fees, and so will be provided with exact disclosures for fees under both the proposed rule and baseline. Relative to the baseline, in which all bank or credit union transfers that take place would have exact disclosures, only (1) represents a change considered for the costs or benefits of the proposed permanent exception for estimating covered third-party fees.

Benefits and Costs to Insured Institutions

As stated above, under the baseline in which the temporary exception expires and the Bureau raises the normal course of business safe harbor threshold to 500 transfers as proposed, the Bureau estimates that approximately 70 insured institutions would need to stop providing estimated disclosures for 822,000 transfers. While the Bureau does not have market-wide information, information provided by certain large banks suggests that there are few designated recipient banks to which these large banks individually send more than 500 transfers and with which these large banks would not be able or willing to set up a relationship sufficient to provide exact disclosures. Based on this information, the Bureau expects that under both the baseline and the proposed permanent exception for estimating covered third-party fees, these 70 institutions will form roughly the same number of relationships and will provide exact disclosures for about half of these transfers. Forming these relationships comes at some cost to insured institution providers, and some of these costs could be passed on to consumers.

As explained above, under the baseline, the other half of the remittance transfers with estimated disclosures would no longer be provided by the insured institutions that currently send them but would be sent by different insured institutions. Based on the information available from certain large banks, under the proposed permanent exception for estimating covered third-party fees, the Bureau expects that the insured institutions that currently send these transfers would continue to send them. These transfers (category (1) above) provide estimated disclosures, so these insured institutions would not need to form additional relationships. These insured institutions would benefit from not turning away potential customers and by being able to continue providing a valuable service to their customers. These benefits might be significant, although they are difficult quantify.

Benefits and Costs to Consumers

Under category (1) above, certain remittance transfers would have been provided with exact disclosures under the baseline but at higher price or by a remittance transfer provider other than the consumer's first choice. As discussed above, the Bureau expects that the proposed permanent exception for estimating covered third-party fees when an insured institution makes 500 or fewer transfers to the designated recipient's institution in the prior calendar year would mitigate all or almost all of the costs to consumers from the loss of access to transfers to certain designated recipient's institutions under the baseline. These remittance transfers represent the most important benefit of the proposed permanent exception for consumers. While the Bureau does not have the information to quantify the number of transfers in this category or the exact value to consumers, the benefit to consumers of continued access is potentially large.

Under category (1) above, consumers will receive disclosures containing estimates. As discussed above in considering the impact of the proposed permanent exception for exchange rates, the use of estimates for covered third-party fees may make it more difficult for consumers to engage in comparison shopping and impose a cost on consumers by making disclosures less accurate.

Alternative

For purposes of considering the effects of the proposed permanent exceptions that allow institutions to estimate exchange rates and covered third-party fees, the Bureau used a baseline in which the temporary exception expired and the Bureau amended the normal course of business safe harbor threshold as proposed. If instead the Bureau maintains the existing normal course of business safe harbor threshold at 100 transfers, then this provision of the current Rule would be part of the baseline, along with the expiration of the temporary exception.

Under this baseline, the proposed permanent exceptions that would allow institutions to estimate exchange rates and covered third-party fees would have effects on insured institutions that provide between 101 and 500 remittance transfers per year and the consumers on whose behalf these institutions send remittance transfers. These effects would be in addition to the effects on insured institutions that provide more than 500 remittance transfers per year and the consumers on whose behalf these insured institutions send remittance transfers.

As discussed above, 414 banks and 247 credit unions provided between 101 and 500 transfers in either 2017 or 2018, but not more than 500 in either year. In 2018, they respectively sent about 92,600 and 49,300 transfers. These banks and credit unions would remain covered by the Rule under the alternative since the normal course of business safe harbor threshold remains at 100 transfers. However, all of these insured institutions would necessarily meet the respective 500-transfer and 1,000-transfer threshold requirements in the proposed permanent exceptions. Thus, all of these insured institutions could continue to disclose estimates for exchange rates and covered third-party fees to the extent that they already do so. The ability to disclose estimates under the proposed permanent exceptions would mitigate costs relative to the baseline used here.

These insured institutions currently provide error resolution rights and meet the other conditions of the Rule. These insured institutions would continue to do so under both the baseline used here and under the alternative proposed rule, that provided only the permanent exceptions for estimating exchange rates and covered third-party fees.

D. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

As stated above, based on their Call Reports, 414 banks and 247 credit unions provided between 101 and 500 transfers in either 2017 or 2018, but not more than 500 in either year. Of these, 386 banks and all 247 credit unions had $10 billion or less in total in assets in 2018. Some of these insured institutions currently provide exact disclosures (based on Call Report data) and all of them would have to provide exact disclosures under the baseline expiration of the temporary exception. None of these insured institutions would be covered by the Rule under the proposed increase in the normal course of business safe harbor threshold. It follows that the large majority of the banks and all of the credit unions affected by the proposed change in the normal course of business safe harbor threshold have $10 billion or less in assets. Thus, the impacts of the proposed increase in the normal course of business safe harbor threshold, described above, are also generally the specific impacts for depository institutions and credit unions with $10 billion or less in total assets.

In addition, 190 banks and 142 credit unions with $10 billion or less in assets in 2018 provided more than 500 transfers in 2017 or 2018. As above, some of these banks and credit unions currently provide exact disclosures, and all of them would have to provide exact disclosures under the baseline expiration of the temporary exception. These banks and credit unions would not be directly affected by the proposed change in the normal course of business safe harbor threshold. They might be affected, compared to the baseline expiration of the temporary exception, by the proposed permanent exceptions for estimating the exchange rate and covered third-party fees. According to the bank Call Report data, only 18 of these banks reported using the temporary exception, and they did so for approximately 66,600 transfers. As discussed above, the Bureau understands that remittance transfer providers that are smaller depository institutions and credit unions obtain information about exchange rates and covered third-party fees from a limited number of service providers that are either very large insured institutions or large nonbank service providers. Given this reliance, the impacts of the proposed permanent exceptions, described above, are also generally the specific impacts for depository institutions and credit unions with $10 billion or less in total assets.

2. Impact of the Proposed Provisions on Consumers in Rural Areas

Consumers in rural areas may experience different impacts from the proposed rule than other consumers. The Bureau has discretion to define rural areas as appropriate for this impact analysis. For the impact analysis in this section, the Bureau used its 2018 rural counties list.[114] The Bureau compared the address each bank and credit union reported on its Call Report with this rural county list to determine if that bank or credit union was located in a rural county. This comparison is limited to the location listed in the Call Report, which is generally the headquarters of the bank or credit union. There are likely rural branches of insured institutions with headquarters located in non-rural areas, so this comparison captures only a portion of the impact of the proposed rule on consumers in rural areas.

[114] *See https://www.consumerfinance.gov/policy-compliance/guidance/rural-and-underserved-counties-list/.*

According to the Call Reports, 83 banks provided between 101 and 500 remittance transfers in either 2017 or 2018, but not more than 500 in either year, and were headquartered in rural counties. These banks provided 17,000 transfers in 2018. Further, 15 credit unions provided between 101 and 500 remittance transfers in either 2017 or 2018, but not more than 500 in either year, and were located in rural counties. These credit unions provided 2,200 transfers. Finally, three banks provided more than 500 transfers in either 2017 or 2018, were located in rural areas, and reported relying on the temporary exception. These banks reported that they relied on the temporary exception for 2,000 transfers total. Assuming reliance on the temporary exception is similar for credit unions, the four credit unions that provided more than 500 transfers in either 2017 or 2018 and were located in rural areas would have used the temporary exception for approximately 900 transfers.

Consumers in rural areas may have access to fewer remittance transfers providers and therefore may benefit more than other consumers from a rule change that keeps more insured institutions in the market or helps reduce costs to the extent that cost reductions are passed on to consumers. However, these consumers will also disproportionately lose consumer protections relative to other consumers, under the baseline in which the temporary exception expires, to the extent that the banks and credit unions that provide remittance transfers to these consumers are disproportionately excluded from the Rule or use the permanent exceptions under the proposed rule. As stated above, the 414 banks and 247 credit unions that provided between 101 and 500 transfers in either 2017 or 2018, but not more than 500 in either year, represent 55 percent of the banks and 62 percent of the credit unions that provided more than 100 transfers in both years. In rural areas, the corresponding 83 banks and 15 credit unions represented 75 percent of the banks and 79 percent of the credit unions that provided more than 100 transfers in both years in rural areas. Thus, the proposed increase in the normal course of business safe harbor threshold would have somewhat larger effects in rural areas in both preserving access to remittance transfer providers and possibly reducing the protections provided by the Rule, as described previously.

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[115] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[116] Potentially affected small entities include insured institutions that have $550 million or less in assets and that provide remittance transfers in the normal course of their business.[117]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[118] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[119]

An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau does not expect the final rule to impose costs on small entities relative to the baseline. Under the baseline, the temporary exception expires, and therefore no remittance transfer providers—including small entities—would be able to provide estimates using that exception. Under the proposed rule, certain small entities that would otherwise be covered by the Remittance Rule would not be covered by the Rule and certain other small entities would be able to provide estimates in certain circumstances. Thus, the Bureau believes that the proposed rule would only reduce burden on small entities relative to the baseline.[120]

Accordingly, the undersigned certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on its analysis of the impact of the proposed rule on small entities and requests any relevant data.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[121] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As explained below, the Bureau has determined that this proposed rule does not contain any new or substantively revised information collection requirements other than those previously approved by OMB under that OMB control number. The proposed rule would amend 12 CFR part 1005 (Regulation E), which implements EFTA. The Bureau's OMB control number for Regulation E is 3170–0014.

Under Regulation E, the Bureau generally accounts for the paperwork burden for the following respondents pursuant to its administrative enforcement authority: Federally insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain non-depository institutions. The Bureau and the FTC generally both have enforcement authority over non-depository institutions subject to Regulation E. Accordingly, the Bureau has allocated to itself half of the proposed rule's estimated reduction in burden on non-depository financial institutions subject to Regulation E. Other Federal agencies, including the FTC, are responsible for estimating and reporting to OMB the paperwork burden for the institutions for which they have enforcement and/or supervision authority. They may use the Bureau's burden estimation methodology, but need not do so.

The Bureau does not believe that this proposed rule would impose any new or substantively revised collections of information as defined by the PRA. Specifically, based on the above analysis, the Bureau believes that the overall impact of the proposal to increase the normal course of business safe harbor threshold to 500 and to allow limited use of estimates for covered third-party fee and exchange rate disclosures is small. The Bureau recognizes, however, that it lacks data with which to determine the precise impact of the proposal. Comments are specifically requested concerning information that would assist the Bureau with making a determination on the impact of allowing limited use of estimates in certain disclosures on the Bureau's current collection of information pursuant to Regulation E.

Current Total Annual Burden Hours on Bureau Respondents, Regulation E: 3,445,033.

Current Total Annual Burden Hours on Bureau Respondents, Subpart B only: 1,471,808.

Estimated Total Annual Burden Hours on Bureau Respondents Under the Proposed Rule, Subpart B only: 1,448,938.

Estimated Change in Total Annual Burden Hours on Bureau Respondents Under the Proposed Rule: −22,870.

In addition, the Bureau estimates that Bureau respondents will incur one-time costs of $6.886 million under the proposed rule, mostly to form new relationships with designated recipients' institutions.

The Bureau has determined that the proposed rule does not contain any new or substantively revised information collection requirements as defined by the PRA and that the burden estimate for the previously approved information collections should be revised as

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[115] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any small governmental units or not-for-profit organizations to which the proposal would apply.

[116] 5 U.S.C. 601(3) (the Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment).

[117] Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes, https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[118] 5 U.S.C. 603 through 605.

[119] 5 U.S.C. 609.

[120] In general, given the expiration of the temporary exception and assuming the adoption of the proposed rule, some small entities that currently provide estimates would be able to continue to provide estimates for some or all of their remittance transfers and some would need to begin providing exact disclosures. Using the bank Call Reports, however, the Bureau finds that no small banks would need to begin providing exact disclosures. Specifically, the Bureau finds that there were 75 banks in 2018 with assets under $550 million covered by the Rule (because they provided greater than 100 transfers in 2017 or 2018). Of these banks, only 12 would be covered by the Rule if the normal course of business safe harbor threshold was adopted as proposed. Further, none of these banks currently report relying on the temporary exception. Thus, no small banks would need to begin providing exact disclosures even if the proposed exceptions on use of estimates were not adopted. Using the credit union Call Reports, the Bureau finds that there were 120 credit unions covered by the Rule in 2018 (because they provided more than 100 transfers in 2017 or 2018). Of these credit unions, only 29 would be covered by the Rule if the normal course of business safe harbor threshold was adopted as proposed. The credit union Call Reports do not report utilization of the temporary exception. However, since none of the 12 small banks that would remain covered by the proposed rule use the temporary exception, the Bureau considers it reasonable to suppose that that few or none of the 29 small credit unions that would remain covered by the proposed rule use the temporary exception.

[121] 44 U.S.C. 3501 *et seq.*

explained above. The Bureau welcomes comments on these determinations or any other aspect of the proposal for purposes of the PRA. Comments should be submitted as outlined in the **ADDRESSES** section above. All comments will become a matter of public record.

List of Subjects in 12 CFR Part 1005

Automated teller machines, Banking, Banks, Consumer protection, Credit unions, Electronic fund transfers, National banks, Remittance transfers, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to amend 12 CFR part 1005 as set forth below:

PART 1005—ELECTRONIC FUND TRANSFERS (REGULATION E)

■ 1. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b. Subpart B is also issued under 12 U.S.C. 5601 and 15 U.S.C. 1693o–1.

Subpart B—Requirements for Remittance Transfers

■ 2. Amend § 1005.30 by revising paragraphs (f)(2)(i)(A) and (B) and (f)(2)(ii), and adding paragraph (f)(2)(iii) to read as follows:

§ 1005.30 Remittance transfer definitions.

* * * * *

(f) * * *

(2) * * *

(i) * * *

(A) Provided 500 or fewer remittance transfers in the previous calendar year; and

(B) Provides 500 or fewer remittance transfers in the current calendar year.

(ii) *Transition period—coming into compliance.* If, beginning on July 21, 2020, a person that provided 500 or fewer remittance transfers in the previous calendar year provides more than 500 remittance transfers in the current calendar year, and if that person is then providing remittance transfers for a consumer in the normal course of its business pursuant to paragraph (f)(1) of this section, the person has a reasonable period of time, not to exceed six months, to begin complying with this subpart. Compliance with this subpart will not be required for any remittance transfers for which payment is made during that reasonable period of time.

(iii) *Transition period—qualifying for the safe harbor.* If a person who previously provided remittance transfers in the normal course of its business in excess of the safe harbor threshold set forth in this paragraph (f)(2) determines that, as of a particular date, it will qualify for the safe harbor, it may cease complying with the requirements of this subpart with respect to any remittance transfers for which payment is made after that date. The requirements of the Act and this part, including those set forth in §§ 1005.33 and 1005.34, as well as the requirements set forth in § 1005.13, continue to apply to transfers for which payment is made prior to that date.

* * * * *

■ 3. In § 1005.32:

■ a. Add paragraphs (b)(4) and (5); and

■ b. Remove ''(a) or (b)(1)'' and add in its place ''(a) or (b)(1), (4), or (5)'' in the first sentence of paragraph (c) introductory text.

The additions read as follows:

§ 1005.32 Estimates.

* * * * *

(b) * * *

(4) *Permanent exception for estimation of the exchange rate by an insured institution.* (i) Except as provided in paragraph (b)(4)(ii) of this section, for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for a remittance transfer to a particular country in accordance with paragraph (c) of this section for the amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii), if the designated recipient of the remittance transfer will receive funds in the country's local currency and all of the following conditions are met:

(A) The remittance transfer provider is an insured institution as defined in paragraph (a)(3) of this section;

(B) At the time the insured institution must provide, as applicable, the disclosure required by § 1005.31(b)(1) through (3) or § 1005.36(a)(1) or (2), the insured institution cannot determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) for that remittance transfer;

(C) The insured institution made 1,000 or fewer remittance transfers in the prior calendar year to the particular country for which the designated recipients of those transfers received funds in the country's local currency; and

(D) The remittance transfer is sent from the sender's account with the insured institution; provided however, for the purposes of this paragraph (b)(4)(i)(D), a sender's account does not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.

(ii) The disclosures in § 1005.31(b)(1)(v) through (vii) may be estimated under paragraph (b)(4)(i) of this section only if the exchange rate is permitted to be estimated under paragraph (b)(4)(i) of this section and the estimated exchange rate affects the amount of such disclosures.

(5) *Permanent exception for estimation of covered third-party fees by an insured institution.* (i) Except as provided in paragraph (b)(5)(ii) of this section, for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2), estimates may be provided for a remittance transfer to a particular designated recipient's institution in accordance with paragraph (c) of this section for the amounts required to be disclosed under § 1005.31(b)(1)(vi) through (vii), if all of the following conditions are met:

(A) The remittance transfer provider is an insured institution as defined in paragraph (a)(3) of this section;

(B) At the time the insured institution must provide, as applicable, the disclosure required by § 1005.31(b)(1) through (3) or § 1005.36(a)(1) or (2), the insured institution cannot determine the exact covered third-party fees required to be disclosed under § 1005.31(b)(1)(vi) for that remittance transfer;

(C) The insured institution made 500 or fewer remittance transfers in the prior calendar year to that designated recipient's institution; and

(D) The remittance transfer is sent from the sender's account with the insured institution; provided however, for the purposes of this paragraph (b)(5)(i)(D), a sender's account does not include a prepaid account, unless the prepaid account is a payroll card account or a government benefit account.

(ii) The disclosure in § 1005.31(b)(1)(vii) may be estimated under paragraph (b)(5)(i) of this section only if covered third-party fees are permitted to be estimated under paragraph (b)(5)(i) of this section and the estimated covered third-party fees affect the amount of such disclosure.

* * * * *

§ 1005.33 [Amended]

■ 4. Amend § 1005.33(a)(1)(iii)(A) by removing ''(a), (b)(1) or (b)(2)'' and adding in its place ''(a) or (b)(1), (2), (4), or (5)''.

§ 1005.36 [Amended]

■ 5. Amend § 1005.36(b)(3) by removing ''(a) or (b)(1)'' and adding in its place ''(a) or (b)(1), (4), or (5)''.

■ 6. In supplement I to part 1005:

■ a. Under Section 1005.30—*Remittance Transfer Definitions,* revise *30(f) Remittance Transfer Provider.*
■ b. Under Section 1005.32—*Estimates:*
■ i. Revise introductory text paragraph 1 and *32(b)(1) Permanent Exceptions for Transfers to Certain Countries;*
■ ii. Add *32(b)(4) Permanent Exception for Estimation of the Exchange Rate by an Insured Institution,* and *32(b)(5) Permanent Exception for Estimation of Covered Third-Party Fees by an Insured Institution;* and
■ iii. Revise *32(c)(3) Covered Third-Party Fees,* and *32(d) Bases for Estimates for Transfers Scheduled Before the Date of Transfer;* and
■ d. Under Section 1005.36—*Transfers Scheduled Before the Date of Transfer,* revise *36(b) Accuracy.*

The revisions and additions read as follows:

Supplement I to Part 1005—Official Interpretations

* * * * *

Section 1005.30—Remittance Transfer Definitions

* * * * *

30(f) Remittance Transfer Provider

1. *Agents.* A person is not deemed to be acting as a remittance transfer provider when it performs activities as an agent on behalf of a remittance transfer provider.

2. *Normal course of business.* i. *General.* Whether a person provides remittance transfers in the normal course of business depends on the facts and circumstances, including the total number and frequency of remittance transfers sent by the provider. For example, if a financial institution generally does not make remittance transfers available to customers, but sends a couple of such transfers in a given year as an accommodation for a customer, the institution does not provide remittance transfers in the normal course of business. In contrast, if a financial institution makes remittance transfers generally available to customers (whether described in the institution's deposit account agreement, or in practice) and makes transfers more frequently than on an occasional basis, the institution provides remittance transfers in the normal course of business.

ii. *Safe harbor.* On July 21, 2020, the safe harbor threshold in § 1005.30(f)(2)(i) changed from 100 transfers to 500 transfers. Under § 1005.30(f)(2)(i), beginning on July 21, 2020, a person that provided 500 or fewer remittance transfers in the previous calendar year and provides 500 or fewer remittance transfers in the current calendar year is deemed not to be providing remittance transfers in the normal course of its business. Accordingly, a person that qualifies for the safe harbor in § 1005.30(f)(2)(i) is not a ''remittance transfer provider'' and is not subject to the requirements of subpart B of this part. For purposes of determining whether a person qualifies for the safe harbor under § 1005.30(f)(2)(i), the number of remittance transfers provided includes any transfers excluded from the definition of ''remittance transfer'' due simply to the safe harbor. In contrast, the number of remittance transfers provided does not include any transfers that are excluded from the definition of ''remittance transfer'' for reasons other than the safe harbor, such as small value transactions or securities and commodities transfers that are excluded from the definition of ''remittance transfer'' by § 1005.30(e)(2).

iii. *Transition period.* A person may cease to satisfy the requirements of the safe harbor described in § 1005.30(f)(2)(i) if, beginning on July 21, 2020, the person provides in excess of 500 remittance transfers in a calendar year. For example, if a person that provided 500 or fewer remittance transfers in the previous calendar year provides more than 500 remittance transfers in the current calendar year, the safe harbor applies to the first 500 remittance transfers that the person provides in the current calendar year. For any additional remittance transfers provided in the current calendar year and for any remittance transfers provided in the subsequent calendar year, whether the person provides remittance transfers for a consumer in the normal course of its business, as defined in § 1005.30(f)(1), and is thus a remittance transfer provider for those additional transfers, depends on the facts and circumstances. Section 1005.30(f)(2)(ii) provides a reasonable period of time, not to exceed six months, for such a person to begin complying with subpart B of this part, if that person is then providing remittance transfers in the normal course of its business. At the end of that reasonable period of time, such person would be required to comply with subpart B unless, based on the facts and circumstances, the person is not a remittance transfer provider.

iv. *Examples.* A. *Example of safe harbor and transition period for 100-transfer safe harbor threshold effective prior to July 21, 2020.* Assume that a person provided 90 remittance transfers in 2012 and 90 such transfers in 2013. The safe harbor applied to the person's transfers in 2013, as well as the person's first 100 remittance transfers in 2014. However, if the person provided a 101st transfer on September 5, 2014, the facts and circumstances determine whether the person provided remittance transfers in the normal course of business and was thus a remittance transfer provider for the 101st and any subsequent remittance transfers that it provided in 2014. Furthermore, the person would not have qualified for the safe harbor described in § 1005.30(f)(2)(i) in 2015 because the person did not provide 100 or fewer remittance transfers in 2014. However, for the 101st remittance transfer provided in 2014, as well as additional remittance transfers provided thereafter in 2014 and 2015, if that person was then providing remittance transfers for a consumer in the normal course of business, the person had a reasonable period of time, not to exceed six months, to come into compliance with subpart B of this part. Assume that in this case, a reasonable period of time is six months. Thus, compliance with subpart B was not required for remittance transfers made on or before March 5, 2015 (*i.e.,* six months after September 5, 2014). After March 5, 2015, the person was required to comply with subpart B if, based on the facts and circumstances, the person provided remittance transfers in the normal course of business and was thus a remittance transfer provider.

B. *Example of safe harbor for a person that provided 500 or fewer transfers in 2019 and provides 500 or fewer transfers in 2020.* On July 21, 2020, the safe harbor threshold in § 1005.30(f)(2)(i) changed from 100 transfers to 500 transfers. Thus, beginning on July 21, 2020, pursuant to § 1005.30(f)(2)(i), a person is deemed not to be providing remittance transfers for a consumer in the normal course of its business if the person provided 500 or fewer remittance transfers in the previous calendar year and provides 500 or fewer remittance transfers in the current calendar year. If a person provided 500 or fewer transfers in 2019 and provides 500 or fewer remittance transfers in 2020, that person qualifies for the safe harbor threshold in 2020. For example, assume that a person provided 200 remittance transfers in 2019 and 400 remittance transfers in 2020. The safe harbor will apply to the person's transfers in 2020 beginning on July 21, 2020, as well as the person's first 500 transfers in 2021. See comment 30(f)-2.iv.C for an example regarding the transition period if the 500-transfer safe harbor is exceeded.

C. *Example of safe harbor and transition period for the 500-transfer* *safe harbor threshold beginning on July 21, 2020.* Assume that a person provided 490 remittance transfers in 2020 and 490 such transfers in 2021. The safe harbor will apply to the person's transfers in 2021, as well as the person's first 500 remittance transfers in 2022. However, if the person provides a 501st transfer on September 5, 2022, the facts and circumstances determine whether the person provides remittance transfers in the normal course of business and is thus a remittance transfer provider for the 501st and any subsequent remittance transfers that it provides in 2022. Furthermore, the person would not qualify for the safe harbor described in § 1005.30(f)(2)(i) in 2023 because the person did not provide 500 or fewer remittance transfers in 2022. However, for the 501st remittance transfer provided in 2022, as well as additional remittance transfers provided thereafter in 2022 and 2023, if that person is then providing remittance transfers for a consumer in the normal course of business, the person will have a reasonable period of time, not to exceed six months, to come into compliance with subpart B of this part. Assume that in this case, a reasonable period of time is six months. Thus, compliance with subpart B is not required for remittance transfers made on or before March 5, 2023 (*i.e.,* six months after September 5, 2022). After March 5, 2023, the person is required to comply with subpart B if, based on the facts and circumstances, the person provides remittance transfers in the normal course of business and is thus a remittance transfer provider.

v. *Continued compliance for transfers for which payment was made before a person qualifies for the safe harbor.* Section 1005.30(f)(2)(iii) addresses situations where a person who previously was required to comply with subpart B of this part newly qualifies for the safe harbor in § 1005.30(f)(2)(i). That section states that the requirements of EFTA and Regulation E, including those set forth in §§ 1005.33 and 1005.34 (which address procedures for resolving errors and procedures for cancellation and refund of remittance transfers, respectively), as well as the requirements set forth in § 1005.13 (which, in part, governs record retention), continue to apply to transfers for which payment is made prior to the date the person qualifies for the safe harbor in § 1005.30(f)(2)(i). Qualifying for the safe harbor in § 1005.30(f)(2)(i) likewise does not excuse compliance with any other applicable law or regulation. For example, if a remittance transfer is also an electronic fund transfer, any requirements in subpart A of Regulation E that apply to the transfer continue to apply, regardless of whether the person must comply with subpart B. Relevant requirements in subpart A may include, but are not limited to, those relating to initial disclosures, change-in-terms notices, liability of consumers for unauthorized transfers, and procedures for resolving errors.

3. *Multiple remittance transfer providers.* If the remittance transfer involves more than one remittance transfer provider, only one set of disclosures must be given, and the remittance transfer providers must agree among themselves which provider must take the actions necessary to comply with the requirements that subpart B of this part imposes on any or all of them. Even though the providers must designate one provider to take the actions necessary to comply with the requirements that subpart B imposes on any or all of them, all remittance transfer providers involved in the remittance transfer remain responsible for compliance with the applicable provisions of the EFTA and Regulation E.

* * * * *

Section 1005.32—Estimates

1. *Disclosures where estimates can be used.* Sections 1005.32(a) and (b)(1), (4), and (5) permit estimates to be used in certain circumstances for disclosures described in §§ 1005.31(b)(1) through (3) and 1005.36(a)(1) and (2). To the extent permitted in § 1005.32(a) and (b)(1), (4), and (5), estimates may be used in the pre-payment disclosure described in § 1005.31(b)(1), the receipt disclosure described in § 1005.31(b)(2), the combined disclosure described in § 1005.31(b)(3), and the pre-payment disclosures and receipt disclosures for both first and subsequent preauthorized remittance transfers described in § 1005.36(a)(1) and (2). Section 1005.32(b)(2) permits estimates to be used for certain information if the remittance transfer is scheduled by a sender five or more business days before the date of the transfer, for disclosures described in § 1005.36(a)(1)(i) and (a)(2)(i).

* * * * *

32(b) Permanent Exceptions

32(b)(1) Permanent Exceptions for Transfers to Certain Countries

1. *Laws of the recipient country.* The laws of the recipient country do not permit a remittance transfer provider to determine exact amounts required to be disclosed when a law or regulation of the recipient country requires the person making funds directly available to the designated recipient to apply an exchange rate that is:

i. Set by the government of the recipient country after the remittance transfer provider sends the remittance transfer or

ii. Set when the designated recipient receives the funds.

2. *Example illustrating when exact amounts can and cannot be determined because of the laws of the recipient country.*

i. The laws of the recipient country do not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when, for example, the government of the recipient country, on a daily basis, sets the exchange rate that must, by law, apply to funds received and the funds are made available to the designated recipient in the local currency the day after the remittance transfer provider sends the remittance transfer.

ii. In contrast, the laws of the recipient country permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when, for example, the government of the recipient country ties the value of its currency to the U.S. dollar.

3. *Method by which transactions are made in the recipient country.* The method by which transactions are made in the recipient country does not permit a remittance transfer provider to determine exact amounts required to be disclosed when transactions are sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank or other governmental authority after the provider sends the remittance transfer.

4. *Example illustrating when exact amounts can and cannot be determined because of the method by which transactions are made in the recipient country.*

i. The method by which transactions are made in the recipient country does not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) when the provider sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is a rate set by the recipient country's central bank on the business day after the provider has sent the remittance transfer.

ii. In contrast, a remittance transfer provider would not qualify for the § 1005.32(b)(1)(i)(B) methods exception if it sends a remittance transfer via international ACH on terms negotiated between the United States government and a private-sector entity or entities in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. However, a remittance transfer provider sending a remittance transfer using such a method may qualify for the § 1005.32(a) temporary exception or the exception set forth in § 1005.32(b)(4).

iii. A remittance transfer provider would not qualify for the § 1005.32(b)(1)(i)(B) methods exception if, for example, it sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank or other governmental authority before the sender requests a transfer.

5. *Safe harbor list.* If a country is included on a safe harbor list published by the Bureau under § 1005.32(b)(1)(ii), a remittance transfer provider may provide estimates of the amounts to be disclosed under § 1005.31(b)(1)(iv) through (vii). If a country does not appear on the Bureau's list, a remittance transfer provider may provide estimates under § 1005.32(b)(1)(i) if the provider determines that the recipient country does not legally permit or method by which transactions are conducted in that country does not permit the provider to determine exact disclosure amounts.

6. *Reliance on Bureau list of countries.* A remittance transfer provider may rely on the list of countries published by the Bureau to determine whether the laws of a recipient country do not permit the remittance transfer provider to determine exact amounts required to be disclosed under § 1005.31(b)(1)(iv) through (vii). Thus, if a country is on the Bureau's list, the provider may give estimates under this section, unless a remittance transfer provider has information that a country on the Bureau's list legally permits the provider to determine exact disclosure amounts.

7. *Change in laws of recipient country.* i. If the laws of a recipient country change such that a remittance transfer provider can determine exact amounts, the remittance transfer provider must begin providing exact amounts for the required disclosures as soon as reasonably practicable if the provider has information that the country legally permits the provider to determine exact disclosure amounts.

ii. If the laws of a recipient country change such that a remittance transfer provider cannot determine exact disclosure amounts, the remittance transfer provider may provide estimates under § 1005.32(b)(1)(i), even if that country does not appear on the list published by the Bureau.

* * * * *

32(b)(4) Permanent Exception for Estimation of the Exchange Rate by an Insured Institution

1. *Determining the exact exchange rate.* For purposes of § 1005.32(b)(4)(i)(B), an insured institution cannot determine, at the time it must provide the applicable disclosures, the exact exchange rate required to be disclosed under § 1005.31(b)(1)(iv) for a remittance transfer to a particular country where the designated recipient of the transfer will receive funds in the country's local currency if a person other than the insured institution sets the exchange rate for that transfer, except where that person has a correspondent relationship with the insured institution, that person is a service provider for the institution, or that person acts as an agent of the insured institution.

i. *Example where an insured institution cannot determine the exact exchange rate.* The following example illustrates when an insured institution cannot determine an exact exchange rate under § 1005.32(b)(4)(i)(B) for a remittance transfer:

A. An insured institution or its service provider does not set the exchange rate required to be disclosed under § 1005.31(b)(1)(iv), and the rate is set when the funds are deposited into the recipient's account by the designated recipient's institution that does not have a correspondent relationship with, and does not act as an agent of, the insured institution.

ii. *Examples where an insured institution can determine the exact exchange rate.* The following examples illustrate when an insured institution can determine an exact exchange rate under § 1005.32(b)(4)(i)(B) for a remittance transfer, and thus the insured institution may not use the exception in § 1005.32(b)(4) to estimate the disclosures required under § 1005.31(b)(1)(iv) through (vii) for the remittance transfer:

A. An insured institution has a correspondent relationship with an intermediary financial institution (or the intermediary financial institution acts as an agent of the insured institution) and that intermediary financial institution sets the exchange rate required to be disclosed under § 1005.31(b)(1)(iv) for a remittance transfer.

B. An insured institution or its service provider converts the funds into the local currency to be received by the designated recipient for a remittance transfer using an exchange rate that the insured institution or its service provider sets. The insured institution can determine the exact exchange rate for purposes of § 1005.32(b)(4)(i)(B) for the remittance transfer even if the insured institution does not have a correspondent relationship with an intermediary financial institution in the transmittal route or the designated recipient's institution, and an intermediary financial institution in the transmittal route or the designed recipient's institution does not act as an agent of the insured institution.

2. *Threshold.* For purposes of determining whether an insured institution made 1,000 or fewer remittance transfers in the prior calendar year to a particular country pursuant to § 1005.32(b)(4)(i)(C):

i. The number of remittance transfers provided includes transfers in the prior calendar year to that country when the designated recipients of those transfers received funds in the country's local currency regardless of whether the exchange rate was estimated for those transfers. For example, an insured institution exceeds the 1,000 threshold in the prior calendar year if the insured institution provided 700 remittance transfers to a country in the prior calendar year when the designated recipients of those transfers received funds in the country's local currency when the exchange rate was estimated for those transfers and also sends 400 remittance transfers to the same country in the prior calendar year when the designated recipients of those transfers received funds in the country's local currency and the exchange rate for those transfers was not estimated.

ii. The number of remittance transfers does not include remittance transfers to a country in the prior calendar year when the designated recipients of those transfers did not receive the funds in the country's local currency. For example, an insured institution does not exceed the 1,000 threshold in the prior calendar year if the insured institution provides 700 remittance transfers to a country in the prior calendar year when the designated recipients of those transfers received funds in the country's local currency and also sends 400 remittance transfers to the same country in the prior calendar year when the designated recipients of those transfers did not receive funds in the country's local currency.

32(b)(5) Permanent Exception for Estimation of Covered Third-Party Fees by an Insured Institution

1. *Insured institution cannot determine the exact covered third-party fees.* For purposes of § 1005.32(b)(5)(i)(B), an insured institution cannot determine, at the time it must provide the applicable disclosures, the exact covered third-party fees required to be disclosed under § 1005.31(b)(1)(vi) for a remittance transfer to a designated recipient's institution when all of the following conditions are met:

i. The insured institution does not have a correspondent relationship with the designated recipient's institution;

ii. The designated recipient's institution does not act as an agent of the insured institution;

iii. The insured institution does not have an agreement with the designated recipient's institution with respect to the imposition of covered third-party fees on the remittance transfer (*e.g.,* an agreement whereby the designated recipient's institution agrees to charge back any covered third-party fees to the insured institution rather than impose the fees on the remittance transfer); and

iv. The insured institution does not know at the time the disclosures are given that the only intermediary financial institutions that will impose covered third-party fees on the transfer are those institutions that have a correspondent relationship with or act as an agent for the insured institution, or have otherwise agreed upon the covered third-party fees with the insured institution.

2. *Insured institution can determine the exact covered third-party fees.* For purposes of § 1005.32(b)(5)(i)(B), an insured institution can determine, at the time it must provide the applicable disclosures, exact covered third-party fees, and thus the insured institution may not use the exception in § 1005.32(b)(5) to estimate the disclosures required under § 1005.31(b)(1)(vi) or (vii) for the transfer, if any of the following conditions are met:

i. An insured institution has a correspondent relationship with the designated recipient's institution;

ii. The designated recipient's institution acts as an agent of the insured institution;

iii. An insured institution has an agreement with the designated recipient's institution with respect to the imposition of covered third-party fees on the remittance transfer; or

iv. An insured institution knows at the time the disclosures are given that the only intermediary financial institutions that will impose covered third-party fees on the transfer are those institutions that have a correspondent relationship with or act as an agent for the insured institution, or have otherwise agreed upon the covered third-party fees with the insured institution.

3. *Threshold.* For purposes of determining whether an insured institution made 500 or fewer remittance transfers in the prior calendar year to a particular designated recipient's institution pursuant to § 1005.32(b)(5)(i)(C):

i. The number of remittance transfers provided includes remittance transfers in the prior calendar year to that designated recipient's institution regardless of whether the covered third-party fees were estimated for those transfers. For example, an insured institution exceeds the 500 threshold in the prior calendar year if an insured institution provides 300 remittance transfers to the designated recipient's institution in the prior calendar year when the covered third-party fees were estimated for those transfers and also sends 400 remittance transfers to the designated recipient's institution in the prior calendar year and the covered third-party fees for those transfers were not estimated.

ii. The number of remittance transfers includes remittance transfers provided to the designated recipient's institution in the prior calendar year regardless of whether the designated recipients received the funds in the country's local currency or in another currency. For example, an insured institution exceeds the 500 threshold in the prior calendar year if the insured institution provides 300 remittance transfers to the designated recipient's institution in the prior calendar year when the designated recipients of those transfers received funds in the country's local currency and also sends 400 remittance transfers to the same designated recipient's institution in the prior calendar year when the designated recipients of those transfers did not receive funds in the country's local currency.

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32(c) Bases for Estimates

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32(c)(3) Covered Third-Party Fees

1. *Potential transmittal routes.* A remittance transfer from the sender's account at an insured institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. In providing an estimate of the fees required to be disclosed under § 1005.31(b)(1)(vi) pursuant to the § 1005.32(a) temporary exception or the exception under § 1005.32(b)(5), an insured institution may rely upon the representations of the designated recipient's institution and the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

32(d) Bases for Estimates for Transfers Scheduled Before the Date of Transfer

1. *In general.* When providing an estimate pursuant to § 1005.32(b)(2), § 1005.32(d) requires that a remittance transfer provider's estimated exchange rate must be the exchange rate (or estimated exchange rate) that the remittance transfer provider would have used or did use that day in providing disclosures to a sender requesting such a remittance transfer to be made on the same day. If, for the same-day remittance transfer, the provider could utilize an exception permitting the provision of estimates in § 1005.32(a) or (b)(1) or (4), the provider may provide estimates based on a methodology permitted under § 1005.32(c). For example, if, on February 1, the sender schedules a remittance transfer to occur on February 10, the provider should disclose the exchange rate as if the sender was requesting the transfer be sent on February 1. However, if at the time payment is made for the requested transfer, the remittance transfer provider could not send any remittance transfer until the next day (for reasons such as the provider's deadline for the batching of transfers), the remittance transfer provider can use the rate (or estimated exchange rate) that the remittance transfer provider would have used or did use in providing disclosures that day with respect to a remittance transfer requested that day that could not be sent until the following day.

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Section 1005.36—Transfers Scheduled Before the Date of Transfer

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36(b) Accuracy

1. *Use of estimates.* In providing the disclosures described in § 1005.36(a)(1)(i) or (a)(2)(i), remittance transfer providers may use estimates to the extent permitted by any of the exceptions in § 1005.32. When estimates

are permitted, however, they must be disclosed in accordance with § 1005.31(d).

2. *Subsequent preauthorized remittance transfers.* For a subsequent transfer in a series of preauthorized remittance transfers, the receipt provided pursuant to § 1005.36(a)(1)(i), except for the temporal disclosures in that receipt required by § 1005.31(b)(2)(ii) (Date Available) and (b)(2)(vii) (Transfer Date), applies to each subsequent preauthorized remittance transfer unless and until it is superseded by a receipt provided pursuant to § 1005.36(a)(2)(i). For each subsequent preauthorized remittance transfer, only the most recent receipt provided pursuant to § 1005.36(a)(1)(i) or (a)(2)(i) must be accurate as of the date each subsequent transfer is made.

3. *Receipts.* A receipt required by § 1005.36(a)(1)(ii) or (a)(2)(ii) must accurately reflect the details of the transfer to which it pertains and may not contain estimates pursuant to § 1005.32(b)(2). However, the remittance transfer provider may continue to disclose estimates to the extent permitted by § 1005.32(a) or (b)(1), (4), or (5). In providing receipts pursuant to § 1005.36(a)(1)(ii) or (a)(2)(ii), § 1005.36(b)(2) and (3) do not allow a remittance transfer provider to change figures previously disclosed on a receipt provided pursuant to § 1005.36(a)(1)(i) or (a)(2)(i), unless a figure was an estimate or based on an estimate disclosed pursuant to § 1005.32. Thus, for example, if a provider disclosed its fee as $10 in a receipt provided pursuant to § 1005.36(a)(1)(i) and that receipt contained an estimate of the exchange rate pursuant to § 1005.32(b)(2), the second receipt provided pursuant to § 1005.36(a)(1)(ii) must also disclose the fee as $10.

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Dated: November 25, 2019.

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.

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